

Roger Slee
Gordon Tait

Ethics and Inclusive Education

Disability, Schooling and Justice



Springer

Inclusive Learning and Educational Equity

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This book series reflects on the challenges of inclusive education as a strategy for improving educational equity. The series addresses issues of diversity in support of the UN Sustainable Development Goals (SDGs) which set the global education agenda for 2030 in SDG 4: Ensure inclusive and quality education for all and promote lifelong learning.

Although considered an important aspect of a global human rights agenda ensuring education for all is a complex endeavour that is subject to the forces of globalization, and the exclusionary pressures associated with migration, mobility, language, ethnicity, disability, and intergenerational poverty. Acknowledgement of the reciprocal links between these markers of diversity and educational underachievement has led to an increasing interest in the development of inclusive education as a strategy for improving educational equity.

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- Stimulates and challenges further developments for the field.
- Explores global disparities in educational provision and compares developments.
- Provides a welcome addition to the literature on inclusive education.

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Disability, Schooling and Justice

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Series Editor's Preface

Questions about what inclusive education can learn from philosophy have interested scholars for some time. The *Cambridge Journal of Education* dedicated a special issue (44:4) to it in 2014, and a number of books have investigated the concept of inclusion through specific theoretical lenses, for example, Julie Allan's 2008 book *Rethinking Inclusive Education: The Philosophers of Difference in Practice* and Lorella Terzi's 2010 study, *Justice and Equality in Education: A Capability Perspective on Disability and Special Educational Needs*. In this volume, Roger Slee and Gordon Tait interrogate a range of philosophical perspectives and ask what they have to offer the field. In doing so, they explore of the intersection of rights and justice in education ethics to make a case for an applied philosophy for inclusive education. Their aim is to develop an 'everyday philosophy' that can guide attempts to make school a welcoming place for students with disabilities.

The idea of an everyday philosophy is appealing because it encourages a reflection on what and how things are thought about. Taking an epistemological stance offers a shift away from the tradition of sociological critique about the way things are or came to be, which has shaped the field, towards hope for what they might become. The focus of this optimistic intention is addressed by exploring philosophical traditions for tackling everyday dilemmas of exclusion and inclusion in education.

Beginning within the familiar rights-based frameworks that recognise education as a fundamental human right as well as means for achieving other important rights, the book reviews and reminds the reader how deficit assumptions still underpin thinking about equity and justice in education. As this volume points out, deficit assumptions lead to remedies that perpetuate the status quo because they rely on traditional ethical frameworks that depend on consequentialist arguments such as the utilitarian idea of the greatest good for the greatest number that underpins the bell curve structure of schooling, or deontological logic that suggests actions are inherently right or wrong, so decisions about schooling are moral imperatives about what is the right thing to do rather than utilitarian decisions about what is right for most people. A consideration of virtue ethics is presented, offering an alternative

perspective that suggests a values-based orientation with a specific emphasis on an ethic of care is promising, but the limits of this perspective are also discussed.

Following this discussion, rights-based claims for determining how social institutions and practices might be shaped are reconsidered. Here, the contested nature of rights – whose rights, which rights, what kind of rights – is deliberated as a fundamental consideration that leads to a discussion of justice and questions about fairness. Emphasising the contributions of some notable contemporary thinkers on justice encourages readers to engage with contemporary notions of fairness, distributive justice, and social entitlements in asking how a genuinely inclusive school system might be created. These questions serve as provocations intended to stimulate further, deeper thinking and action, and therein lies the contribution this book makes to a new generation of theorists, activists, researchers and practitioners.

Edinburgh, UK

Lani Florian

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Contents

1	What Is Inclusive Education and Why All the Fuss?	1
1.1	Three Housekeeping Matters to Guide Our Readers	1
1.1.1	Considering Disability and Disablement	1
1.1.2	Contingency	2
1.1.3	Definition & Diction	2
1.2	A Legacy of Exclusion	3
1.3	So, What Is Inclusive Education?	8
1.4	And, Where Did Inclusive Education Come From?	10
1.5	So, What's All the Fuss About Disability and Education?	13
1.6	Grotesque Cages or Ethical Sanctuaries?	15
1.7	So Now Let's Explore Ethics in More Detail	16
	References	17
2	Weighting the Consequences and Following the Rules	21
2.1	So, What Is Consequentialism?	21
2.2	Consequentialism and the Self-Contained Classroom	22
2.2.1	The Mathematics of Utilitarianism	23
2.3	Why Might This Have Been Seen as a Positive Move in Ethical Theory?	26
2.3.1	The Greatest Good for the Greatest Number? – Gonski	26
2.3.2	The Philosophical Strengths of Utilitarianism	27
2.4	Some Problems	29
2.4.1	The Danger of 'Majority Rule'	29
2.4.2	Williams and the Issue of 'Integrity'	31
2.4.3	Objective Calculation	32
2.5	How About a More Sophisticated Version of Utilitarianism?	33
2.5.1	Disability and Bullying	33
2.5.2	Re-assessing the Single Scale of Pleasure/Pain	34
2.5.3	Introducing a More Nuanced Version of Liberty	35
2.5.4	Act vs. Rule Utilitarianism	36
2.5.5	Rule Utilitarianism – More of the Same?	37

2.6	Deontological Ethics: Rules Not Outcomes	39
2.7	Kantian Ethics	40
2.7.1	Forget the Consequences	41
2.7.2	Freedom, Reason, Duty	42
2.7.3	The Categorical Imperative	44
2.7.4	The Practical Imperative	45
2.8	So, Are There Any Problems with Kant's Deontological Approach?	47
2.9	Review	49
	References	50
3	Virtue Ethics and the Possibilities of 'Care'	53
3.1	So, How Is Virtue Ethics Different?	53
3.2	The Ethics of Antiquity	56
3.3	The Evolution of Virtue Ethics	57
3.3.1	Aquinas and Natural Law	58
3.3.2	Hume and Character	59
3.3.3	More Recent Virtue Ethics	60
3.4	Why Should Educators Be Interested in This?	61
3.4.1	The Shaping of Modern Education	62
3.4.2	What Virtue Ethics Has to Offer	63
3.4.3	The Cardinal Virtues	64
3.4.4	What Virtues Might Be Required by 'Special Needs Educators'?	66
3.5	If Virtue Ethics Is So Good, Why Isn't It the Dominant Approach?	68
3.5.1	Which Virtues?	68
3.5.2	But What Should We Actually <i>Do</i> ?	70
3.6	An Ethics of 'Care'	72
3.6.1	Gilligan – The Gender Bias of Moral Development Research	73
3.6.2	Noddings – Caring Relationships	74
3.6.3	Held – Building Upon, Not Rejecting, the 'Rights/Justice' Approach	75
3.6.4	Tronto – A Framework for Care	75
3.7	Problems with 'Care'	77
3.8	Review	79
	References	80
4	Disability and the Limitations of 'Rights'	83
4.1	Schools, Rights and Disability	83
4.2	From Normative Ethics to Rights	85
4.3	So, What Exactly Are Rights?	87
4.3.1	What Do Rights Do?	88
4.4	Natural Rights	90

4.4.1	Thomas Hobbes (1588–1679)	92
4.4.2	John Locke (1632–1704)	93
4.4.3	Jean-Jacques Rousseau (1712–1778)	94
4.4.4	Nonsense on Stilts?	95
4.5	Moral Rights vs. Legal Rights	97
4.5.1	Disability, Legal and Moral Rights	98
4.5.2	Covert Limitations on Rights	100
4.6	Types of Legal Rights	101
4.7	Human Rights, Civil Rights, Social Justice Rights	104
4.7.1	Three Generations of Human Rights	106
4.7.2	Human Rights and Disability	107
4.8	Criticisms of ‘Human Rights’	108
4.9	Review	110
	References	111
5	Justice, Fairness, Equity and the Inclusive School	115
5.1	So, What Is ‘Justice’?	115
5.1.1	2500 Years of Disagreement	116
5.1.2	Shaping Some Coherent Ideas About ‘Justice’	118
5.2	Different Types of Justice	120
5.2.1	Retributive Justice	121
5.2.2	Restorative Justice	122
5.2.3	Procedural Justice	123
5.3	Distributive Justice	125
5.3.1	Four Other Approaches to Distributive Justice – Briefly	126
5.3.2	Desert-Based Distributive Justice	127
5.3.3	Libertarian Distributive Justice – Robert Nozick (1938–2002)	129
5.4	Justice as Fairness – John Rawls (1921–2002)	131
5.4.1	Two Principles of Justice	132
5.4.2	The Veil of Ignorance	133
5.4.3	Some Strengths and Weaknesses	134
5.4.4	Rawls, Nussbaum and Disability	135
5.5	Social Justice	137
5.5.1	The Rise of Social Justice and Educational Equity in 50s America	138
5.5.2	Fraser and ‘Participatory Parity’	140
5.5.3	Social Justice as a Political Football	142
5.6	Review	143
	References	144
6	Finding A Way Forward	149
6.1	Disability, Justice, Fairness & Reform – A Bigger Picture	151
6.2	A Fair and Just Education for Students with Disabilities?	154
6.2.1	Gatekeeping	157

6.2.2	Overrepresentation in Disciplinary Absences and Unique Attendance Schedules	158
6.2.3	Lack or Unsuitability of Reasonable Adjustments	158
6.2.4	Bullying and Mistreatment	159
6.2.5	Restrictive Practices	159
6.2.6	Low Expectations and Underachievement	159
6.2.7	Inadequate or Insufficient Training	160
6.2.8	Funding Gaps and Inappropriate Funding Models	160
6.2.9	Inappropriate and Ineffective Protocols and Procedures for Complaint Resolution	160
6.2.10	A Return to Recognition, Representation & Redistribution	161
	References	164
	References	167
	Index	181

Chapter 1

What Is Inclusive Education and Why All the Fuss?



Abstract This introduction to our description of ethical frameworks for reconsidering unresolved controversies surrounding the education of students with disabilities, includes: a history of movements to observe and safeguard the *Universal Declaration of Human Rights (United Nations, 1948)* as an attempt to ensure that vulnerable populations realise their right to an education. An acknowledgement of exclusion as a stubborn foe that has long been a part of schooling’s institutional and cultural DNA. Recognising this is a necessary first step for moving beyond the deficit-locked assumptions that historically binds our thinking about equity and justice in education, and registers “unfortunate others” as the targets for change in order to boost their educational achievement. We describe the long struggle for educational rights for children with disabilities, and consider the contested question of the form of schooling for students with disabilities: separate, same or something of both. This is the prelude for considering the benefits or otherwise of using traditional ethical frameworks for interrogating the provision of education for students with disabilities.

Keywords Disability · Disablement · Ableism · Exclusion · Segregation · Discrimination · Human rights

1.1 Three Housekeeping Matters to Guide Our Readers

1.1.1 *Considering Disability and Disablement*

We advise readers that language matters (Shakespeare, 2018) and we have been careful in this text to use People First language with reference to people with disabilities consistent with the United Nations Convention on the Rights of People with Disability and Optional Protocol (2006). That said, we are also comfortable with references to “disabled people” as has long been the preference of many disability activists who use “disabled” to describe what becomes of people with impairments and illness living in a world unwilling or incapable of changing itself to guarantee access and participation.

Accordingly, terms such as “special educational needs” or “additional needs” grate. They are the administrative rationale and organisers for systems that see the child with disabilities as having a secondary, an additional claim to schooling and the pool of resources set aside for that social endeavour. We do not take this lightly. Just as language matters in dismantling racism, it also matters when calling out and dismantling ableism in education.

1.1.2 Contingency

Inclusive education is recognised as a global movement. This is not surprising because educational exclusion is ubiquitous, reaching back in time and across nation-states and continents. We recognise that inclusive educational responses are to a greater or lesser degree contingent. In other words, the causes of exclusion change according to context and culture. The moment you elect to describe inclusive education as a universal or homogenous movement you set yourself an impossible task.

Recognising this, we do not set out to provide a global survey of inclusive education and ethics. We acknowledge our lack of familiarity with many jurisdictions and with their struggle to improve educational access for all students. For that reason, we use examples with which we are familiar to establish themes and issues for readers to reflect on as they make their own transpositions.

Likewise, we do not consider all of the population cohorts who gather under the banner of inclusive education. For us, that’s a task we have set for ourselves for another day. This is a book is a consideration of the experiences of students with disabilities in, and out of, schooling. We are asking ourselves, and you, what represents fairness and equity for this diverse population cohort, and how far will philosophical postulations take us in this ongoing project.

1.1.3 Definition & Diction

Consistent with the comments above we have not set out to rigidly define inclusive education. We have observed before the counsel of Van Morrison who lamented cleaning up his diction and having nothing left to say (Slee, 2011). Inclusive education is contingent – changing with the exigencies of time, place, political economy and culture.

This of course presents a conundrum. If we don’t define it – anything goes and we find conservative forces deploying the language of inclusion to maintain practices of exclusion. If we insist on attempting intellectual foreclosure on a definition for what is essentially a rebellious challenge to oppression in and through education, we may quickly sacrifice, as Edward Said (2000) reminds us in his essay *Travelling Theory*

Revisited, this “insurrectionary zeal” and create a “tamed and domesticated” body of dogma.

That said, we opt to apply some principles for guidance. Generally speaking, we subscribe to the notion that inclusive education refers to increasing access, presence, participation and success for all children in their neighbourhood school. Specifically, when thinking about students with disabilities, for us inclusive education is not simply the merging of special and regular education. It demands a more far-reaching transformation of education. Paradoxically, pandemic may provide a glimmer of hope that this magnitude of change is possible and desirable. COVID-19 has demonstrated the ability of monolithic institutions to reassess structures and practices to provide nuanced responses to changing exigencies. The flexibility it has demanded from schools may point to new ways of embracing the thorny equity agenda.

1.2 A Legacy of Exclusion

In his George F. Kneller Lecture to the Comparative and International Education Society Conference in April 2019 in San Francisco, the eminent economist, Professor Jeffrey D Sachs reminds his audience of the significance of the location for his keynote address in the Herbst Auditorium on Van Ness Avenue. It was there that the *United Nations Charter* had been signed in 1945. Three years later in 1948, the “moral charter” of the United Nations, the *Universal Declaration of Human Rights* was signed, within which education was declared a basic human right. Our assumption is that the signatories to the *Universal Declaration of Human Rights* were serious in declaring human rights to be enjoyed universally. Consequently, the right to education was meant for all, not for chosen groups.

In deference to the occupational hazard for the privileged academics gathered to hear him – *jetlag* – Professor Sachs promises his audience provocation. His complaint against educators, he asserts, and here we paraphrase, is that they need to fight harder for the resources to guarantee the right of all children and young people to an education. “*You are too polite, too nice*”, he tells us. Without anger, resistance, and agitation, he contends, the more than two hundred and fifty million children of school-age who are not in school on this day continue to carry a lifelong burden, especially in the twenty-first century (Sachs, 2019, <https://cies2019.org/keynote/>). In 2018 UNESCO had declared that 258.4 million children were out of school (UNESCO, 2019). The advent of the COVID-19 pandemic moved UNESCO Director General, Audrey Azoulay to revise the global out of school data showing that with temporary school closures some 290 million children were denied their right to an education (UNESCO, 2020a, b). This latest pandemic makes access to and participation in education more difficult for vulnerable population groups (Marr, 2020; Li, 2020). UNESCO (2020a, b: 4/06) reports that:

The COVID-19 pandemic is having a disproportionate impact on learners with disabilities who were already experiencing social and educational disadvantage. As many as half of the estimated 65 million primary and lower secondary-school age children with disabilities in developing countries were already out of school before COVID-19 according to GLAD (Global Action on Disability). . . . With COVID-related school closures, many countries have turned to online instruction to ensure continuity of learning.

UNESCO's Asia and Pacific Regional Bureau for Education also reports:

- In health crises such as COVID-19, persons with disabilities are often provided with less help and inadequately trained teachers.⁴
- More time and resources are required for students with disabilities to actively participate in learning.⁵ This includes equipment, internet access and specially designed materials and support. This makes **learning more costly** for students and their families. (UNESCO Bangkok, May 4th 2020)

The exclusion of this estimated 290 million children from school is contingent on a number of intersecting and compounding factors. Some adhere to geopolitical context; others are more idiosyncratic. Schooling may be interrupted, if provided in the first place, by:

Conflict and population displacement – the spectre of terrorism and warfare caused by religious, tribal, ideological and ethnic animosities is a permanent fixture of global affairs. The relentless movement of displaced people searching for asylum and refuge obstructs educational provision (Bhopal & Myers, 2008; Bunar, 2020). Where people find temporary accommodation in large refugee camps, limited educational access may be achieved. However, the readiness and ability of children living with trauma to draw benefit from schooling is compromised. The damaging effects of the indefinite detention of people seeking asylum in Australia were scrutinised by a United Nations investigation into human rights abuses by the Australian government (Doherty, 2018).

Unrelenting poverty – caused by conflict, global economic exploitation, so-called “natural” disasters that are more precisely framed by discussions of the earth’s depletion in the Anthropocene, or by the relentless requirement and search by capital for cheap labour (too-often child labour) to supply commodities for the enjoyment of the privileged. Of course, we express collective distress over child labour and exploitative working conditions when regular disasters such as building collapses or garment factory fires in Bangladesh remind us of the cheap origins of our expensive trainers and “leisure wear”. The Rana Plaza nine-story building collapse in Dhaka took the lives of 1130 people and injured over 2500 others. We hasten to add that victim-blaming is easy for the privileged (Mills, 1959). Not sending children to work is not an option for many families who see no other choice when they choosing between homelessness and starvation on the one hand, or everyone selling their labour on the other.

The lottery of place of birth – Immediately our thoughts turn to the countries of the south where poverty is endemic and sustained by the countries of the North (Lewis, 2006; Moyo, 2009, 2018), and it is right that we should acknowledge and respond to our complicity. We contend that poverty is contingent and pernicious in

its effects across geographic boundaries. It immiserates communities in so-called developed countries of the world as has been extensively documented (Dorling, 2018). Wilkinson and Pickett (2010), in their examination of growing levels of inequality in affluent economies in *The Spirit Level*, demonstrate that the greater the gap between privilege and disadvantage, the greater is the corresponding level of dysfunction as represented by indicators such as incarceration, educational absence and underperformance, poor health, reduced life expectancy and so on. The *Rust Belts* and *Broiler Belts* (Harvey, 1996; Kozol, 2000, 2005) of the US; entrenched rural poverty in Australia; and the residual intergenerational unemployment and poverty across the large conurbations of Europe and Asia manifest myriad exclusions born of structural disadvantage. As Michael Sandel counsels, it is difficult to sustain a commitment to meritocracy knowing that it comes down to a question of luck as to where we are born or the roulette wheel of talent (Sandel, 2020: 122–126).

In addition, other identity markers are also bound up with poverty we describe and inhabit the data on exclusion from school:

- Gender and or sexual identity.
- Race/ethnicity.
- Religious, tribal or political affiliation.
- Cultural practices e.g., child marriage.
- Disability.

Our list is not exhaustive and the compound effects of these intersecting and overlapping factors is manifold. If we take just one of these indicators – in this case, disability – the two-way relationship between disability and poverty quickly reveals itself (Saunders, 2016). For example, the Australian Council of Social Services (ACOSS) and University of New South Wales reported that people with disabilities face a risk of poverty well above average. Four out of every ten Australians living in poverty have a disability. That is 739,200 or 38% of the almost two million adult Australians living in poverty. If we consider poverty rates for people with disabilities, Davidson et al. (2018) suggest that 45% of people with disability in Australia are living near or below the poverty line. This more than double the OECD average of 22%.

Available research on poverty and disability in Australia understates the extent of poverty amongst people with disability because of the greater costs of living incurred for a range of necessary supports (Davidson et al., 2018: 58). Moreover, reduced employment opportunities for people with disability increases the incidence of poverty (Davidson et al., 2018: 58).

You may ask about the mitigating effects of the welfare state. Arguably, both “welfare” and “state” have become pejorative terms in the Australian political lexicon. People with disabilities may qualify for the Disability Allowance or for the New Start Allowance. The New Start Allowance pays less. Increasingly, people with disabilities who ‘enjoy’ the Disability Allowance are being shifted through new eligibility criteria to the New Start Allowance. 33% of people with disabilities receiving the Disability Allowance live in poverty and 55% of people with disabilities receiving the New Start Allowance live in poverty (Davidson et al., 2018).

Though described in legislation as “free, secular & compulsory”, the costs of education, even state schooling, remain significant for families living in poverty. Public schools turn to parents to bridge funding shortfalls through so-called voluntary contributions (Shad, 2019; The Smith Family, 2020). In 2017 parents in the state of New South Wales contributed \$75.4 million in public school contributions. Shad (2019) observes the shaming of children to extract parents’ voluntary contributions. Teese (2007, 2013) shows the attenuation of educational opportunity through poverty, including the shrinkage of curriculum offerings according to postcode; a common proxy for poverty.

Without digressing too far, we note that in Australia the loosely named ‘private schooling sector’ is supported by a combination of direct payment of school fees and annual grants from the federal government budget. Contrary to the mantra of “trickle-down” economics which suggests that rewarding privilege will create opportunity for the disadvantaged, there is a gravity defying redistribution of wealth upwards; wealth never trickles down, it consolidates (Dorling, 2018; Sachs, 2017).

To conclude this brief consideration of exclusion as a stubborn educational foe, we are obliged to recognise exclusion as a tradition of the modern invention of schooling. Schooling has always been the boiler-room of inequality. The architecture of schooling (Tait, 2017) – and here we refer not simply to the built environment, but also to the culture of schooling concocted by the alchemy of values and beliefs stirred together in the cauldron of curriculum, pedagogy, assessment, operational policies and practices, organisational protocols and habits, workforce structures, hiring prerogative, expenditure priorities, classroom layout, playground equipment and design and so the list goes on – interact with population cohorts differentially. Charting the origins of inclusive education must first acknowledge the fact that education, and more recently schooling, was never meant for all-comers. Rather, the successful completion of schooling, and transition to higher education and training for the rewards of the more prestigious professions, was reserved for the privileged few (Connell, 1993). Others were systematically ejected to take their allotted place in the unskilled labour market (Slee, 2011).

The collapse of the unskilled labour market through obsolescence caused by technological advancement, and the relocation of manufacturing to the sites of cheapest labour supplies, has generated crises in schooling. Failed children, who fitted into an insatiable and unfussy labour market, stay at school now. How might schools deal with this growing and fundamentally *disengaged* populous?

Zygmunt Bauman (2004) refers to surplus populations and the production of human waste in his analysis of advanced capitalist economies. In order to objectify decisions that result in the redundancy of increasing numbers of people, he describes the use of technical language to render the pain of rejection and *uselessness* (Sennett, 2006) benign; to render exclusion as rational.

... the production of human waste has all the markings of an impersonal, purely technical issue. The principal actors in the drama are ‘terms of trade’, ‘market demands’, ‘competitive pressures’, ‘productivity’ or ‘efficiency requirements’, all covering up or explicitly denying any connection with the intentions, will, decisions and actions of real humans with names and addresses.

Let us explain the perverse effects of this process in relation to schooling more carefully. *The Diagnostic and Statistical Manual of Mental Disorders* (APA, 2013) has become an indispensable tool for student management in contemporary schooling (Tobin & House, 2016). Whereas previously children who failed or were failed by school could leave; willingly or otherwise, and find a place in the unskilled or semi-skilled workforce. This source of productive employment and transition into adult life has reshaped itself and we see young people moving into the precarious “gig economy” or staying on in education. The twist of the institutional knife always was the blaming of students for their failure. It was the student who failed to learn because of their own defectiveness; typically described as not having the “brains” to do well. Or, students failed because of the problems they inherited from their parents. Schools have long sifted and sorted, tracked and banded students according to ascribed ability, efficient management and effective pedagogy (Gamoran, 2010, 2016; Oakes, 2005). The window dressing for this process of sorting, and ejecting, is the discourse of meritocracy that has dominated education from Plato to the invention of mass schooling (Tait, 2017).

Dealing with increasing numbers of disengaged and disruptive young people sustains perverse effects. First, is the increased levels of exclusion of students from “compulsory” schooling. The recent Timpson Review (DfE, 2019) of exclusions from schools in England reveals over 40 permanent exclusions from school each day and 2000 fixed-term exclusions each day in England. The review reports the multiplier effect of student characteristics with poverty, ethnicity and disability enduring as markers of educational vulnerability. Second, is the more frequent application of diagnoses of behaviour disorder to describe increasing numbers of uncompliant students. Officially reported and treated as disabled, these students are effectively managed through the processes of special and, ironically, inclusive education (Tomlinson, 1982; Fulcher, 1989; Slee, 2011, 2018; Harwood & Allan, 2014). We have just encountered another level of complication for this text to consider; paradoxically exclusion may well be, and increasingly is, a within-school phenomenon. Schools have shown the capacity for constructing schools within schools, or programmes within schools to isolate and hold different categories of children.

Exclusions from education, formalised through institutional disciplinary procedures, informal and unacknowledged, are typically permanent in effect and expanding. The need therefore for research into the reasons for, and means of excluding some students and including others, is urgent. The troubling question of why some children are favoured in education and others are not is a deeply ethical problem. Why should some children get a lesser education deal than others? Inclusive education is an attempt to interrogate exclusion and advocate for educational justice for all children, including children with disabilities. Let’s pursue this further.

1.3 So, What Is Inclusive Education?

Simply put, inclusive education refers to removing barriers to and within education to increase access, representation, participation, and success for all students. Elegantly straightforward isn't it. However, as a Swedish writer Karl Ove Knausgaard (2018) cautions: "... *simplicity is treachery*". Although he was responding to the direct, some may imprecisely say, 'simple' question: "Why do you write?", the maxim holds. "What is inclusive education?", is an apparently simple enough question and our immediate answer responds, if you'll forgive our immodesty, with corresponding clarity. However, as this text will demonstrate, there is little that is simple, straightforward or uncontested in education and even less when interrogating the philosophical minefield – some say *mindfield* – of ethics. Research and practice in inclusive education struggles with dilemmas, difficulties, and – sadly increasingly acrimonious – debates (Allan & Slee, 2008). To understand these pitfalls, we need to remind ourselves of the origins and development of inclusive education. A relative new-comer to educational research and practice, inclusive education is variously used and abused in questions about children and young people excluded from schooling. Understanding this is a necessary prerequisite for our discussion of the ethics of education for students with disabilities.

Obviously, barriers to schooling may take various forms that affect diverse population cohorts differentially. This helps to explain problems of disproportionality. The disproportional referral of minority student populations to special education, both over-referral and under-referral, has been scrutinised across a number of jurisdictions. Sally Tomlinson (1981) first revealed disproportionate exclusions from school and referrals to special education in her study of decision-making about the education of Black Caribbean boys in Britain. Specifically, she was concerned about the excessive numbers of Black Caribbean boys being assigned to behaviour units compared with White British boys. Described as a trend then, the over-subscription of minority populations in special education and Pupil Referral Units is now an established tradition (Gillborn, 2008; Tomlinson, 2017). In a circular entitled, the *Permanent and Fixed Period Exclusions in England: 2015–2016* (Department for Education, 2017), the broader patterns of disproportional exclusion quickly emerge:

- Black Caribbean pupils are over three times more likely to be permanently excluded.
- Gypsy/Roma and Traveller of Irish Heritage pupils have the highest rates of exclusion.
- Students who are eligible to receive free school meals (FSM), a proxy measure for poverty, are four times more likely to be excluded.
- Pupils with SEN support had the highest permanent exclusion rate and were almost 7 times more likely to receive a permanent exclusion than pupils with no SEN.

Press the fast-forward icon to take you to the last circular on Permanent and fixed term exclusions in England (DfE, 2020), and the dominant pupil characteristic for exclusion from school remain the same. The vulnerability of Black British boys and displaced or itinerant populations endures. However, we also see the preponderance of white British boys from areas of endogenous unemployment.

In Canada, research (Addo, 2011) indicates minority ethnic overrepresentation in special education limiting educational and post-schooling opportunities for Aboriginal, Inuit, and African Canadian students. Gabel and her colleagues (2009) highlight the vulnerability of Pasifika and Maori students in New Zealand, while research in Greece sheds light on and encouraged government intervention to address the problems of Roma children's absences from school in general and their overrepresentation in special schools (Parthenis & Fragoulis, 2016; Zachos, 2012). Historically, US data (National Research Council, 2002; Parish, 2005; Losen & Orfield, 2005; Hehir, 2005; Artiles et al., 2010; Connor et al., 2016) describe the vulnerability of Black American, Hispanic and Native American students to over and underrepresentation in special education and disciplinary exclusions.

A recent reconsideration of disproportionality has been Nora Gordon's (2017, 2018) Brookings Institute research. Gordon's (2017) report affirms the disparities of special education identification processes between and within school districts as well as the intersection of factors outside and inside schooling that forge a special education identity, or not.

Even if schools treated all students the same, special education identification rates would likely differ across racial and ethnic groups. The disproportionality literature consistently notes that children's outcomes are causally affected by out-of-school factors such as poor nutrition, stress, and exposure to environmental toxins, and that exposure to these influences unduly affects poor children and children of colour. The unfortunate implication of this – that true prevalence of disability may be higher for these students – can get lost in the back and forth over measurement, sampling, and other methodological issues. (Gordon, 2017: 5–6)

For Gordon, the issue of intersectionality is the key. In other words, it is the interaction of a number of contributory factors that adds up to distortions in the data – a kind of social accrual accounting. As Kozol (1991, 2000, 2005) has repeatedly observed, civil rights victories in US legislation have resulted in the reconstruction of segregation through the demarcation between poverty and affluence. We contend that the issue of over-representation of minority population groups in special education warrants wider global investigation to examine the overlay of poverty and the cultural biases of special education identification protocols. We can reasonably conclude that minority ethnic overrepresentation in special education demonstrates the social construction of disablement in and by education.

Exclusion is a risk for all students to greater and lesser extents. In Australia we suggest that the most reliable predictors of educational underachievement are Aboriginality, poverty and disability. In this text, we will discuss the ethical implications of the educational experiences of students with disabilities, not only in terms of the self-evident need to recognise ablism at work here, and to shift our thinking from variations on the historic theme of individual defectiveness, but also – and

foundational to the purpose of this book – in terms of wider decisions about how we might go about framing our ethical approach to education and inclusion.

1.4 And, Where Did Inclusive Education Come From?

Frequently, the origins of inclusive education will be traced back to the *World Conference on Education for All* in Jomtien, Thailand in 1990 (UNESCO, 1990). Even more frequently, when it concerns the education of students with disabilities, our primary concern here, pundits start with the follow-up conference on special needs education in the Spanish city of Salamanca over 25 years ago in 1994 (UNESCO, 1994; Ainscow et al., 2019). It was from this conference that the *Salamanca Statement and Framework for Action on Special Needs Education* was signed and adopted by the 92 represented governments and 25 international organisations from around the world and jointly released by UNESCO and the Spanish Ministry of Education. Two of the principles set out in the *Salamanca Statement and Framework for Action on Special Needs Education* are important to note:

- *Those with special educational needs must have access to regular schools which will accommodate them within a child-centred pedagogy capable of meeting those needs;*
- *Regular schools with this inclusive orientation are the most effective means of combatting discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost effectiveness of the entire system.* (UNESCO, 1994: viii & ix)

Inclusive education has accordingly been seen as the objective and practice of the *Education for All* movement, with UNESCO as its principal backer and driver, in pursuit of the 17 United Nations *Sustainable Development Goals* (United Nations, 2020).

Others, taking a longer view, cite the progress of civil rights legislation in the USA as the precursor to inclusive education for students with disabilities. Specifically, they refer to the landmark case of *Brown v. Board of Education Topeka* (1954) which departed from the “separate but equal” principle in the Supreme Court ruling (1896) in *Plessy v. Ferguson* that segregated facilities for White Americans and African Americans were legal to challenge the “separate but equal” principle, referred to as the Jim Crow laws, by ruling that separate, or segregated, education was not equal and therefore unconstitutional.

Still others (Danforth, 2009) return us to the activism of the pioneers of special education who refused to accept the dominant beliefs of their time suggesting that students with disabilities – variously referred to as *sub-normal*, *mentally-retarded*, *feeble-minded*, *handicapped* and *invalid* – were uneducable. In France Jean Marc Gaspard Itard initiated programmes of instruction for deaf-mute and feeble-minded children following his ground-breaking work in 1779 with Victor, the so-called *wild*

boy of Aveyron. A student of Itard, Edouard Seguin emigrated to America and established schools for ‘retarded’ children, while Johann Jacob Guggenbuhl established a residential training programme for children with “cretinism” in Abendberg in Switzerland. This radically incomplete representation of early educational interventions on behalf of children with disabilities collectively established what we now refer to as special education. Special educators of yesteryear offered a radical strain of resistance to medical and educational authority. Danforth (2009: 1) writes with great sensitivity about the young Samuel Kirk, then a trainee psychologist, who conducted clandestine night-time tutorials with a 10-year-old boy in the Oak Forrest Institution for Delinquent Children under a small corridor-light “away from the critical gaze of censorious nurses”. Kirk is credited as one of the founders of special education in America. Readers should understand from this discussion that inclusive education is not a means for demonising special education, an expression of “animus” (Kauffman et al., 2018). Rather, special education was borne from the unwillingness and inability of regular schools to educate all children. And for so long as regular schools have been permitted to shed different groups of students, special education has expanded to fulfill this responsibility (Tomlinson, 1985, 2017; Allan, 2015). There is a co-dependence that now describes historical discrimination in the language of “choice”, “special educational needs” and “pedagogical effectiveness”. In Bourdieu’s (2014) words, it is a *collective fiction* – repeat it often enough and the becomes an institutional truth.

The movement for the education of students with disabilities has shifted over time. It has placed emphasis on synchronising pedagogy with the specific demands of diagnostic discovery. There remains an overarching question – where will students with disabilities receive their education? Is it possible to describe the separation of children with disabilities into schools and classes according to diagnostic groups as inclusive? Hornby’s (2014) lexical distortion, *Inclusive Special Education, suggests it is*. This discussion of the inclusion or separation of students with disabilities from the neighbourhood school adopted its own vocabulary to describe degrees of inclusion in the “mainstream” or separation along a “continuum of support” (Dunn, 1968; Deno, 1970).

Anti-discrimination legislation in different jurisdictions challenged what had become the segregated education of students with disabilities in separate schools outside of regular, or the mainstream of schooling. Such a bifurcation of schooling, it was argued, limited the opportunities of “special students” to transition into the community after completion of their special schooling. For example, in the US in 1975 Public Law 94–142 (the *Education of All Handicapped Children Act* – EAHCA). Public Law 94–142 was revised in 1990 to become the *Individuals with Disabilities Education Act* (IDEA) and more recently in 2004 when it was amended to be the *Individuals with Disabilities Educational Improvement Act*. There are four basic requirements of the legislation that are important to consider. First, every child with a disability is entitled to a Free and Appropriate Education at public expense. Second, a Continuum of Alternative Placements that range from separate special schools through to placement in a regular school classroom with supplementary support must be made available to students with disabilities. Third, all students with

disabilities must be educated in the Least Restrictive Environment (LRE). This LRE must be as close to home as possible depending upon the educational needs of the child. And, fourth, every child with a disability must have a documented Individual Education Program (IEP) wherein the educational objectives and the means for achieving these objectives are listed.

We observe three important features of this legislation. First, the existence of separate special schools where students with disabilities may be “placed” is protected by legislation. Second, there is considerable interpretive latitude in the legislation and this has become the focus for dispute and litigation. And third, there has been an uncomfortable relationship between special, regular and inclusive education. As the popularity of inclusive education has saturated jurisdictional policy documents, programme descriptions and other communications, special education has appropriated, qualified and applied the discourse of inclusion. Brantlinger (2006) has charted this in her analysis of what she calls the Big Glossies or the most popular textbooks adopted in college and university teacher education programmes. Separate schools, separate programmes, separate classrooms all incorporate “inclusion” into their nomenclature. Perplexing, isn’t it.

In the state of Victoria, the Department of Education and Training has simultaneously affirmed its commitment to inclusive education and increased its commitment to opening new “specialist” schools for students with disabilities and refurbishing the old ones. Across the state border, South Australia expresses inclusive education through a programme of co-location wherein the special school is situated inside the regular school boundaries. As Peter Walker’s (2019) review of this initiative concludes, the seal has not been broken.

Crossing the Atlantic Ocean, British researchers and activists significantly influenced the shaping of inclusive education. First, Paul Hunt and Vic Finkelstein were at the forefront of establishing the Union of the Physically Impaired Against Segregation (UPIAS) which, in 1975, published *Fundamental Principles of Disability*. This work recast *disability* from the description of individual “defects” that forged a life of *handicap*, to an analysis of political oppression wherein people with impairments and chronic illness were disabled by societies unwilling and or unable to accommodate difference. Most forcibly and clearly articulated by Mike Oliver (1990, 2009, 2013), the social model of disability rejected the project of normalising *handicapped* people to allow them to fit in, as far as possible or permissible, to a disabling world.

According to this logic, an institutional arrangement such as special education was seen as oppressive, given the determination to normalise people and school them in separate centres, classrooms or programmes. Schools have the capacity to enable or disable. Consequently, the focus shifted to the structural and cultural reforms required to dismantle the disabling barriers for people with impairments and chronic illness. Attention was drawn, through the social model, toward legislative activism as a lever for social reform which embraced an inclusive education for students with disabilities. Successive anti-discrimination legislation, with specific reference to the requirements of education authorities to eliminate disability

discrimination in schooling, has fuelled the inclusive education movement for students with disabilities.

In 1982 Sally Tomlinson's book, *A Sociology of Special Education*, was published. Building on her analysis of the disproportional representation of Caribbean boys in special education in Britain that we mentioned earlier, Tomlinson shifted the analysis of special education from the description of benevolent humanitarianism wherein the special needs of defective students were served in the more forgiving environment of the separate or segregated school. Applying a Weberian lens, she demonstrated the servicing of the expanding requirements of schools to manage increasingly diverse populations displaced by changes in the requirements of the labour market. She has continued to track the inexorable expansion of special education and renditions of segregative practices to the present (Tomlinson, 1985, 2012).

Through the 1980s up until the writing of this text, we have observed the coexistence of the expansion of special education research, policy and practice (Kauffman et al., 2018) and what has variously been called mainstreaming, integration and inclusive education. This has organised itself according to: research into the requirements of specific diagnostic profiles; school improvement pursuant to the education of all children; studies in teacher education; curriculum and assessment research; and education policy and leadership studies. Predictably, there is constant dilution of meaning and purpose as terms lack stipulation. This is easily recognised in college and university descriptions of their programmes in Special and Inclusive Education, at the end of which a student may be awarded a certificate with the inscription: *Master of Special and Inclusive Education*, indifferent to its awkward conflation.

1.5 So, What's All the Fuss About Disability and Education?

In June 2012 the Victorian Equal Opportunities & Human Rights Commission published a Report on the experiences of students with disabilities in Victorian government schools. The report entitled *Held Back* answers our question in its opening paragraphs:

When students with disabilities are unable to enjoy a good education, their future is seriously compromised. A poor education is one of the key reasons why the economic and social participation rate of Australians with disabilities is so low.

People with disabilities are less likely to have completed Year 12 and are less likely to hold a post-school qualification. They are also more likely to be unemployed and have significantly less income than others in the community. Indeed, 45 per cent of Australians with disabilities live in, or near, poverty. (VEO & HRC, 2012: 8)

We will return to the substance of this report and others like it later. For now, let's travel forward in time to 2015 and northward in location to Canberra.

On March 10th 2015 a primary (elementary) school principal in the city of Canberra in the Australian Capital Territory (ACT) paid an independent contractor \$5195.00 from the school's bank account to build a cage adjacent to a classroom for the purpose of restraining a 10-year-old boy with autism. The young boy was considered dangerous to teachers and classmates and the construction made from blue swimming-pool fencing stood in a storeroom abutting the classroom so that the child could look into the classroom and see his classmates. The cage, which was two metres by two metres, was made of blue metal and looks just like an enclosure you would stand outside of to look at the animals in a zoo or wildlife park. It was called *The Sanctuary*. We note that the parents of the boy were approached by the school seeking permission to restrain their child if his behaviour became violent. We are not sure whether the principal disclosed her intention to build the cage at this point. Parental permission was not granted.

The existence of *The Sanctuary* was first brought to the attention of officials in the ACT Education Directorate on March 17th. The cage was not dismantled until March 27th. It was reported in *The Canberra Times* (Macdonald & Connery, 2015; Lawson, 2015; Macdonald, 2016, 2015a, b) that the child had broken the lock that secured the cage door in a distressed attempt to free himself. In a press conference the Minister for Education, the Honourable Joy Burch transferred the principal to an administrative position in the Education Directorate and established an internal inquiry to investigate the “inappropriate structure” in the classroom and the tardiness of Education Directorate officers in responding to notice of its existence. She also appointed Emeritus Professor Anthony Shaddock, a respected expert in the education of children with disabilities, to lead a review into “the complex needs of children and challenging behaviour”.

The issue garnered the attention of national and international media, leading some parents and caregivers to challenge the conditions experienced by their children with disabilities. In the sleepy Queensland coastal town of Hervey Bay some 290 kilometres from the state capital, Brisbane, a parent notified education authorities that her 9-year-old son had been kept in a locked store room on twenty occasions where the windows had been covered by cardboard (Bohle, 2016). On hearing of this from the Regional Director, Deputy Director-General Patrea Walton instructed all Queensland schools were to ensure that external locks on time-out rooms and store rooms used for that purpose were to be removed immediately. She also prompted an inquiry into the incident and drew up the remit for a review of education for students with disabilities in Queensland government schools, with special attention to the protocols and practices for restraint and seclusion. Minister Jones announced the extensive review on June 2nd 2016.

Queensland and the Australian Capital Territory were not the only jurisdictions where the education of children with disabilities proved difficult and contentious. There has been a plethora of reviews and reports to demonstrate the achievements of and challenges for education authorities when it comes to educating *disabled* children in schools. We will consider these reports later in the book, consider the table below.

1.6 Grotesque Cages or Ethical Sanctuaries?

We make no attempt to disguise our opposition – *really*, you gasp – to what transpired in that otherwise ordinary primary school in Canberra in a veneer of academic distancing. There are, as will be made clear through the following chapters of this book, arguments that could be offered to provide ethical justifications for restraining a 10-year-old child with autism in a cage in a school classroom. Utilitarian calculations might be, and indeed they were, applied to demonstrate that it was in the best interests of all of the other children to differentiate/segregate/imprison (take your pick) this one child with autism. “After all, the child might hurt the other children, the teacher or himself. Isn’t the safety of all of the children paramount?” “The distress of that one child is balanced against the costs of a whole classroom of children. Can we sacrifice the need to learn in a peaceful classroom for the sake of one child?” “Isn’t the formal school curriculum far too important to be constantly interrupted by the errant behaviour, no matter the cause, of this child?” “If the parents insist on the attendance of their disabled child at the local primary school, then should it not be managed to minimise disruption?”

For many readers these questions are sound, necessary and lead to one conclusion; the principal did the right thing in seeking a solution that “protected” all of the children and *freed* (another provocative choice of words) the teacher to teach. To not make this calculation would be, some argue, unethical and irresponsible. We will consider the antecedents, justifications and forms of what is referred to as *consequentialism*. Here, the focus is on the outcome of the action. Did it produce the desired result? Yes, it did, the restraint of the child and separation of all of the others to get on with the lessons as usual. Utility consequentialism is defended by the numbers; whose needs should we consider here? The arithmetic is compelling; which is paramount, the majority of the classroom or the one *disruptive* child, of course. The result is good, do the numbers, well done school principal.

Others will invoke other ethical rationalities such as care ethics, questions of rights or applying case-by-case tests of justice. We will see that the philosophical traditions upon which ethical questions are interrogated and decisions made, defended or dismissed help us to excavate the assumptions we make when coming to decisions that appear to create or amplify ethical dilemmas or transgressions. As we demonstrate in the following chapters, different constructs of ethics have their serious limitations and fall short of satisfactory resolution of the dilemmas and challenges people raise in discussions about the education of children and young people with disabilities.

As we look at the classroom cage, or think about numerous other children who are secluded and restrained in schools, at this stage we will simply apply what have been called in the vernacular “pub test” questions. Although we hasten to qualify this to suggest that the character of the test will depend in large measure upon the pub at which you are taking refreshment, or more precisely; who you decide to take refreshment with. Let’s consider our pub test in very elementary terms. “*How would you expect and condone of your child being treated?*” “*Would you expect a*

school, the principal, teacher, counsellor, or classroom assistant, to inform you of decisions to restrain your child?” “Where does a cage sit on a continuum of options to be tried out?” “What does the existence and use of a cage, or a storeroom designated ‘The Responsible Thinking Room’ (as some schools were calling time-out rooms in Queensland state schools), tell us about the nature of inclusive education?” “What are the unintended lessons for the children in the classroom when they see their distressed classmate behind bars?” “What is reasonable treatment for a child with a disability compared with a child who is disabled?” “Are schools putting resources into the recognition and mitigation of the antecedents to disruptive behaviour?”

We seem to be arriving where the text concludes, considerations of fairness and justice – ‘*what’s the right thing to do?*’ may be flawed, but valuable if we return to the fundamental question raised by the pursuit of inclusive education for students with disabilities; What sort of world do we want to live in? And, our answer makes concession to the work of John Rawls (1999) and therein to the requirement of meeting the needs of the most vulnerable students.

1.7 So Now Let’s Explore Ethics in More Detail

In the following chapters we will anchor our discussion of the education of students with disabilities within different and competing ethical frameworks. We do this in order to test the capacity of such philosophical frameworks to resolve dilemmas when faced with difficult choices that educating diverse populations in more or less rigid school systems and institutions invites. Inclusive education has been described as an ethical project (Allan, 2005). Proponents for segregated or separate special schooling describe their choices as ethical (Kauffman et al., 2018). Those who describe themselves as advocates for inclusive regular schools adhere to what they see as an ethical claim. At work are the different sides of the ethical coin. We will set out the competing representations of ethics in this volatile debate about the purpose and form of education. Identifying the shortcomings of existing frameworks for ethics, we suggest more might is to be gained from inquiries into human rights and equity and social justice.

This book inhabits the shadowland of philosophy, justice, human rights, equity and educational practice. We confess the frequent inadequacy of rational thought, expressed as philosophy, psychology, sociology or education theory, as an explanatory frame for the myriad choices we make for ourselves and those for whom we advocate. Nevertheless, “fessing” up to, and explicating, our intellectual traditions does help to lay bare those choices and the competing justifications for more rigorous examination.

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Chapter 2

Weighting the Consequences and Following the Rules



Abstract Attempting to locate educational exclusion within an explanatory ethical framework most frequently results in the pitting of consequentialist arguments against Kant’s more absolutist deontological logic – an ever-ongoing battle within the broader field of philosophical debate. Kant is generally regarded as having the upper hand. However, it seems that no matter how often the flaws of consequentialist reasoning are pointed out, it still keeps rising up, phoenix-like, within the policies and practices of mass schooling. This chapter will address the main elements of consequentialism as an ethical position, including its shortcomings, the many reasons for its ongoing popularity, the practical effects of this popularity, and what might be done about it. Speaking of which, the main route off the consequentialist highway is usually thought to be traced out within Kant’s deontological approach to ethics, an approach not based on weighing the outcomes of any given act, but rather the nature of the act itself. Unfortunately, while a comprehensive and convincing framework, this chapter will suggest that it also appears to have its own significant problems.

Keywords Kantian ethics · Deontological ethics · Categorical imperative · Consequentialism · Act utilitarianism · Rule utilitarianism · Utility calculus

2.1 So, What Is Consequentialism?

Most of us – with the possible exception of those we might readily label as either psychopaths or sociopaths – seem to have some kind of innate, internal set of ideas about right and wrong which guides our behaviour. This might be called a *moral intuition*. It doesn’t have a point of origin, and its parameters are not readily definable, but it’s there anyway, and it provides a rough internal template for the complex, ongoing process of trying to shape ourselves as moral beings. Of course, this moral intuition can take many different forms. It can inform us as to how we go about making ourselves good people; it can tell us that we ought to follow the rules, even at a cost to ourselves; or it can help us choose, from within the murkiest of ethical dilemmas, a course of action that we think will result in the greatest benefit.

This final form of intuition is particularly common, and is based upon the existence of a relationship between the moral value of an act, and its outcome – an approach generally referred to as *Consequentialism*. According to this ethical paradigm, a good act is one that produces a good result. ‘Good’ may be very difficult, if not impossible, to define, but – so the argument runs – we know it when we see it (Moore, 1993). And it is this logic that lies at the root of consequentialist reasoning. Life is often complicated, and the ‘best’ action is generally the one that is best for everyone. The central question here is: does this vague moral intuition provide a sufficient moral foundation for an entire normative ethical system?

Generally positioned in direct contrast to the consequentialist position is the *Deontological* (duty-based) approach of Immanuel Kant (as well as a third normative ethical framework – *Virtue Ethics* – which will be addressed in the next chapter). Deontological ethics is premised upon the proposition that right and wrong are inherent within any given moral act, and do not hinge upon how that act turns out. Therefore, deontologists would contend that it is morally wrong to harm an innocent person, even if that action results in saving the lives of many other people (that is, it is morally wrong to use people as a mean to an end) – a conclusion that consequentialists would not share. It is this long-standing tension between these two ethical positions that will form the foundation of this chapter – particularly as they apply to the potential establishment of an effective ethics of inclusive education.

2.2 Consequentialism and the Self-Contained Classroom

There are a number of ways in which children with disabilities are managed by our education systems. These can range from the formal separate special school, where such children are segregated within their own institutions – through scheduled visits to mainstream schools, on-site special units located on school’s campuses, and self-contained classrooms where children can be corralled – right through to inclusion within the formal schooling community.

The ‘self-contained classroom’ is an American term, but the structural arrangement that it refers to is relatively ubiquitous within modern mass schooling. Children who are deemed to fall outside the norm, often a wide variety of different ages, are put together in a single room for instruction. There are normally two central explanations for this: one is the dominant narrative that generally acts as a public rationale for the existence of such classrooms: it’s good for those children. The other is the subordinate narrative, and yet probably the principal reasoning: it’s better for everyone else. Arguably, both operate according to consequentialist logic. Taking these in turn.

Much of the academic and pedagogic narrative about the self-contained classroom centres around the accrual of benefits to the children actually being educated there. Practitioners ‘weigh up the costs and benefits’ of a separate education – care and protection, and ‘realistic expectations’ versus the pace of general education, and relevant content (Timberlake, 2014) – and conclude that the balance of the ‘good’

lies with a system of relative exclusion. This is calculated to be a kind system, which provides an appropriate and nurturing educational environment, one which insulates so-called *special needs children* from the often-harsh world of mainstream schooling.

The second, subordinate narrative paints a somewhat less rosy picture of the motivations behind the self-contained classroom. The argument here is that the primary reason behind the corralling of children with disabilities and differences into their own learning space is that it significantly minimises the drag on a teacher's time in the ordinary classroom. Furthermore, it also minimises the potential disruption caused by such children on their so-called *normal* classmates. Villegas (2014) points out that while the vast majority of research suggests those placed in 'segregated classrooms' would do better in the mainstream, the reality is that they aren't going to be allowed in there, and all a good special needs teacher can do under the circumstances is get on with it, and do the best job they can.

2.2.1 *The Mathematics of Utilitarianism*

So, what's going on here? It would seem that some kind of pedagogic calculation has been made. Yes, children with disabilities might benefit more from being in a mainstream classroom, but not as much as the education of ordinary children would 'suffer' by their presence. Ergo, the right thing to do under these circumstances – according to *this* calculation – is to segregate those who don't conform to normal expectations. This is a classic example of utilitarian reasoning, wherein utilitarianism is the dominant form of consequentialism.

It would probably help to unpack consequentialism, as one of the three great normative ethical systems, a little more closely. Probably the first example of this reasoning is referred to as *ethical egoism*: the belief that whatever produces the best consequences for ourselves, is the right course of action. If there's a limited amount of food, take it for yourself; if it's cold and there's only one blanket, it's yours; if there's a kid in your classroom with the potential to disturb your learning, kick them out. This rightly sounds like a very primitive moral system. After all, it's all well and good until someone else wants that food, and they are bigger than you . . . and they have a knife. . . and the large knife-owner also thinks that *you* might disturb *their* learning. Thomas Hobbes (1588–1679) famously discussed some of the apparent shortcomings of this lawless 'state of nature' in his book *Leviathan*. His conclusion is that the only thing that stops all individuals engaging in an endless, ongoing knife fight, is to agree on a set of rules – a social contract – and to stick to that contract (reinforced by the power of an absolutist monarch) (Hobbes, 1998). Not much of an ethical system really, or a very sunny view of the world, but the first coherent example of consequentialist reasoning.

Seemingly a far more convincing ethical system, but one still shaped by the domain assumption that the outcome of an action determines its moral worth, emerged towards the end of the eighteenth century with the utilitarian ideas of

Jeremy Bentham (1748–1832). Bentham’s pivotal text, *An introduction to the principles of morals and legislation*, was published in 1789, the date most frequently given as the beginning of the era of modernity. This is fitting, as Bentham perfectly captures the post-enlightenment belief that truth is not to be found within the realms of superstition, tradition, or even religion, but rather that the morality of the future could be charted by practical scientific reasoning. Thus, right and wrong are not to be determined by such vagaries as cultural norms and habits, ecclesiastical dogma, or personal intuition, resulting in a kind of hopeful guessing-game of ‘maybe I got it right, maybe I didn’t’. No, right and wrong would now be calculated objectively and scientifically – provable, replicable, and totally defensible moral choices. He begins his seminal book with the following quote:

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne . . . The principle of utility recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. (Bentham, 2000, 14)

Bentham’s logic is fairly straightforward. He contends that the fundamental two poles of human existence are the seeking of pleasure, and the avoidance of pain, and the act that maximises pleasure and minimises pain, must, by definition, be the best of any available alternatives. Out of this simple assertion, Bentham then managed to construct his *utility principle* (also called the greatest happiness principle), and from there, his entire moral theory. For Bentham, utility is the property that produces good or happiness, or prevents evil or unhappiness.

Of course, as we shall see, figuring out the pleasure/pain index – more usually called the utility calculus – isn’t an entirely simple matter. Bentham even contends that every action can be measured for pleasure/pain across a range of different axes: intensity, duration, certainty, remoteness, fecundity, purity and extent. The results are then totalled up and a mathematical conclusion can be drawn as to whether the action is desirable (pleasure-producing/good) or undesirable (pain producing/bad). Still, complex or otherwise, there’s now no need for guessing as to the moral worth of an action, or asking advice from some moral ‘wise person’; you can now do the sums yourself.

And there has clearly been such a calculation done on the issue of the self-contained classroom; suppose our ethical question is: *should special-needs children be placed in mainstream classrooms?* A very basic utility calculus could look like this (given that the very existence of self-contained classrooms presupposes a certain kind of answer) (Table 2.1):

This kind of calculation is hardly a rarity within the field of inclusive education. One particular legal case in Australia demonstrates the way in which utilitarian reasoning is deployed to decide such issues: *L v Minister for Education* (Qld). In this case, a young girl, L – who had been diagnosed with ‘global developmental delay’ – was suspended from her school. Her teachers stated that they had difficulty managing her behaviour, as well as managing the education of the rest of the class. L’s mother took her case to the Queensland Anti-Discrimination Tribunal, which found

Table 2.1 Utility calculus: inclusion/exclusion of special-needs children

Positives	Score	Negatives	Score
Most special needs children would do better in general classrooms	+15	Such children would take up too much of the teacher’s time	– 15
We would be fostering inclusive learning environments	+10	They might interrupt other children	– 10
		Ordinary teachers don’t have the specialist training	– 15
		Other children might not want them there	– 5
		They might disturb the smooth running of the classroom	– 10
		Parents of other children would agitate against their presence	– 10

Utility calculus result: $(+25) + (-65) = -40$.
Therefore, special needs children should not be placed in mainstream classrooms.

that although L had indeed been discriminated against, this discrimination was exempted under the *Anti-Discrimination Act 1991* (Qld) because ‘unjustifiable hardship’ would result for the school with her continued presence. The finding of the Tribunal was that L had to leave mainstream education, and attend a ‘special’ school.

The case of *L v Minister for Education* has been the subject of much discussion, not only among mainstream classroom teachers, but also among those involved in the practical, legal, ethical, and pedagogic aspects of inclusive education (Butler, 1995; Dickson, 2018). The central dispute within the case is particularly familiar – that is, whether a mainstream education is the best choice for those children with disabilities, or whether they are better off in specifically tailored surroundings. However, as one of the teachers said at the hearing, ‘He could give L a good lesson, or he could give the remainder of the class a good lesson, but he could not do both’. Under these apparent circumstances, a utilitarian calculation was then made by the Tribunal: the maximum social good was deemed to lie with L’s removal (although against her wishes and those of her mother). As the head of the Tribunal stated:

It seems to me that other considerations, such as the stresses placed on teaching staff at Beta [the school] without specialist training and the disruption entailed to other children, are such as to outweigh the benefits to L and constitute unjustifiable hardship to the Department should it be compelled to accept L back into the Beta school. (*L v Minister for Education*, 1996, 9)

The utilitarian logic here is identical to the calculations made above regarding the rightness or wrongness of self-contained classrooms. Simply weigh up the cost and benefits, and whatever the mathematical outcome, this is the best course to follow. Whether this process pertains to just one single individual, or whether it concerns us all, the maths will point in the direction of ‘the greater good’.

2.3 Why Might This Have Been Seen as a Positive Move in Ethical Theory?

There are a wide range of reasons for seeing the rise of utilitarianism as a good thing. The first two reasons are primarily historical. First, as discussed above, it is hardly surprising that utilitarianism emerged when it did. If the central characteristics of modernism are widely regarded as the valorisation of truth, progress and objectivity, this new approach to morality promised all three at once. By being able to calculate our way out of moral dilemmas, we could now reach ‘objectively true’ conclusions as to how to behave and what decisions to make, and this was surely better than anything that went before.

The second involves the underlying rationale for utilitarian reasoning: *the greater good*. The Enlightenment, and the subsequent era of modernity, charted a move away from the divine right of kings and the belief that the common folk – the vast, vast majority of us – were just there to provide economic, social and military support for the continued rule of the sovereign (Machiavelli, 2003). This move was relatively slow in coming. Whereas in medieval times, according to Foucault (1980, 1984), power exercised only two functions – war (and hard-won monopoly of arms) and peace (the arbitration of lawsuits and the punishment of crimes) – by the end of the middle ages, there had developed the additional expectations of the maintenance of order and the organisation of enrichment. However, it was not until the eighteenth century that there emerged any real concerns over the well-being of the general population, but when this new understanding of the relationship between governance and the population did ultimately evolve, the notion of an ethical system that appeared to work to its benefit was a perfect fit. As such, the greatest good for the greatest number – not just the important and the powerful – determined with apparent mathematical certainty, dovetailed well into this new understanding of ‘the population’, itself a calculable and manageable modernist entity.

2.3.1 *The Greatest Good for the Greatest Number? – Gonski*

Examples of consequentialist policy making are not hard to find, and most of them are introduced with the best of utilitarian intentions – i.e. the greatest good for the greatest number. One good example is what has come to be called the *Gonski Report* (2011), named after the review’s chairman David Gonski. In 2010, the Australian Government initiated a full review of the funding arrangements for its schooling system, in large part triggered by a fall in Australia’s position on the seemingly all-important international education league tables. The review lasted over a year, and involved over 7000 written submissions and interviews with hundreds of stakeholders (Gonski, 2011).

At the end of this process, the report reached a number of important conclusions. One is of particular interest to us, probably the most important conclusion in the

report, because of its obvious utilitarian underpinning – the funding of the Australian education system should, at its core, be equity-based. Finding 17 of the report makes precisely this point:

New funding arrangements for schooling should aim to ensure that:

- differences in educational outcomes are not the result of differences in wealth, income, power or possessions;
- all students have access to a high standard of education regardless of their background or circumstances. (Gonski 2011, 110)

This finding has been overlaid across two structural observations. The first is that in Australia there is a particularly large gap between the highest and lowest performing students. The second is that this low performance imposes a high cost on society, limiting its economy's ability to produce and grow.

As a consequence of all this, Gonski concluded that Australia required a needs-based and sector-blind system of school funding. With impeccable utilitarian logic, given we have a finite national budget, the greatest good would be achieved by diverting financial resources (money) from those who already have quite a lot, and probably wouldn't really notice its absence – largely in the private educational sector – to those who do not, and as a consequence, are not achieving to their potential and are hence costing us all.

Perhaps not surprisingly, after initial bipartisan support, the conservative Australian government decided against pursuing the Gonski recommendations, in part because of the 'inequity' of the policy towards Australia's private schools. A second version of the report – *Gonski 2.0* – with a 'recalculated' mathematical component, has been introduced instead. In spite of this relatively unhappy ending, this example illustrates that the logic behind a utilitarian decision can seem both perfectly laudable and socially justified.

2.3.2 *The Philosophical Strengths of Utilitarianism*

The third reason for the rise of utilitarianism is that, philosophically, it has appeared to be a particularly strong and resilient intellectual paradigm. That is, utilitarianism did not reach its lofty perch within ethical theory simply by being in the right place at the right time; it got there because it convinced a very significant number of philosophers that it was the best and most rigorous normative ethical system available. This viewpoint is founded on a number of grounds.

First, utilitarians claim that other ethical systems are actually based upon utilitarian reasoning, whether they realise it or not. For example, Bentham himself asserts that the notion of 'maximising happiness' lies at the root of all practical ethical thought. People might *think* they are basing their decisions upon other foundational principles. However, when stripping any problem back to its fundamentals, they will find the utility principle there waiting for them. He notes that if you want to replace 'maximising happiness', you have to have something else in mind; or as he

memorably puts it: *'Is it possible for man to move the earth? Yes, but he must first find some other earth to stand upon'* (Bentham, 2000, 16).

Second, utilitarians make the point that their main opposition – deontological ethicists, whose ideas we shall address shortly – propose a system that takes no consideration of the differing contexts of moral action. Since all moral decisions are also social decisions, according to utilitarians, it makes no sense to propose a system that reaches its conclusions without any mechanism for incorporating the effects of those contexts. This argument constitutes a smart intellectual move by the utilitarians: it takes an issue that deontologists regard as a fundamental strength of their position, and positions it as a weakness. That is, the more deontologists argue that their ethical conclusions are solely determined by the rightness or wrongness of a given act – irrespective of the consequences of that act – the more they can be painted as out of touch with the complex world of real-life ethical decision-making.

Third, utilitarianism also claims to have finally found a way to cut through the seemingly inevitable complexity of moral life with a concrete, modernist certainty. Moral choices would no longer be vulnerable to the whims of subjectivity. It had formerly not seemed entirely unreasonable for one person to reach a given moral conclusion, and their best friend to take the opposite position, without either of them being categorically wrong. This would no longer be the case. Utilitarianism now introduced 'objectivity' into moral deliberations. We had no time for subjectivity in science, so why should we tolerate it in the field of ethics? For the first time then, according to utilitarians, we could genuinely talk about 'right' and 'wrong', and actually mean it.

Finally, following on from the ethical holy grail of 'objectivity', comes two of its positive correlates: the first is impartiality. It now supposedly no longer matters who conducts the utility calculus – either of the two friends above can do the necessary mathematics – and, if they do the sums right, they will come up with the same answer, irrespective of their initial intuitions about the correct moral answer. That impartiality also extends to the subjects of the calculus: everyone gets treated the same, unless that difference is part of the factoring process. Objective *and* democratic. This leads to the second positive correlate: fairness. As mentioned previously, utilitarianism, at least on the surface, can lay claim to a certain kind of status-blind equity. According to John Stuart Mill, Bentham himself had a maxim: *'Everybody to count for one, and nobody for more than one'* (Kenny, 2010, 928). The validity of this claim will be discussed in greater length shortly.

To restate, this continues to be one of the two most influential normative ethical theories. It remains a very common form of justification underlying not only contemporary governance, but also huge swathes of educational policy. At first glance, as has just been discussed, it can seem like fairly unimpeachable logic; however, perhaps unfortunately, nothing within the field of ethics is ever that simple.

2.4 Some Problems

In 2018, Steve Smithers – a disabled man who uses a wheelchair – was at Belfast Airport to catch a plane; he was flying to London to visit his elderly father, who had cancer. Mr. Smithers had travelled extensively in the 11 years he had been using the wheelchair, and had never had any problems. On this occasion however, he was stopped at security and told that he couldn't embark on the plane with the rest of the passengers. Along with his wheelchair, Mr. Smithers had a small bag of tools containing a couple of spanners and some nuts, just for those occasions when repairs were needed like a bicycle repair kit. On seeing this tiny repair kit, the airport authorities reasoned that they wouldn't be able to let him on the flight ... as there was a risk that he might try to start dismantling the plane, with his arsenal of tiny spanners, the decision was presumably based on the assumption that he might be some kind of terrorist. As an alternative, Mr. Smithers then suggested that his tool kit could be given to the airplane staff instead, who could return it to him upon landing, as he needed it to adjust his chair to fit his English hire car. This option was deemed unacceptable and, unable to risk flying without the tool kit that guaranteed the functioning of his wheelchair, Mr. Smithers was forced to miss his flight (Selby, 2018). The logic here is one of basic utilitarianism: mathematically, causing a large amount of distress to one disabled person is significantly outweighed by the small benefit gained by several hundred people in not having a potential terrorist's wheelchair on the plane.

Such concerns about the link between wheelchairs, terrorism and the greater good are apparently not limited to the staff at Belfast Airport. Some time ago now, one of the authors of this book witnessed the Principal of a small, rural Australian primary school refuse the enrolment of a girl in a wheelchair. Although ostensibly against the Disability Discrimination Act (1992), the Principal explained to a government review panel that such an exclusion would be in the interests of the majority of the children – i.e. for the greater good. After all, it would be those very children who might find themselves obstructed by her, and her wheelchair, in the school corridor in the event of an evacuation during a terrorist incident.

2.4.1 *The Danger of 'Majority Rule'*

The utilitarian calculations conducted in the above examples are fairly straightforward. Yes, it's true that the girl in the wheelchair did not get the outcome she wanted. But, to follow Bentham's maxim, each only counts for one – and, according to the school Principal, many more other children potentially benefitted from his decision, to a greater mathematical degree than she suffered from it. Following the utility principle, this is the sole criteria for deciding whether or not a moral choice can be determined to be 'good'. Do the sums, say the utilitarians.

And yet, there is something about this decision that would leave many of you feeling uncomfortable, in that it goes against some of the basic intuitions about right and wrong. How can it be ‘good’ to discriminate against a young disabled girl, in such a severe way, simply on the basis of a highly unlikely event (a terrorist attack in a small, rural Australian primary school), played out in an even less likely way (her wheelchair somehow blocks the exits)? Surely this means that if a sufficiently large number of people benefit from the mistreatment to some smaller group of people, then that mistreatment can not only be *tolerated*, it can also be regarded as the right thing to do.

Disabled people constitute exactly one such group, and arguably the ethical philosophy of utilitarianism has the potential to leave them uncomfortably vulnerable to the whims of the ‘normal’ majority. If a child is given the diagnosis of ADHD, and is therefore deemed to have the potential to disrupt a mainstream classroom, there is no ethical reason why that child should not face exclusion. If a child is diagnosed with a learning disorder, and is therefore deemed to be a significant drag to the school’s NAPLAN ranking, there is also no ethical reason why that child should not face exclusion. In all these cases, the rights of the disabled minority can easily come a very distant second to the various demands, prejudices and agendas of the majority.

Disabled people are by no means the only minority group vulnerable to utilitarian reasoning. For example, utilitarianism does not conveniently stop at the boundaries of possible racial discrimination either; if enough people of the dominant racial/ethnic grouping can conjure up some basis for excluding a minority race/ethnicity from the classroom (or the workplace, or the voting booth), then this can most likely be deemed to be ethically acceptable. As Williams (1985, 86) notes: *‘If racist prejudice is directed towards a small minority by a majority that gets enough satisfaction from it, it could begin to be touch and go whether racism might not be justified’*.

Sandel (2010) makes the point that this vulnerability can be extended to almost anyone in a minority, or lacking power. He not only uses the interesting example of torture – more specifically, torturing the innocent daughter of a suspected terrorist to extract information from the suspect about a forthcoming atrocity – he also uses the example of the ancient Romans and their practice of throwing Christians to the lions. He rightly notes that if the crowd in the Coliseum was large enough, and getting enough pleasure from watching the bloody spectacle, then there is no reason why the eating of Christians could not be validly regarded as a ‘good’ thing to do.

The central issue here is really one of minority rights. Do individuals/specific groups retain certain rights if the greater good is served by the breaching of those rights? With Bentham’s form of utilitarianism, it seems easy to argue that they do not; after all, ‘fairness’ is not some kind of prerequisite factor within a utility calculus. Shortly, this chapter will address a somewhat more nuanced attempt at utilitarian reasoning (that associated with John Stuart Mill), and ask the same question. The issue of ‘Rights’ will also be discussed in much greater detail in Chap. 4.

2.4.2 Williams and the Issue of 'Integrity'

The philosopher Bernard Williams (1929–2003) opposes utilitarian ethics on a number of grounds, not least of which for a general dislike of any intellectual system that tells us how we ought to feel, or experience and respond to the world; he asks the question, '*by what right does it legislate to the moral sentiments?*' (Williams, 1981, x). As a sub-set of this meta-ethical inquiry, his most well-known criticism of utilitarianism revolves around the notion of *integrity*.

Williams sets up the integrity problem with an often-quoted moral dilemma (Williams, 1973, 98). Jim is an important visitor to a small South American town, where twenty Indians (sic) are tied up against a wall, about to be shot. Pedro, the Captain, explains that in honour of his visit, he can shoot one of the Indians and then the rest will be allowed to go free; however, if he doesn't kill an Indian himself, there is no special occasion, and all twenty of the Indians will be executed. What should he do? Certainly, for a utilitarian, the answer here is quite straightforward: a simple utility calculus leads to the inescapable, mathematically-supported moral conclusion that the greater good is served by Jim killing a random Indian.

Williams' arguments – largely his '*integrity objection*' – leads in a very different direction, although there are two possible understandings of the term '*integrity*' here. The first suggests that utilitarianism has a major flaw in that it does not take into account the individual moral values held by the agents within any particular calculus. In this instance, if Jim has a firmly held belief that killing is morally wrong, asking him to commit murder, even if the maths stack up in favour of that particular choice, is an attack on his integrity as an independent moral agent. Many of those working their way through this moral dilemma would already have recognised the possible conflict between their own moral intuitions about the wrongness of the required act, and what compliance might mean about their personal integrity, and the solution accorded by the utilitarian approach.

The second understanding of integrity here is more theoretically important. In this instance, when Williams talks about integrity, he is referring to a moral agent who retains control of their own boundaries *as* moral agents. Williams asserts that utilitarianism has lost sight of an important fact: that there is no 'God's eye' point of view from which neutral calculations can be made, no '*viewpoint of the universe*', to quote one influential utilitarian philosopher (Sidgwick, 1884, 381). All the players in this game are actually individual agents with moral leanings, aspirations and projects of their own. They cannot be legitimately rolled into one unified *uber*-agent that understands, and responds to, the various issues involved in any moral question in the same way.

This contention is evidenced within the dilemma over the execution of the Indian/Indians. The utility calculus treats Jim and Pedro as the same moral person. Their individual agency makes no essential difference to the process; there is simply the point of view of the universe which organises the players and sets out the maths. This leads to a critique of what is referred to as *negative responsibility*, wherein individuals are just as responsible for the consequences they *fail* to prevent, as for

those that they cause. Or to put it another way, from a utilitarian point of view, if Jim chooses not to execute a single Indian, he is just as responsible for the death of all twenty as is Pedro – an approach which, according to Williams, robs moral agents of their integrity, and human action of its very point.

2.4.3 Objective Calculation

Lying at the core of utilitarianism is the belief that it is possible to make an objective calculation of all the factors required to determine which course of moral action within any dilemma would lead to *‘the greater good’*. Linked to the concerns above, this presumes that, as part of a utility calculus, somehow the point of view of the universe can be directly translated into an objective delineation and quantification of the pertinent issues to be weighed. Unfortunately, the evidence doesn’t really support this optimistic contention. For every ‘objective’ assessment made, there are alternative assessments pointing to the desirability of different conclusions.

Take, for example, the utilitarian calculations done by the rural school Principal who concluded that the greater good was achieved by excluding the girl in a wheelchair from his school on the basis of imagined increased terrorism-related risks. An alternative utility calculus for this ‘objective’ conclusion is set out below, weighting the positives of including the girl in the school, against the potential negatives (Table 2.2).

As can be seen, here is an equally plausible utility calculus, reaching exactly the opposite conclusion. Given that the content of such calculations is always organised and ranked by human actors (the Principal at the school; the head of the Tribunal in *L*

Table 2.2 Utility calculus: the terrorism-associated risks of little girls in wheelchairs

Positives	Score	Negatives	Score
The girl wanted to go to the school	+15	The school may face a terrorist attack – (and, in that event) – the wheelchair may block the exits. (The score is factored against ‘certainty’ (likelihood) – one of Bentham’s 7 factors)	–0.00001
The girl will do better at a school she wants to go to	+15		
The other children will learn about disability	+10		
The other children will learn more about helping / supporting others	+10		
The other children will learn that difference $\neq$ exclusion	+15		
The other children have a new friend to play with	+10		
Utility calculus result: $(+75) + (-0.00001) = +74.99999$			
Therefore, the girl should be allowed to go to the school			

v Minister for Education), the calculation always remains an inherently subjective one.

In summary then, given these significant flaws (i.e. minority rights, integrity, lack of objectivity), can the utilitarian project be salvaged, or in fact are its defects terminal? The interesting point here is that later utilitarians were themselves aware of many of these criticisms, and often agreed with them, and therefore set out to produce a more defensible model – one still based upon consequentialist reasoning, but one which seemed less likely to produce intuitively horrible, and therefore self-defeating, results. This project was led by John Stuart Mill (1806–1873).

2.5 How About a More Sophisticated Version of Utilitarianism?

Mill was the son of one of Bentham's intellectual followers, and he realised at a relatively early age that classical, Benthamite utilitarianism had some significant problems. Furthermore, he also realised that if he was to save this, the most viable version of ethical consequentialism, from logical collapse, he was going to have to make some targeted theoretical changes. Three of these changes are worth addressing here, and two come directly from Mill's work. The first is a more complex version of pleasure, the central currency of utility. The second is a greater focus on the notion of personal liberty. The third spills out from Mill's work, which is a move from what is generally referred to as 'act utilitarianism' to the more flexible and stable 'rule utilitarianism'. All of these changes can probably be best explored around a worked example.

2.5.1 Disability and Bullying

Schools are not always welcoming places for those who are different. As will be demonstrated throughout this book, exclusion can occur across a range of axes, both formally and informally. Informal exclusion can be particularly brutal. Recent research suggests that students with disabilities are twice as likely to be bullied as other children (Chatzitheochari et al., 2014). Children with autism spectrum disorder (ASD) – another particular category of difference — are over three times more likely to be bullied (Anderson, 2014). The question arises of precisely how to respond to such bullying, and how utilitarian ethics might judge those responses.

In 2011 in Australia, a 16 year-old boy with ASD was being bullied by a group of younger boys, one particular boy punching him several times in the face. After passively taking the punches for a while, the older boy suddenly picked his attacker up, spun him over his head, and slammed him down on the floor. The bullies then quickly retreated, one limping rather badly. After the video of the event went viral,

the bullied child – who was briefly suspended from school, along with his attacker – stopped being bullied, became something of a celebrity, and even got to meet Justin Bieber (!) (Crane, 2014).

So how would a Benthamite utilitarian calculate the rightness of this strategy for dealing with bullying? The results would appear to be fairly conclusive.

Using this example, it’s possible to explore how Mill’s more nuanced utilitarian ideas sought to improve Bentham’s original model in three fundamental ways.

2.5.2 Re-assessing the Single Scale of Pleasure/Pain

According to Bentham, the ‘two sovereign masters, pleasure and pain’ are all we really need to know to organise our calculations of ‘the greater good’. True, it is a very simple model, but this single continuum appears to get to the core of moral dilemmas quickly and easily. As seen in Table 2.3, everything can be reduced to a single scale, in that there is no differentiation in quality of pleasure. Therefore, listening to a Justin Bieber concert (and meeting him afterwards) is intrinsically no different in substance to being thrown to the floor from a height and hurting your leg – they are just different points on the same scale.

However, Mill does not agree with Bentham here, regarding this as a significant oversimplification; instead, Mill divides this continuum into higher and lower pleasures. Accordingly, the pleasure to be gained from watching a Shakespeare play is obviously not the same as from watching *Australia’s Got Talent* – Shakespeare is of a higher quality, and should therefore be valued more. After all, as Mill states, we are not pigs devouring anything without discernment:

It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they know only their own side of the question. The other party to the comparison knows both sides. (Mill, 2002, 260)

And when asked who should decide the higher pleasure from the lower, Mill suggests that the comparison should be made by ‘competent judges’ – Socrates, rather than the fool – that is, educated people who have knowledge of both higher and lower pleasures; presumably, people like Mill. Putting aside the obviously

Table 2.3 Utility calculus: body-slamming bullies

Positives	Score	Negatives	Score
Immediate cessation to the punching in the face	+15	Brief school suspension	–10
The general bullying stopped	+50	Bully limped for a while	–5
Other children started talking to him	+30		
Got a cool nickname: ‘The Punisher’	+10		
Met Justin Bieber	+1		
Utility calculus result: (+106) + (–15) = +91			
Therefore, attacking the bully was the right thing to do			

problematic issue of who should be judges here, three other problems arise from Mill's attempts to upgrade Bentham's single line approach.

First, the central appeal of Bentham's system is its utter simplicity: put all the elements of a dilemma on one of two sides of a table; give them a score; get a result; act for the greater good. This advantage has now all but disappeared. The '*body-slammings bullies*' calculus (subjective, convoluted, and disconcerting in its conclusions though it is) would seem like a paragon of simplicity and good sense in comparison to what a Mill-inspired version might look like – that is, if we tried to introduce an additional 'quality' score to each of the pleasure rankings.

Second, there is arguably something arbitrary and ahistorical about most attempts to bifurcate 'higher' and 'lower' pleasures. Though Mill is almost certainly talking about a mind-body distinction here, his argument has all the hallmarks of the same kind of assumptions built into F.R. Leavis' *Mass civilisation and minority culture* (1930), where he famously attempts to define objectively the parameters of '*high culture*' – works of taste and value – which he contrasts with the brainless dross popular among the unwashed masses. Of course, this position failed to recognise its own class-based assumptions, or seemingly grasp that much of what is the now highest of high-culture (we're looking at you, Mr. Shakespeare) was simply the popular culture of its own day. Mill could be accused of being equally myopic.

Finally, the distinction doesn't appear to work in the way Mill wants it to. Michael Sandel (2010) in his Harvard lectures: *Justice*, regularly asks his students to rank videos of three forms of culture (a professional wrestling brawl, a Shakespeare soliloquy, and an excerpt from *The Simpsons*) according to which they found the most pleasurable, and which they found the worthiest. It turns out that *The Simpsons* are generally deemed to be the most pleasurable, and Shakespeare deemed to be the worthiest. Given that, unlike the fool or the pig, these are Harvard students and therefore they presumably 'know both sides', surely they should choose Shakespeare, the higher pleasure . . . and yet the majority still prefer *The Simpsons*. So, not only does Mill's model not appear to work the way he imagined it would, he is also explicitly relying upon the notion that some ways of life are significantly more noble than others, and as such:

Mill saves utilitarianism from the charge that it reduces everything to a crude calculation of pleasure and pain, but only by invoking a moral ideal of human dignity and personality independent of utility itself. (Sandel, 2010, 56)

2.5.3 *Introducing a More Nuanced Version of Liberty*

We have already discussed some of the problems for minority rights under the logic of utilitarianism; that is, if enough people benefit from the attenuation/cancellation of those rights, then ethically, that is the appropriate thing to do. Of course, in this specific instance of bullying, the bullied individual's rights were not traded off against the greater good, and the bullied child appears to have come out on top.

But suppose the bullies had won – as they generally do – and enough people had been involved in the bullying, and taken pleasure from it, that like the crowds in the coliseum, the result of the utility calculus was reversed. All of a sudden, the bullying becomes a good thing. Extending this conjecture: suppose all children with ASD are eventually bullied out of mainstream classrooms, and in addition to the pleasure this gives the bullies, it might also be additionally justified within a utility calculus on the grounds of funding, or resources allocation, or staff expertise, or school league table position. What would all this say about the relationship between utilitarianism and personal liberty? Nothing good.

Mill disagrees. As one of the greatest writers on the notion of liberty, it does seem highly unlikely that Mill would put his name to a theory that increases the limits placed on individual freedom, after all he is the author of one of the most influential books on the subject – *On Liberty*, written in 1859. His central thesis is that as long as individuals do no harm to others, they should be free to do what they want, protected from the interference of both other people, and the government. He argues that the notion of utility should still act as the foundation of all claims about the desirability of individual liberty, but that it should not be assessed solely on the basis of a single set of circumstances. Instead, the utilitarian value of respect for individual liberty should be weighed over many cases, and over the long term. Therefore, bullying children with disabilities, or for that matter other minority cohorts, out of mainstream classrooms may have short-term benefits, but in terms of fostering more important long-term social characteristics – such as kindness, acceptance, diversity, cooperation, social progress – the utility calculus leans in favour of educational inclusion.

There are two important issues here: the first is the logic that Mill's claim rests upon. By arguing that it is important, both individually and socially, to develop characteristics that increase our overall worth, he is appealing to ideas and qualities that extend far beyond the simple notion of utility. That is, whether he would admit it or not, he is employing a conceptual framework that speaks to the value of fostering individuality and human character; logically, these are not features of the utilitarian worldview. The second is that Mill is setting the stage for a somewhat different form of utilitarianism to the one advanced by Bentham. By stating that utilitarian calculations should extend beyond the boundaries of a single act, Mill is setting the stage for a new normative ethical system: *rule utilitarianism*.

2.5.4 Act vs. Rule Utilitarianism

As we have already calculated above, the greater good appears to have been served by body-slamming the bully and becoming internet-famous. The utilitarian mathematics of a single action lead to a particular conclusion as to 'the good'. Many of us, however, though fully understanding the frustrations that may have led to his response, would struggle to regard this act as 'good', or the most ethically acceptable outcome. There's something wrong here, in that this does not fully align with most

people's intuitions as to the best way for this incident to have played out. Though bullying is bad, this does not somehow make one child hurting another good.

And this is the central problem with what is referred to as *act utilitarianism*: a utilitarian calculation about a single act. Under the right circumstances, this approach can produce some truly whacky results; indeed, it can justify almost anything. The most common way around this problem has been to follow Mill's lead, and to focus instead upon utilitarian justifications of *rules*. That is, whereas the '*first principle*' is deemed to be that of utility, this is used as a mechanism for generating '*secondary principles*' – rules – by which we should live. It is these secondary principles which then form the basis of *rule utilitarianism*.

Let's try re-evaluating the bullying incident, but from a rule-utilitarian rather than an act-utilitarian point of view. We already know that act-utilitarianism has given the bullied child's response the thumbs-up. What about rule-utilitarianism? In his book *On Liberty*, Mills discusses some of the rules that are axiomatic to the protection of individual rights, such as not encroaching on the rights of others, or causing injury to others. Clearly, the bullies were encroaching on the rights of the child with ASD, but equally he hurt one of those bullies in response. Both sides broke the rules. Mill's probable conclusion here – following the logic of rule-utilitarianism – would most likely be that establishing a rule whereby children could body-slam each other would not be for the greater good. This ethical conclusion would likely gel with most people's intuitions on the matter, and rather than introducing '*justified vigilante rules*' into the school, maybe a more defensible way forward would be to have much more effective anti-bullying policies, procedures and interventions in place.

And so, is the most defensible conclusion here that, although act utilitarianism may have some fairly severe flaws, we can save the day with a more nuanced version of the theory, albeit one with the same domain assumptions? Is rule utilitarianism the solution to all our ethical problems? Unfortunately, arguably not.

2.5.5 Rule Utilitarianism – More of the Same?

Rule utilitarianism is certainly an advance on your basic-model of act utilitarianism. Consider the issue of lying. According to the logic of act utilitarianism, it is permissible to lie if and when it serves the greater good; however, rule utilitarianism argues that, in the long term, telling the truth (and the associated wider social belief that honesty is important) is preferable to a situation where lies can be told at will whenever a particular situational benefit is to be gained (Emmons, 1973). Even if the lies come from a Pennsylvania Avenue twitter account?

Ethical advancement though it appears to be, rule utilitarianism is still vulnerable to some significant criticisms. First, like act utilitarianism, rule utilitarianism can still contradict some of our intuitions about moral conduct. Take the example of punishing the innocent: almost all of us would intuit that this is equivocally and universally morally unacceptable. It is also clearly the case that, under the right circumstances, such actions would be acceptable for act utilitarians (for example,

executing one innocent Indian to save the lives of nineteen others). However, ‘rules’, supposedly immune from this problem, can also result in identical outcomes, and criticisms. Again, take the moral rule: *‘It is always wrong to punish the innocent’* but then add to it the proviso *‘... unless ordered by government during times of war’*. And, therefore, acts such as the bombing of Hiroshima and Nagasaki are exempted from moral criticism by identical notions of *‘the greater good’* – in spite, perhaps, of our moral intuitions.

Second, and following the work of J.J.C. Smart (1973), there is the issue of the blind following of rules, or as he refers to it, *‘superstitious rule worship’* (Smart, 1956, 349). After all, if greater good can be done by breaking a rule, rather than by following it, why bother following it? Which is not to say that rules do not have a place within ethical systems – setting up some kind of default position, for example – however the very foundation of rule utilitarianism is called into question if those rules continually get in the way of choosing what are obviously better outcomes. In addition, if the only things that matter are rules, why not just go straight to deontological ethics (which will be discussed shortly), and forget about issues of utility altogether?

Finally, and probably the most damning of the criticisms, is that in the final analysis, rule utilitarianism isn’t really very much different from act utilitarianism; indeed, if you examine it closely enough, it appears to simply collapse back into act utilitarianism (Lyons, 1965). We have already noted how the moral rule: *‘It is always wrong to punish the innocent’*, can be modified to allow for civilian deaths by adding: *‘... unless ordered by government during time of war’*. This proviso is only one of many that could be added under the right circumstances: *‘... and unless economic sanctions need to be put in place against a particular country, including vital medical supplies’*; *‘... and unless we need to shoot down a commercial plane heading for our capital city that has a bio-weapon aboard’*; *‘... and unless enrolling disabled children causes undue hardship to the school’*. Eventually, virtually anything can be added as needed, and rule utilitarianism simply becomes a more heavily qualified form of act utilitarianism. That is, if the need is pressing enough, and the greater good is at stake, the ‘rule’ will be modified as required. So, the argument here is that rule utilitarianism just kicks the theoretical can further down the road. Ultimately, it has all the same problems as act utilitarianism regarding fairness, integrity and impartiality; in the final analysis, it is the same thing.

Importantly then, by way of summary, given the specific groups and problems that are being focused upon here, utilitarianism – in whatever form – does not seem to give us a ready theoretical fit when applied to inclusive education. Even with a relatively charitable assessment of this approach, utilitarianism appears to have a front-and-centre problem within minority rights. As a consequence of this pivotal shortcoming, the normal alternative, for those interested in finding some kind of normative framework for guiding their moral choices, is to head off in the direction of deontological ethics. So – unlike utilitarianism, with its focus on consequences – will this rules-based paradigm provide a more convincing answer to all our ethical problems, regarding education and inclusion?

2.6 Deontological Ethics: Rules Not Outcomes

When the complexities of consequentialist approaches to ethics are put to one side, their fundamental logic is fairly straightforward: that is, if it all works out OK for most people, then you've done the right thing. As we've seen, at first glance this all seems perfectly reasonable – Greatest good for the greatest number? Why not? – but arguably the closer you look, the less convincing, and more flawed, this whole ethical enterprise becomes. The question then is: just what do you offer us as an alternative?

The general answer given by most philosophers to that question is *deontological ethics* (otherwise referred to as *duty ethics*). This is also a form of normative ethics, but it is one that does not understand right and wrong as being determined by the desirability of an act's outcomes, rather the moral value of the action is deemed to be inherent to the act. Revisiting the notion of punishing the innocent: according to deontological ethics, this act is wrong *in and of itself*. Not only do our moral intuitions tell us this, our *human reason* tells us this. This is true even if the outcomes of this punishment are projected to be drastically in favour of '*the greater good*'. Simply because we think lots of people might benefit from that unjust punishment doesn't somehow make it right; and even if we *could* predict the future, i.e. the consequences of the punishment (which we can't), and knowing for certain that those consequences would be positive, this is still utterly irrelevant to the inherent rightness or wrongness of the act.

Similarly, a deontological ethicist would be unlikely to be impressed with the utilitarian moral reasoning of the rural headmaster who decided to exclude the girl in the wheelchair from the primary school on the basis of possible, read imagined, terrorist attack. The potential outcomes of moral choices do not form any part of deontological reasoning. Therefore, the question is not, '*What will be the consequences of allowing the disabled girl into the school?*' Instead the question will be, '*Is allowing the disabled girl into the school the right thing to do, in and of itself?*' Importantly, the normal way to answer this question is to then ask a secondary question, '*Well, what do the rules say?*' Given that we now have disability discrimination legislation, the most straightforward answer to the question ought to be, '*The rules say she has every right to go to the school, just like everybody else.*' The fact that this may well not be the case will be discussed in much greater detail in Chap. 4, in the section on the realpolitik of anti-discrimination legislation.

This rule-based normative ethical system is generally associated with the work of Immanuel Kant (1724–1804), particularly within the realms of Western philosophy, and his ideas will be discussed at length shortly. However, it is by no means the first, or probably even the most influential form of deontological ethical theory. That honour belongs to what is generally referred to a *divine command theory*, and this forms the basis for the majority of our major religion-based moral systems. Within these systems, God tells us what is right and wrong, and we follow those rules; indeed, not only is God the source of these morals and the guarantor of their validity, S/He is the power that enforces their observance.

For Christians, arguably the most important rules are set out in the *Ten Commandments* (Exodus 20), but these are by no means the only ones available; God is deemed to provide a broad array of moral guidelines. Once again, returning to the rural headmaster and the girl in the wheelchair, a deontological ethicist following divine command theory might point to the bible and cite Ephesians 4:32, which orders us to, '*Be kind and compassionate to one another*'. Here is a rule which can be applied to a widest possible variety of ethical dilemmas, and does not rely upon knowing the possible consequences of those dilemmas. It would appear then that while the headmaster has made a decision that accords with sound utilitarian moral reasoning (or certain understandings of it), his decision would be much less likely to pass muster with many adherents to a Divine Command version of deontological normative reasoning.

There are a number of reasons for finding divine command theory problematic. First, it is premised upon the fact that you believe there actually is a God in the first place. Second, there is the problem of how we can be sure that God is good – see arguments about the existence of evil and the possibility of a benevolent God (Jackson, 2011). Third, there is also the issue of being sure of exactly what God's will is? It seems that a very comprehensive history of the world's conflicts can be written in terms of the violent disagreements between those claiming to speak on His/Her behalf. Finally, and from a philosophical point of view, probably the hardest to get around or push aside, is the problem raised by Plato (424–348 BC) in his dialogue, *The Euthyphro* (2002), neatly summarised by Jones et al. (2006, 33).

EITHER – God's will is the source of morality – whatever he commands is Good, in which case he can command us to do horrific things, which run counter to our moral intuitions. (Plato then asks why we should worship a God who could command such horrific things.)

OR – God's will is not the source of morality – he is Good because he follows moral law. In which case the moral law lies beyond God and we can bypass God if we wish to be moral. (Plato then asks why we should worship a God who is bound by the same moral rules as ourselves.)

As a result of these (and other) criticisms, divine command theory does not have much of a following among deontological ethicists (outside of theology departments). This is not the case for Kant's version of the theory, which remains one of the most important contributions to the field – although, as we shall see, it is not without its own critics.

2.7 Kantian Ethics

To understand the central features of Kant's (frankly complex) ethical system, a number of different elements come into play. Whereas utilitarianism is ultimately a relatively straightforward set of ideas, Kant's version of deontological ethics is nowhere near as conceptually obliging (Kant, 2002). However, coming to terms with his arguments is worth the effort, even if, as we shall see, they still don't answer all our questions, or lead us to any kind of unassailable position regarding ethics and

inclusive education. It will be suggested here that two main foundational points are of greatest note when coming to terms with Kantian ethics:

2.7.1 *Forget the Consequences*

As with divine command theory, for the Kantian version of deontological ethics, the consequences of an action – who benefits, who doesn't, where does the greatest good lie? – are also irrelevant to the rightness and wrongness of an act. There is probably no better exemplar of the weaknesses of utilitarian theory, and the relative strengths of a Kantian alternative, than the matter of the *Stolen Generations*.

In Australia, between the beginning of the twentieth century and the early 1970s, somewhere between one in ten and one in three children of Aboriginal and Torres Strait Islander descent – and in particular, 'half caste' children – were forcibly removed from their parents and communities and taken into state or foster care (Read, 2006). The majority of these children were to be trained as either farm labourers, or domestic servants. The overall intention of this forcible removal was to disconnect them from the 'harmful environment' of an Indigenous way of life, and to assimilate them within what was deemed the infinitely preferable option of mainstream Anglo-Australian culture (Anderson, 2003).

From a utilitarian point of view in 1905, this appeared to make perfect sense. Yes, it was harsh ripping children away from their parents and communities (put some negative points in the utility calculus side of the ledger), but overall the authorities were certain that the greater good would be served by this: Aborigines were 'dying out' anyway; we would create a more productive and harmonious society; Indigenous children would no longer be at risk from their impoverished conditions; and white people would be better at looking after them anyway. Of course, absolutely none of this turned out to be true. The utilitarian crystal ball-gazers of the Australian state and federal governments got it all hideously wrong, causing untold emotional damage to the children, their parents and communities and the broader social fabric.

From a deontological point of view, the moral equation seems much simpler and more defensible. To start with, it does not rely upon trying to guess what the outcomes/future will, or ought, to be, and then start working backwards from there. After all, as can be seen above, such assessments have the habit of being highly subjective, necessarily incomplete, culturally biased, dangerously flawed and potentially catastrophic. Instead, deontological ethics addresses the act itself. In this instance, the question might be asked, '*Is it acceptable to remove a child from its parents for no reason, other than the colour of its skin?*' While this question clearly has to be placed in some kind of historical context, following on from the arguments about punishing the innocent, the answer is clearly 'no'. We have principles that underpin our rights, responsibilities and rules in this area (certainly when it comes to white people), and we should be guided by those principles.

2.7.2 *Freedom, Reason, Duty*

The second foundational point of Kantian ethics concerns the *intention* of moral actions. While Kant contends that our moral choices should not be driven by the potential outcomes of our actions, neither is it enough to simply follow the rules (although following the rules is still important for Kant, since, as we shall see, those rules often protect our most important principles). He argues that our actions can only be *truly* moral if they are done for one specific reason: because it is our duty to act that way. This does not mean that all other motivating reasons are bad, or that the act therefore becomes the wrong thing to do, but rather that for an action to be genuinely moral, it must be driven by duty, and motivated by a principle recognised by reason.

So, what on earth does Kant mean by that? Let's start with his notion of freedom. Kant believes that we can either act in two ways: the first is *heteronomously* – which means acting according to forces beyond our own determination. These forces may be of social, cultural or historical origin; however, they may also be biological, but as such are simply 'naturally' determined. The second is to act *autonomously* – which means acting in accordance with laws we have given ourselves, and this is done through the application of reason. The point Kant is making here is that we are much more than simply animals, behaving as a function of our instincts, needs and compulsions, whether natural or social. We are autonomous, we can shape our actions on the basis of our ability to reason, and this makes us free. (Arguably, Kant's contention that we are all rational beings with the capacity for freedom – and are hence worthy of respect – lies at the heart of argument about rights, discussed in Chap. 4). So, when it comes to moral issues, we may act heteronomously, i.e. according to inclinations, or we may act autonomously, i.e. according to our reason. Kant refers to this as acting morally, acting on the basis of *duty*, and it is the *intention* that is of importance here. After all, as Kant famously argues, there is nothing in the world that can be called good without qualification . . . except a good will – and '*A good will is manifested when we act out of duty rather than inclination*' (Kant, 2002, 13).

An example would probably be useful here. A four-year-old Welsh boy with ASD was terrified of getting a haircut (as can be relatively common with this condition). As a consequence, he hadn't had a proper haircut in years. On one particular visit to the barber, he lay down on the floor, refusing to get into the barber's chair. Rather than have the parents drag the boy screaming into the chair and hold him there, or have them simply give up and leave, the heavily-tattooed barber lay down on the floor next to the child and successfully trimmed his hair from there. Later, somewhat surprised to have become something of a national celebrity when the photos went viral, the barber said, '*I felt chuffed to have been able to help but didn't think much more about it*' (Stanton, 2015).

Kant would undoubtedly have applauded the barber's actions, but in order to consider those actions to be fully *moral*, he would have needed to know the barber's intentions in lying down next to the child. If the barber was motivated by an

economic desire to increase his business by appearing kind, or by some psychological desire to be liked, or because he just happens to enjoy lying on the floor in piles of hair clippings, these are essentially heteronomous motivations, motivations beyond his own free, rational determination (and are hence unrelated to the issues of freedom and reason). However, if he decided to lie on the floor because he has reasoned that it is his duty to do so – based upon the principle that he should care for the health and concerns of his customers as much as he can – then this can be considered an autonomous moral act (and thereby demonstrates ‘a good will’). To reiterate: even if the barber’s actions had been driven by one of these other motivations, lying on the floor with the young boy would still have been a laudable thing to do, but it would not have risen to the level of a freely-chosen, duty-driven moral act, as understood and championed by Kant.

Of course, the question now becomes, ‘*What exactly does Kant mean by duty?*’ In the sense that it is being used here, a duty is a demand on our behaviour, but more importantly, it is a demand that has no conditions or qualifiers attached to it. Kant refers to these demands as *categorical*, as opposed to *hypothetical*.

Now if the action were good merely as a means to something else, then the imperative is hypothetical; if it is represented as good in itself, hence necessary, as the principle of the will, in a will that in itself accords with reason, then it is categorical. (Kant, 2002, 31)

For example, a hypothetical imperative is something that places demands upon conduct that applies under specific circumstances and within given contexts. As a barber, there exists hypothetical demands to turn up in a set place, at set times, to cut hair. These demands do not apply during holidays, or in the evening, or for people that don’t actually want a haircut. Alternatively, barbers are subject to a categorical demand that they care for the health and concerns of their customers, and this applies without exception and irrespective of circumstance or context. You can’t just chop away at a customer’s ears with a pair of sharp scissors, or suddenly decide to give them a quick Mohawk, or cut half their hair and go home. According to Kant, this categorical demand represents a duty, and as discussed before, adhering to our duties represents the fundamental foundation of moral actions.

So where does reason fit into this? Kant contends that all duties are arrived at by reason alone, and it is our reason which allows us to determine the principles that underpin our moral choices. So, as Kant famously asserts, ‘*an action from duty has its moral worth not in the aim that is supposed to be attained by it, but rather in the maxim in accordance with which it is resolved upon*’ (Kant, 2002, 15). To paraphrase: the moral value of an action does not lie in its consequences, but rather in the principle that supports it. As previously discussed, for Kant, the barber’s actions were not of value because the consequences turned out to be for the greater good (the boy got a haircut, and is no longer as frightened of barbers), or because lying on the floor of his shop made him feel good about himself. Rather, the barber’s actions were good because he acted in accordance with an underlying principle – ‘*Care for the health and concerns of your customers*’ – and he thereby did his duty.

Reason has a further role to play here. If a demand on conduct is truly to be considered a categorical imperative, then reason tells us that this must apply equally

to everyone. After all, if it only applied to some people, or in some places, then by definition, it would be a hypothetical imperative. Consequently, categorical imperatives are universal, and they apply equally to all rational beings (Jones et al., 2006). This reasoning leads us to a very important place within Kant's moral theory: that is, if there are various different principles (or maxims) underlying all our moral duties, and those principles are necessarily universal, then underlying those various different principles, there must actually be a single, basic categorical imperative – and it is this which forms the foundation of all Kant's moral ideas.

2.7.3 *The Categorical Imperative*

Once again, if an underlying principle is to be regarded as categorical, then it must necessarily apply at all times, and in all places, and to everyone. If that is the case, then it can be said to be universal, and if it is universal, it is reasonable to regard that principle – indeed any such principle – not only to be a rule for personal conduct, but also to be a rule for everyone to follow. This is Kant's *categorical imperative*, certainly the most famous maxim within ethics, if not within the whole of philosophy.

Act only in accordance with that maxim through which you can at the same time will that it become a universal law. (Kant, 2002, 31)

While this may sound like a somewhat more obtuse version of the old moral law, '*Treat people as you would like to be treated*', its implications are significantly more far-reaching than this. Kant's categorical imperative is not just a way of saying that such categorical principles should be generalisable across the whole of society, it is a way of saying that when we examine particular actions, and we delineate the maxim that underpins them, we must ask ourselves, '*Could this maxim become a universal law?*' (and as such, it is both a measure and a test). If the answer is 'No', then the action is the wrong thing to do. The most important thing to note here is that in making this determination, Kant is not appealing to our moral intuitions, but to our reason.

Returning to the now-familiar example of the girl in the wheelchair at the rural Australian school. We have discussed at length the arguments surrounding this issue in terms of the punishment of the innocent, and we have concluded that under utilitarian logic, it is possible to justify such punishment under certain circumstances, seemingly within both act and rule utilitarianism. We have also discussed this action through the lens of deontological ethics – specifically in terms of the centrality of '*following the rules*'. However, this same example can be used to dig deeper into Kantian ethics, and to investigate exactly how the categorical imperative works.

If you are the Principal of the school, we can say that there are two possible courses of action open to you here, each supported by a different maxim. The first possible course of action is that you allow the girl in the wheelchair to go to the

school like everyone else. The maxim that would underpin this course of action would be, *'I will not punish the innocent'*. Following the categorical imperative, we then ask the question, *'Could this become a universal law, without contradiction?'* So, *'if you won't punish the innocent; how would it be if everyone refused to punish the innocent?'* Pretty good, actually. There's no problem or contradiction here at all.

What about the second course of action? You do not allow the girl in the wheelchair to go to school like everyone else – no, it's not her fault, but terrorists might just be waiting around the corner. The maxim that would underpin this course of action would be, *'I will punish the innocent, if I deem it necessary'*. Following the categorical imperative, we again ask the question, *'Could this become a universal law, without contradiction?'* So, you'll punish the innocent, if you think it's necessary; how would it be if everyone decided to punish the innocent? Not so good. If we punish the innocent, just as we punish the guilty, then the whole notion of guilt, innocence and punishment starts to break down – which means that the maxim becomes self-contradictory. We have thereby used our reason to demonstrate that punishing the innocent cannot be a moral act, since it cannot become a universal law.

It is important to emphasise here the centrality of reason, as opposed to intuition. We may well (rightly) intuit that punishing the innocent is wrong, and Kant may also have intuited this, however it is not intuition that lies at the core of his ethical theory. Kant rejects punishing the innocent because of a chain of reasoning that leads to self-contradiction, not because of moral intuition.

While Kant is most well-known within the field of ethics for this first version of his categorical imperative, there is also a second categorical imperative, one considered of almost equal value. To avoid confusion, this is often referred to by a different name: the *practical imperative*. This rule addresses the importance of treating all people as ends in themselves.

2.7.4 The Practical Imperative

Kant described the practical imperative as follows: *'Act so that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means'* (Kant, 2002, 46–47). Almost in the same way that Descartes (1596–1650) asks the rationalist question, *'Is there anything of which we can be absolutely certain, anything upon which can be based a system of reason?'* – coming up with 'I think, therefore I am' – Kant asks a similar type of moral question: *'Is there anything that has absolute value, anything upon which can be based a system of morality?'*

This is perhaps a harder question than it first appears, after all, we ascribe value to lots of things – possessions, relationships, actions – but all of these are contextual in their value; everybody has a different idea of what matters, who is important, and why we should want what we do. However, Kant suggests that there is one thing that

has an absolute value: our humanity. We are thinking beings, and as such, we have an inherent dignity and, *a priori*, are worthy of respect.

Now I say that the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will, but in all its actions, those directed toward itself as well as those directed toward other rational beings, it must always at the same time be considered as an end. (Kant, 2002, 45)

Given that every reasoning person has their own inherent dignity, no one is to be used for arbitrary purposes; no one is to be used as a means to someone else's ends. Every person is an end in themselves. Therefore, it follows from this reasoning that it is possible to construct another categorical imperative from this realisation, an imperative also not contingent upon individual inclination or social context. And it is an imperative that gives practice guidance for conduct, hence its name.

In the light of the practical imperative, the reasons why we have moral problems with punishing the innocent become all the more apparent. We have already seen how punishing the innocent falls foul of the categorical imperative: if we do, guilt and innocence become meaningless, and the entire logical edifice comes crashing down. However, if we punish the innocent – for example, close to the end of WW2 in 1945, the militarily-irrelevant medieval city of Dresden was firebombed for 2 days by the Allies, killing 35,000 civilians, simply in an attempt to intimidate the German leaders (and the advancing Russians) – this also falls foul of the practical imperative. Here we are using people as a means to some other end. We are not granting them the inherent dignity that their humanity deserves, and all people have the right to be an end in themselves.

A more education-orientated example relating to the practical imperative concerns a somewhat dubious strategy which seems prevalent within a not-insignificant proportion of Australian schools around the time of National Assessment Program – Literacy and Numeracy (NAPLAN) testing. This is referred to as 'strategic exclusion'. Although a relatively complex procedure, the central functional mechanism is to identify those students who will have a negative impact on the school's results and eliminate them. The most common strategies of exclusion are suspending 'trouble-makers' for relatively minor infractions for the duration of NAPLAN; encouraging parents of students with learning difficulties, Indigenous students, and Non English Speaking Background (NESB) students to keep them home to protect them from negative results; and rejecting applications for enrolment from students with low previous NAPLAN scores (Thompson & Cook, 2014).

One particular school, one within a low socio-economic and culturally diverse area, was designated as 'a failing school' based upon the first year of NAPLAN data. Given such data is directly linked to 'reward funding', the educational leaders of the school felt they had no choice but to engage in some of the above exclusion strategies. On the next year's NAPLAN, the school was subsequently ranked above average in most areas. As the Principal stated:

NAPLAN – last year ... they said 'This is it; this is everything'. I came back and said to staff, 'This is it, this is everything, we just have to lift our NAPLAN up', and they said

'Yeah, but we've put all these kids in', and I said 'Well we don't next year, we just don't . . .'

(Comber, 2012, 127)

Consequently, while there is little doubt that these exclusion strategies work, the argument here is that these students are simply being treated as a means to somebody else's ends, and those ends are improved NAPLAN rankings for the school. Given that involuntarily excluding students from NAPLAN therefore contravenes the practical imperative, it is the wrong thing to do ethically. Even though some schools have used the excuse that it '*saves such children from unnecessary stress*' (Bagshaw, 2016), the truth is that these students are excluded from full participation in the school community, and not only do they not get the same kind of feedback and monitoring as those students who participate in NAPLAN, they are at risk of being marked out as 'less' by their teachers and peers.

This imperative for the categorical necessity to treat people as their own ends leads Kant to speculate on the desirability of a '*realm of ends*' (Kant, 2002, 51). This is an idealised world wherein all human beings are treated as ends in themselves, and nobody is treated as a means to anybody else's ends. This is a particularly thought-provoking philosophical speculation for those interested in a truly inclusive system of education.

2.8 So, Are There Any Problems with Kant's Deontological Approach?

Kant's version of deontological ethics certainly seems to avoid some of the problems associated with utilitarianism. There aren't the issues associated with minority rights, particularly important for those interested in the ethics of inclusive education; there isn't the guessing game of what the consequences of any given action might be; and for all its claims to objectivity, there isn't the matter of the subjectivity inherent within the construction of a utility calculus. However, the system of Kantian ethics is also not without its criticisms. Four of these are worth discussing here.

First, unlike utilitarianism, there is little room for manoeuvre within Kantian ethics. Rules are there to be followed, and given that their origins are generally to be found within important moral principles, what's the point of having those principles if you can then decide when, and when not, to follow them? After all, that's the most important thing about categorical imperatives – they shape our moral duties, and they apply to everyone, all the time, no exceptions.

So, it would appear then, that there is no space for sympathy, compassion or flexibility within Kantian ethics. We may disparage utilitarianism for producing some potentially cruel outcomes, but in many ways deontological ethics is equally vulnerable to this criticism. Kant himself makes this perfectly clear in his answer to the question, '*Can we lie if the reason for doing so is good enough?*' In his short essay, *On the supposed right to lie* (Kant, 1797), the example is used of whether it's permissible to lie to a murderer who comes to your door looking for a friend who has

taken refuge there. His answer? No, it is never acceptable to lie – Kant is not a man to compromise his ethical beliefs. After all, he argues, our reason tells us that if we universalise this action, and everyone started lying, for whatever reason, truth and falsehood would start to lose their meaning. Therefore, no lying to the murderer, and bad luck to your friend.

Second, like utilitarianism, and exemplified by the arguments above about lying, Kantian ethics sometimes appears to offend our moral intuitions. Intuitively, most of us would probably think that, in the final analysis, the consequences of our actions must factor in to our reasoning somehow. If Nazis come to our door and ask if we know where any Jews are hiding, surely, we are not morally obliged to given an honest answer under those circumstances, as the consequences of that honesty cannot simply be understood as a dry academic exercise (for an interesting discussion of Kant and door-knocking Nazis, see Varden (2010)).

So, should we factor in consequences to our moral deliberations? One possible way forward here has been suggested by W.D. Ross (1877–1971), who takes a more pluralistic approach to determining right and wrong, arguing that consequences can indeed be taken into account, but only when specific duties have been addressed first. He calls these *Prima Facie* duties, of which he delineates seven: fidelity, reparation, gratitude, justice, beneficence, self-improvement, and non-maleficence (Ross, 1930). Ross contends that all of these duties must be adhered to before any other factors, such as consequences, can be taken into consideration. This would certainly satisfy some of our intuitive concerns, but then the questions arise: is this an exhaustive list? And in the case of conflict, which of these *prima facie* duties take precedence? Unfortunately, it seems that Ross' work, while worthy in its ambition, isn't the magic glue which can bind utilitarian and deontological ethical theories together.

Third, the final question above is particularly problematic within deontological ethics. If it is axiomatic to this approach that we do our duty and follow the rules, and that those rules are based upon principles recognised by reason, what happens when we are confronted by conflicting duties? As an example, Catholic priests have a religious duty to keep the secrets of the confessional; in addition, those priests also have a religious and legal duty to protect children. The problem then arises of how to deal with the ongoing abuse of children, as revealed to priests during confession. Clearly there are conflicting duties here. The question has been asked, '*Is protecting the privacy of paedophiles a more important duty than protecting the rights and safety of children?*' As recently as this year, the Australian Catholic Church has confirmed that it is (McKirdy & Westcott, 2018).

The above conundrum is fairly straightforward according to consequentialist reasoning. Any utility calculus involving the sexual abuse of children is something of a foregone conclusion – or at least it ought to be. What about Kantianism, however? The problem here is that Kant did not really offer any guidance on this matter, and we are confronted with conflicting duties all the time. Do we rank our duties? And if so, according to what criteria?

Finally, John Stuart Mill has argued that Kantian deontological ethics is not as free from consequentialism as it would like to think. He contends that the categorical

imperative, via its use of reason, is actually based upon some consequentialist assumptions. That is, by pointing to the logical inconsistencies associated with a ‘wrong’ act, and noting what will happen if that inconsistency is allowed to continue, then this is simply consequentialism by another name. When we point to the logical problems of punishing the innocent, for example, we are saying that if that was allowed to occur, the consequences would be a breakdown of the relationship between guilt, innocence and punishment. Mill argues that, like it or not, this is a form of consequentialism. While this may be an over-reading of Kant’s argument, it does perhaps show that consequentialist logic is often never far from the surface of our moral reasoning.

2.9 Review

When trying to assess how to approach the most fundamental of all normative ethical issues – how to determine which acts/behaviours/policies might be called ‘right’, and which might be called ‘wrong’ – it can be seen that both of these normative systems have their advantages and disadvantages. For utilitarianism, there seems to be a fairness to the maxim, the greatest good for the greatest number, and it seems to have a certain objectivity to it. But, arguably, both these positive elements fall apart when under greater scrutiny. Alternatively, Kantian ethics has the benefit of some fixed rules and principles to guide our decision-making, but it can be inflexible and unsympathetic, and doesn’t really offer much help when the ethical waters start to get murky.

So, where do we go from here? Arguably, when writing a book on the ethics of inclusive education – i.e. dealing with those who have been, or are likely to be, ‘othered’ and excluded by our education system – it is a fair bet that utilitarianism’s inherent problems with minority rights will pretty much disqualify it as an appropriate ethical framework from the get-go. However, in spite of these criticisms, this ethical position still appears to be flourishing within the broader domain of social governance, in that it still has a great deal of political, bureaucratic, and educational currency, particularly within neo-liberal discourse.

But Kantianism is not a perfect framework either. Given that it is rigid and unforgiving, and can lead to some particularly uncomfortable outcomes, it may well be that this approach is also not the best way forward for establishing an ethical framework for educational inclusion either – particularly if it tells us that the outcomes of moral decisions don’t matter at all, a proposition that most of us seem to find difficult.

So, what now? Maybe sidestepping the traditional consequentialist/deontological binary when dealing with ‘right and wrong’ may be a more productive way forward. Maybe, rather than asking, ‘*What should we do here?*’ we should be asking, ‘*What kind of people should we be?*’ This alternative approach is referred to as *Virtue Ethics*, and it provides the focus for the next chapter.

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Chapter 3

Virtue Ethics and the Possibilities of ‘Care’



Abstract The most familiar attempt to sidestep the consequentialist/deontological binary outlined in Chap. 2 has been to avoid the question which animates both of them, ‘What is the right thing to do?’, and replace it instead with the virtue-orientated questions, ‘What kind of people should we be?’ and then by extension, ‘What kind of values are most important for shaping our society?’ These questions provide an alternate route for approaching the ethics of inclusive education. Most frequently, the answers tend to revolve around traditional virtues such as wisdom, courage, temperance and justice, but arguably the field of inclusive education lends itself to a more specific set of personal and social characteristics. For example, another way forward from within virtue ethics lies with the sub-field of ‘care ethics’, wherein the greatest social, administrative and ethical concern is directed towards the most socially vulnerable.

While all this seems like a plausible foundation for anchoring the debate, virtue ethics actually struggles not only with its inability to offer much guidance for particular ethical problems, but also with the difficulties associated with reaching agreement over which virtues are important and how we shape their boundaries. In addition, there are more specific issues associated with care ethics, not least of which are that it has been accused of simply accepting and valorising existing gender power relations, and it also assumes that given groups want ‘care’ in the first place, as opposed to other forms of equitable social intervention. Arguably then, some of the ethical issues here are just as intractable as those associated with the consequentialism/deontological dilemma.

Keywords Virtue ethics · Cardinal virtues · Character education · Care ethics · Beneficence · Caring deficit

3.1 So, How Is Virtue Ethics Different?

In 2018, one of Australia’s leading economists – Stephen Anthony – gave a speech at a budget preview forum in Melbourne. His talk covered a range of economic areas, but his most interesting observations concerned the relatively strong budget position for the coming year. Interestingly, Anthony stated that almost one billion dollars of

that improved position came from money that had previously been paid to people on the disability support pension (Michael, 2018). By making it much harder to claim this pension, there had been nearly a two thirds drop in the number of recipients, with the federal government forcing the remainder onto unemployment benefit – which pays \$170 less per week (Wahlquist, 2018). The economist warned that in the longer term, this was not really going to save any money, largely due to the damage that would be done to the people with disabilities and the socially vulnerable:

The problem here of course is we're seeing this spill out on to our street in terms of homelessness. I'd say there's a bit of false economy occurring here and I'd ask the tax office to consider the models that they're using and their reliability because the flipside of what they're doing is causing a lot of social damage and social harm. (Anthony, cited in Wahlquist, 2018)

As Storrar (2018) states, both sides of politics – Labor and the Liberal Party/National Party Coalition – seem to regard these savings as a 'good idea', irrespective of the apparent consequences. A total of 60,000 people have now been taken off the disability support pension, with much of the collateral cost of these changes simply being transferred to the states.

The question now is: how might we understand these policy changes from an ethical point of view? Following on from the last chapter, they seem fairly easy to explain. From a utilitarian point of view, this appears to be a relatively straightforward utility calculus. On the positive side, there are the benefits to the national economy, the saving of money that can perhaps be better invested in more productive human resources, the extra motivation given to 'disabled' people who could perhaps get a job if they only '*tried a bit harder*', the streamlining of the welfare system, and the political benefits that consistently go with '*cracking down on bludgers*'. On the negative side, there will be a few thousand disabled people who will find life somewhat harder, and maybe a bit of bad publicity and blowback from the '*bleeding heart brigade*'. From a utilitarian political perspective, this is what would be called a '*no-brainer*'.

From a deontological point of view, this also seems relatively easy to explain. Politicians and policy advisors can claim that they are simply doing their duty – to the national economy, to their party (in terms of making it more electable), to the organisational viability of the welfare system, to those people with disabilities who '*genuinely*' need the available money, and to the electorate, who expect government to '*make the hard decisions*'. Of course, as was pointed out, Kant never really explained how to manage conflicting duties, and arguably these same politicians and policy advisors also have a duty to some of society's most vulnerable members.

The final approach, and the subject of this chapter, is from the point of view of virtue ethics. That is, the issue is not about judging whether saving money by redefining disability is '*a good idea*' – whether the act was right or wrong – but rather what this says about the *characters* of those who have made this decision. The approach is therefore 'agent-centred' rather than 'act-centred' (Annas, 2004). *Prima facie*, from a virtue-ethical, agent-centred, point of view, it would seem very easy to find some significant character deficiencies here. Using three of the four cardinal

virtues, wisdom, courage, and justice (which will be discussed a greater length shortly), it could be argued that none of these appear to be in great abundance among the decision-makers. Of course, they might counter that they showed courage in *‘making the hard choices’* that resulted in cuts to support for people with disabilities, and since most of us don’t know the people involved, and weren’t at the meetings where the decisions were made, we may have to take them at their word.

Perhaps a better option at this juncture would be to return to the barber discussed in the last chapter. For those readers who might be just dipping into this book section by section, the barber referred to here was trying to cut the hair of a frightened 4-year-old boy with ASD; the boy refused to sit in the chair and simply lay down on the floor. Rather than try to force the distressed boy up into the chair, the barber lay down next to him, in among all the hair clippings, to cut his hair.

From a utilitarian perspective, the barber might have conducted a quick calculation of the pros and cons, and decided that a happy 4-year-old with a sharp new haircut, impressed customers, and the positive publicity was well worth the price of 15 min of discomfort and a coating of hair-clippings. Alternatively, as discussed in the last chapter, from a deontological point of view, he may have regarded it to be part of his moral duty to care for the health and concerns of his customers to the best of his ability; there may have been no other factors in play other than his perceived duty to do the right thing.

While these two possibilities offer some interesting insights into moral decision-making, the third option is probably the most appropriate here – that is, approaching this issue from within the logic of virtue ethics. Perhaps this episode is not best addressed from an act-centred perspective, but rather from an agent-centred one, and the ethical discussion should not revolve around a conceptual classification of the act, but instead it should involve a focus on the character of the actor. The main task here would then be to examine and understand the character traits – the virtues – that would lead someone to do such a ‘good’ act. Certainly, some of the cardinal virtues would be applicable here, but so would some others: kindness, beneficence, compassion, respect, to name but a few.

Perhaps then, virtue ethics is the way forward for constructing a general ethics of inclusive education. Maybe we shouldn’t be so focused upon trying to decide whether a given act, or policy, or turn of events, is good or bad, maybe we should focus instead upon trying to decide what kind of virtues we want to inculcate in our young people, what kind of values should animate our schools, and what kind of society we want to live in. The point then would not be to spend all our time worrying about the question, *‘How should we act?’*, but concern ourselves more with the question, *‘What kind of people should we be?’*

In the 1990s in the United States, it became popular for a while among Christian communities to wear baseball hats, wrist bracelets, and t-shirts with the letters ‘WWJD?’ on them (as well as on bumper stickers, church signboards, and bath towels, and any other surface it would fit). This acronym stands for ‘What Would Jesus Do?’ In many ways, this is a good example of virtue ethics in action, since according to this position, goodness can be seen in the actions of good people, one

sure way of picking the right thing to do in any circumstance is to model your behaviour on someone you know is unequivocally good. Given that Jesus is deemed to have an unimpeachable character, then fashioning yourself – choosing personal virtues that match those you perceive him to have – seems a pretty solid way to make the right choices in life. Furthermore, it could be argued that moral decisions emerging from this process are likely to have a more concrete foundation to them than those based upon more abstract ideas, such as utility and duty (Driver, 2016).

If this is indeed the case, then it would be useful to understand where this approach initially came from, and how it works. In order to do this, we need start in Ancient Greece with Plato and Aristotle, and an examination of some of their most fundamental ideas.

3.2 The Ethics of Antiquity

For the Ancient Greeks, the ‘*self*’ was not something that could be found by looking inwards and hunting around until you stumble across it, as with our somewhat sketchy contemporary notion of an ‘*inner-self*’. For them, the self was something that was to be fashioned, like a work of art, through a diverse array of practices of the self (Foucault, 1984). This was an important process, not only in terms of what kind of self was to be constructed, but also how that construction was to occur. And developing the right virtues was axiomatic to this.

When addressing the ethics of antiquity, probably the best place to start is with Aristotle (384–322 BC). While Plato certainly had quite a lot to say on the subject, the writings of Aristotle, and in particular his *Nicomachean Ethics*, present a somewhat more refined, and contemporarily applicable, approach to the subject. Aristotle’s model is animated by three main concepts: *function*, *virtue*, and *happiness* (or more accurately, *eudaimonia*: flourishing). Taking these in turn:

The first thing to know about Aristotle is that he had a teleological underpinning to all of his ideas. According to him, humans don’t just randomly exist, for no particular purpose; we are here to live out our capacity for rational activity – reason – which constitutes our defining essence (Slote, 2000). So if we are to be good, then the question has to be asked, ‘*Good at what?*’ For Aristotle, goodness does not exist in and of itself; goodness is to be found by its link to a given *function*. If a special needs teacher is regarded as ‘good’, this has the meaning, first and foremost, that they are good at teaching children with disabilities. It is from this starting point that Aristotle then extended the notion of ‘good’ in the direction of happiness:

So for many centuries being a good person was linked to being good at whatever role you played in society . . . However, Aristotle believed that we had a function that went above and beyond the one prescribed for us by society. Aristotle thought that by understanding our function we would understand how we could be good, and this was the key to happiness. (Jones et al., 2006, 89)

Once we see the foundational role that function plays within Aristotle's teleological model, we can move on to the issue of 'virtues' themselves. If a special needs teacher is to excel at their job, then this requires a very specific set of skills, and those skills are likely to differ from, for example, a school principal, or a physical education teacher, or a school caretaker. Each of these different functions requires a different set of skills which enables them to do their job well. It is these 'skills' which correlate with the notion of virtue. If we make a list of the virtues we might desire in someone whose function is 'soldier', then 'courage' would be somewhere near the top. It is unlikely that we would require this virtue to the same degree if their function is to be 'school librarian'. We might be looking instead for the virtues of patience and kindness, at the very least.

The final component of this ethical trilogy, and the one that binds them all together, is the notion of happiness, or flourishing. The central idea here is that we shape our lives, our *selves*, in a way that allows us to achieve our stated functions, such that we lead a good and happy life, a life where we flourish. '*Flourishing*' should not be linked to the ethical egoism discussed in the last chapter – the belief that as long as the consequences work out well for me, that everything is fine and dandy. Rather the way the notion is to be understood here is to see flourishing (eudaimonia) as an inherently collective exercise, one where the virtues constitutive of a morally good life are seen to benefit the entire community, not just oneself.

Returning to the example of becoming a 'good' special needs teacher. In order to understand Aristotelean virtue ethics, as applied to this process, it would begin with identifying the specific function of that position – what special needs teachers are actually setting out to do, and what that personally involves – and it would continue by organising the best way of making that happen; importantly, this would involve acquiring the various virtues needed to accomplish these ends. This would then all combine to shape a good moral life, a flourishing life that would be both rewarding and productive.

To quickly summarise the central issues so far: virtue ethics is not about asking the question, '*What's the right thing to do here?*' Aristotle suggests that all human ethics is really about reasoning our way to becoming a good person, a virtuous person, who will lead a moral and worthwhile life; then, as a consequence of developing a solid moral character, questions like '*What's the right thing to do here?*' will ultimately look after themselves. After all, life is an inherently ethically complex process, and all you can really do is be a good person, and do the best you can.

3.3 The Evolution of Virtue Ethics

Having outlined the main tenets of Aristotle's virtue ethics, it would have been much simpler if we could just stop there, before going on to analyse both its effects and its potential within the field of inclusive education, without having to worry about any further theoretical developments. Aristotle is, after all, the grandfather of this

normative ethical position, and when virtue ethics is discussed, his is generally the first name to be mentioned. However, it is not the only one. There are probably three developments within the theory that need to be canvassed, in order to assess whether virtue ethics has much of a role to play in the contemporary ethics of inclusive education.

3.3.1 *Aquinas and Natural Law*

Aristotle’s ideas did not have a direct path from Ancient Greece all the way through to modern times. His ideas disappeared from view for nearly a thousand years, only to re-emerge in the thirteenth century, largely via the route of Islamic scholars. One of the main early medieval philosophers to participate in Aristotle’s intellectual rebirth was St. Thomas Aquinas (1225–1274), who was particularly interested in his theories on ethics (Aquinas, 2014).

Aquinas was one of the main proponents of what is generally referred to now as *scholastic* (religious) philosophy, so it is perhaps not surprising that although he thought Aristotle was pretty much right with large chunks of his ethical theory, there was one major element that was missing from his model – God. While Aristotle adopts a teleological view of the world, wherein everything has a purpose, and people need to acquire the necessary virtues in order to achieve that purpose, Aquinas contends that this purpose must have been endowed by God, and this process must be governed by a natural law.

An important part of this natural law, according to Aquinas, is that we reason on the basis of first principles. These principles are varied, but it is contended that all human action is governed by a single ethical principle – the first precept of natural law – one that is foundational to all practical reasoning: *good is to be done and evil is to be avoided*. Obviously, this is a somewhat nebulous moral injunction, but the important thing here is that our basic human virtues, and the good that can spill out of them, are given to us by nature.

Natural law (and natural rights) have proven to be resilient and influential philosophical and jurisprudential positions, and they will be discussed in greater length in the next chapter. Setting aside the centrality of the notion of God for a moment, about which people can make up their own minds, there are two criticisms of this standpoint which merit brief discussion. First, this approach is inherently conservative. It takes situations/power relations as they currently exist, and then give those circumstances the stamp of approval of ‘nature’. Of course corporal punishment of children is acceptable; lions and bears clip their young round the ears if they misbehave, so it’s a natural thing to do. The second part of this logic is that if it’s natural, it must therefore be right. This form of reasoning is founded upon what later philosophers have called ‘the naturalistic fallacy’ (Frankena, 1967; Moore, 1993), which involves seeing something in nature, and therefore assuming it must be morally acceptable. This is also called the ‘is/ought’ problem, which makes the logical leap from the way something *is*, to the supposition that it therefore *ought* to

be that way. This is also known as Hume's guillotine (in that it severs the connection between descriptive and prescriptive statements). Significantly, it's Hume's ideas that form the basis for the next stage of virtue ethics, one which starts to shift the focus from 'reason' to 'emotion'.

3.3.2 *Hume and Character*

Hume (1711–1776) agrees with Aristotle that character is pivotal to the entire field of ethics. However, as we have seen, the driving force behind Aristotle's arguments about virtue is the centrality of reason; it is reason that allows us to decide what ends we should fashion for ourselves, ends based upon our respective functions and the virtues necessary to flourish within those roles.

In contrast to this, Hume places greater emphasis on feelings, rather than reason. We can begin our very brief exploration of Hume's position by noting that he is particularly interested in how we decide which acts are to be regarded as laudable, and virtuous, and which are to be regarded as 'vicious'. In doing so, he makes two important points, both of which are evidenced within the following famous quote:

Take any action allowed to be vicious: wilful murder for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call vice. In whatever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflection into your own breast . . . Here is a matter of fact, but 'tis the object of feelings, not of reason. It lies in yourself, not in the object. (Hume, 2003, 333–334)

The first point is that Hume appears to be taking something of an anti-realist approach to morality here. Goodness and badness aren't 'out there', waiting to be perceived; the act itself is out there, but the evaluation of it lies within ourselves. Hume, the definitive philosophical sceptic, therefore stands somewhat in opposition to the realism of Aristotle.

Second, as stated above, there is also a difference between the two on the role played by reason. Whereas Aristotle contends that we use our reason to decide on what our ends should be, as well as the means to achieve those ends, Hume disagrees. He contends that while reason might play a role in determining the means by which we achieve our ends, the ends themselves are determined by our emotions. After all, '*Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them*' (Hume, 2003, 295). This logic is evidenced by Hume's high regard for the virtues of kindness and benevolence, qualities he argues not grounded in reason, but rather in the human emotional capacity for sympathy and compassion (Slote, 2000). And so, while a virtuous character is still of fundamental importance to the 'sentimentalist' Hume – just as it is to the 'rationalist' Aristotle – this character is not necessarily the product of focused human reason.

Hume's contribution to virtue ethics is also not without its problems. Arguably the central difficulty is that Hume attempts to delineate a set of virtues that constitute a general template for conduct, irrespective of social or historical context – that is, virtues that are somehow inherent to us as human beings. But what are these virtues to be? Which character traits will he deem to be virtues, and which will be depicted as vices? Hindsight would suggest that Hume was not particularly successful at constructing an 'objective' universal listing of what kind of people we should aspire to be. Certainly, the choices made point to a particular culturally-based set of assumptions about the value of given character traits. For example, Hume appears to have no time for what he refers to a '*monkish virtues*' – '*celibacy, fasting, penance, mortification, self-denial, humility, silence, solitude*' (Hume, 1975, 270) – virtues which under other historical circumstances (i.e. not upper-class Georgian Britain), could easily be regarded as both desirable and laudable (Davie, 1999).

This is an important point, one which will be discussed at some length later on. After all, who gets to say which virtues we should aspire to, and which character traits are to be avoided? Aristotle? Your parents, or your teachers? Or maybe they are just supposed to emerge from our psyche, or from our 'moral intuitions'.

3.3.3 *More Recent Virtue Ethics*

While virtue ethics dominated the normative ethical landscape for nearly two thousand years, by the time Bentham, Mill and Kant had finished setting out their alternative moral systems, it appeared that, in terms of intellectual support and perceived usefulness, virtue ethics had run its course. This situation changed with the publication of Anscombe's *Modern Moral Philosophy* in 1958. In this article, she seeks to return to Aristotelian understandings of morality, understandings based upon virtue and human flourishing. This is not a repudiation of Aquinas and Hume, and their respective attempts to take virtue ethics out of the age of Antiquity, rather it is a rejection of the underpinning logic of both utilitarianism and Kantian deontological ethics.

According to Anscombe, both these normative positions are founded upon overarching moral principles, be that 'the greatest good', or 'the categorical imperative'. The principles are inherently abstract in nature, and therefore – so their proponents argue – they can be applied within any given social or cultural context; and yet, irrespective of this supposed universality, in practice they actually become rigid and harsh sets of moral codes. A further problem with these positions, and in particular Kant's, is that it requires following a rule for its own sake, regardless of the circumstances. Not only does Anscombe regard this as foolish, she also contends that the logical framework supporting this directive now makes little sense. After all, the pivotal Kantian notion of 'obligation' now carries far less weight within contemporary society – and certainly not enough upon which to found an entire ethical

system. Also, without the underlying existence of ‘a lawgiver’, the system lacks its largely-unspoken ontological foundation. As Anscombe (1958, 2) states:

Kant introduces the idea of ‘legislating for oneself’, which is as absurd as if in these days, when majority votes command great respect, one were to call each reflective decision a man made a vote resulting in a majority . . . The concept of legislation requires superior powers in the legislator.

Following on from Anscombe’s lead, MacIntyre (1981, 1998) also seeks a back-to-basics form of virtue ethics, but once again, his main targets are not really Aquinas and Hume, but rather the action-centred models of Mill and Kant. MacIntyre makes the point that humans are fundamentally social in nature, and that all our moral deliberations and decisions need to be placed within the context of the narrative trajectory of particular lives; therefore it is never really possible to make moral decisions – as required by both utilitarianism and deontological ethics – as genuine, unitary individuals. That is, all forms of moral reflection are necessarily *a-posteriori* to the social circumstances which set the terms and boundaries of that reflection.

For example, this could be understood in terms of the ethical dilemmas faced by teachers. According to MacIntyre, it is not really viable to understand a problem based solely upon some educational utility calculus, or the application of a categorical pedagogic principle – as if any teacher could be transposed into that same situation, and therefore reach, with absolute certainty, an identical moral decision, irrespective of their personal background, or the type of school, or its location. Rather, all teachers have their own social identities, their personal and family histories, their professional roles, their memberships, their inheritances, their expectations, and their obligations. It is as a consequence of differences such as these that, to some extent, all teachers will have different moral perspectives. As MacIntyre (1981, 205) states: ‘*These (differences) constitute the given of my life, my moral starting point. This is in part what gives my life its own moral peculiarity.*’

3.4 Why Should Educators Be Interested in This?

It would be easy to arrive at the conclusion that all this ‘virtue’ stuff has little to say to us now. That is, while it might have been pertinent to the embryonic societies of 2500 years ago, societies trying to figure out just what was morally acceptable and what wasn’t, surely we now have a much clearer grasp of what constitutes ‘appropriate’ behaviour? While you might think this ought to be the case, arguably even a cursory glance at contemporary newspapers would suggest that we have a long way to go before issues of personal character become an irrelevance.

More specifically then, how does the issue of virtue ethics affect both our education system, and those who exist within it? There are three matters that specifically warrant our attention here: the first is the role this approach to ethics played in the formation of contemporary mass schooling; the second concerns the perceived benefits that spring from this approach; and the third involves a

delineation and assessment of those virtues deemed to be of the greatest importance. Taking these in turn:

3.4.1 *The Shaping of Modern Education*

Tatman et al. (2009) rightly note that the history of education has, in many ways, been a history of how societies choose to shape the characters of their citizens. The Ancient Greeks had no doubt that an educated person was not primarily a person who possessed particular sets of knowledges, but rather a person who had been taught to exhibit certain character traits, such as decency, honour, courage and humility. Not much had really changed when, nearly two thousand years later, John Locke stated in *Some thoughts concerning education*, '*I imagine you would think him a very foolish fellow, that should not value a virtuous or a wise man infinitely before a great scholar*' (Locke, 1889, 147).

Following on from this, it can be argued that the great English private schools of the nineteenth century – Eton, Rugby, Harrow, upon which so much of contemporary mass education is still based – were, at heart, essentially giant moral engines for producing and reinforcing certain kinds of (masculine) character traits within the British ruling classes. This classic liberal education was, in large part, formed around the logic of virtue ethics, and the belief that schools had a fundamental role to play in the formation of good character.

Even more than that, there was the explicit assumption that upon this good character lay the fate of the nation. The Duke of Wellington is attributed with the quote: '*The battle of Waterloo was won on the playing fields of Eton*'. Presumably the point he is making here is that it was the manly virtues of courage, physicality, leadership, patriotism and perseverance, learned by the officer class at the elite schools of England, that defeated Napoleon. By Victorian times, this particular set of school-authored virtues eventually morphed into its very own ideology, generally referred to as *Muscular Christianity*. Not only did this movement anchor physical education within the foundational fabric of the mass school, in a much broader sense, it also set the basic framework for the virtues associated with modern masculinity, a framework that still carries significant weight today.

Lest we think that modern schooling is now solely about the neo-liberal, governmental role of skilling the population, accreditation, and job preparation, and that the character-building imperative within education died with Queen Victoria, Hunter (1994), in his discussion of the teaching of 'English', argues that the modern school is a combination of two distinct educational/historical drivers. The first involves governmental imperatives based around surveillance, record-keeping, and the categorisation of populational difference; the second involves the continued implementation of various techniques for observing and shaping the characters of children through pastoral care. As such, the '*character education*' of virtue ethics moved from being an explicit, driving rationale within pre-nineteenth century schools, to a

more nuanced component of the complex amalgam of practices, routines, and forms of capacity-management that came to be constitutive of contemporary education.

While still remaining an implicit part of the piecemeal makeup of the modern school, more explicit forms of ‘*character education*’ now appear to be making something of a curricular comeback. Though often explicitly (but not exclusively) tied to religious and conservative social philosophies (Kristjansson, 2013), the idea that schools should play a direct role in the production of virtuous citizens is gaining some traction. For example, there are now a number of entities seeking to re-state the importance of virtue ethics within public life, including education, such as the ‘Jubilee Centre for Character and Virtue’, based at the University of Birmingham in the UK. Following the Israeli philosopher, Martin Buber’s (147, 123) assertion that ‘*an education worthy of its name is essentially an education in character*’, the founding logic of the Centre points to the important role of schools in producing not just moral individuals, but also a moral society:

A key conviction underlying the existence of the Centre is that the virtues that make up good character can be learnt and taught. We believe these have largely been neglected in schools and in the professions. It is also a key conviction that the more people exhibit good character and virtues, the healthier our society. (Arthur et al., 2015, 2)

Perhaps as a demonstration of the intellectual lineage of the Centre, it explicitly employs Aristotle’s notion of ‘flourishing’ as a defining characteristic of a virtuous life, well lived. Interestingly, in a recent research report on character education within UK schools, the Centre notes that those pupils who participate in sport do not perform any better in character tests than non-participants . . . bad news then for the few remaining proponents of Muscular Christianity (Arthur et al., 2015).

In summary, it would seem that virtue ethics has had an important, and long-standing, role to play within Western education. This role has been both explicit, in often providing the driving foundational rationale for education itself, and implicit, in that one of its offshoots – pastoral care – became woven into the secular fabric of the mass school, schools which are arguably still institutions of moral development (although not to the degree that some educators would like).

3.4.2 What Virtue Ethics Has to Offer

The question now is: *Why should anyone, not just teachers, be interested in virtue ethics, or think that virtue ethics has something to offer?* There are probably four good elements to this answer:

First, in theoretical terms, virtue ethics has stood the test of time – more or less. After two and a half thousand years, and having been shaped and championed by two of the greatest philosophers ever (Plato and Aristotle), virtue ethics continues to survive as a normative moral framework. Some social and philosophical theories have a couple of decades in the sun, and are then quickly condemned to the conceptual scrap heap (hello structural-functionalism), but virtue ethics keeps

chugging along, in large part because most of us know, inherently, that shaping ourselves as good people is the right thing to do.

The second point, following on from this final observation, is that virtue ethics gives us a broad template on how to lead a 'good' life. Whereas normative ethical systems that focus on the rightness or wrongness of specific acts might provide some form of abstract guidance for our moral choices, virtue ethics seeks a more general solution to right and wrong, one founded within the characters of citizens themselves. After all, when we try and decide what kind of people we want to be, or what kind of people we want as our friends, we are far more likely to look at qualities like loyalty, generosity and kindness, rather than a mental ability to reason one's way through various categorical principles. And the same is true for being a teacher. Isn't a good teacher more likely to exhibit the qualities of patience, organisation and wisdom, rather than the ability to conduct an accurate on-the-spot utility calculus?

Third, and again unlike the previous two theories of utilitarianism and Kantian deontological ethics, virtue ethics is not detached from real people; it is personal and relational. Following on from the criticisms raised by Anscombe (1958), virtue ethics does not concern itself with somewhat mysterious, abstract philosophical principles; instead its fundamental ingredients are the moral choices people make within their own lives, the way they treat others, and the way they decide to fashion themselves. As an extension of this, the ethical issues that emerge when addressing notions of education and exclusion are surely not rational calculations about the most effective outcomes, or a social duty to follow the rules, they are about forming worthy, effective and beneficial relationships between the many stakeholders constitutive of an inclusive schooling community.

Finally, virtue ethics seems somewhat more flexible than the other two normative ethical approaches. Whereas Kantianism rules out, *a-priori*, taking account of the consequences of actions, and utilitarianism generally states that following rules is OK, right up until it isn't, virtue ethics doesn't necessarily exclude incorporating elements of other theories into what it would categorise as good conduct. Indeed, this would most likely be regarded as simply part of being a good person. That is, a teacher can be wise and patient, and yet still understand the importance of institutional rules, while having a mind to the outcomes of their various choices. A virtue ethicist would consider that such flexibility is actually a functioning component of the virtue of wisdom.

So having discussed the history of virtue ethics, its role within education, old and new, and all the things it brings to the moral table, the issue now should be one of specifics. It is all well and good to talk about shaping ourselves as good people, but just exactly what do we mean by that?

3.4.3 *The Cardinal Virtues*

Any quick hunt through the internet, or even a reputable book on normative ethics, will uncover seemingly endless lists of virtues to which we should, in one way or

another, aspire. Some of these are familiar and foundational to what most of us would think is a good person – such as kindness, patience, and gratitude – but others are more obscure, and perhaps peripheral to most people’s idea of what constitutes an admirable contemporary character – like verity, amity, and chastity. Out of this melange of moral suggestions, how do we go about distilling those that really matter, or should we aspire to all of them? Do we really want to construct characters that include the virtues of verity, amity and chastity? It already doesn’t sound very appealing.

Fortunately, most of this work has been done for us, and those characteristics widely regarded as being of the greatest importance are generally called the *Cardinal Virtues*. These four virtues are wisdom, courage, moderation, and justice. The suggestion here is that if an individual possesses all these character traits, then they have in place the basic framework for being a good person. But why, for example, moderation? Why not kindness, or patience?

The answer to these questions is to be found in one of the first great philosophy texts: Plato’s *The Republic*. In Book IV of these writings, Plato, speaking through the person of Socrates, proposes a template for an ideal society. This society would be ordered, and benevolent, however it would also be hierarchical. Plato imagined that this utopian society would be divided into three castes, and individuals would be allocated to those castes according to their roles and their abilities – sort of an early meritocracy. The first caste would be the guardians, who would manage the affairs of the Republic; the second caste would be the auxiliaries, who would defend the Republic; and the third caste would be the producers, who would create the goods that enabled the Republic to thrive. In many ways, these three components of the Republic directly mirror what Plato deems to be the three elements of the soul: *reason*, the charioteer, which guides the two horses of *spirit* and *desire*.

And therein lies the root of the cardinal virtues. Plato contends that the guardians require wisdom to do their job properly (as does reason); the auxiliaries require courage (an essential component of spirit); and the producers need to moderate their thirst for pleasure (their desires). Perhaps most importantly, regulating the relationships between these three social groupings in appropriate ways would be the final, and arguably the most important, virtue – justice (which will be discussed at length in Chap. 5).

From having their origins within Plato’s imaginary ideal society, these four virtues have formed the bedrock for most later philosophical and practical formulations of ‘the good person’. They act as a casting-off point whenever laudable virtues are discussed, they continually reoccur when issues of religion and character are discussed (along with faith, hope and charity), and they provide the primary substance upon which the philosophers of Antiquity built their ethical system.

3.4.4 What Virtues Might Be Required by ‘Special Needs Educators’?

But surely it’s somewhat more complex than that. Are these the four virtues that everyone needs? Is there no variance required dependent upon the contexts of our individual lives, or upon our chosen tasks in life? After all, even Plato said that the soldiers needed different character traits to the wise rulers. Surely then we don’t just look at a doctor, for example, and consider that the best virtues for their job are necessarily wisdom, courage, temperance and justice – and the same for road-menders, or bureaucrats, or farmers . . . or teachers.

Even within the teaching profession itself, most of us would think that different curriculum responsibilities, age groupings, authority levels, and school types would require different virtues to do the job as well as it could be done. The logic here is that an excellent head of a major urban secondary school would require different virtues to an excellent pre-school teacher, who would then require different virtues to a physical education teacher, or a ‘special needs’ teacher, and so on.

Below is a list of the virtues deemed to be necessary to be an effective inclusive teacher. It is interesting to note that none of the cardinal virtues are listed here, and Kilmartin (2018) does not state, or imply, that these foundational virtues are somehow taken for granted, or pre-exist these more specific characteristics (Table 3.1).

The logic behind this perfectly reasonable list of virtues raises a number of questions. First, why these virtues? Are they the only options? It is interesting to note that in addition to the exclusion of the cardinal virtues, kindness also isn’t included, whereas ‘acceptance’ – arguably a somewhat patronising way of approaching children with differences and disabilities – has got a place on the team. The point here is that there seems to be something rather arbitrary about these chosen virtues.

Table 3.1 The virtues of ‘special education’ teachers

The five characteristics of effective ‘special education’ teachers (Kilmartin, 2018)
(1) <i>Patience</i> – When a child has special needs, patience is a must. Since this type of student takes longer to perform simple tasks . . . No matter how long it takes, a special education teacher must give a child time to complete the task.
(2) <i>Organisation</i> – Organisation is key for all teachers, especially those who deal with disabled students. When a child is taught in an organised environment, he or she will have higher confidence levels.
(3) <i>Creativity</i> – Since all children have different learning styles, a special education teacher must have the ability to adapt lessons that work for the strengths of each child.
(4) <i>Acceptance</i> – A special education teacher works alongside disabled students with various problems. No matter the issues, this professional must accept all children and interact with dignity and respect.
(5) <i>Intuitive and Calming Nature</i> – A special education teacher must use his or her intuitive skills to uncover the underlying reasons behind poor behavior. Also, it is essential to provide a calm temperament when dealing with these types of students.

Second, does choosing a list of professional virtues say almost as much about the person compiling the list, and their attitude to the job, as it does about the job itself? Since there is no real disagreement with the validity of the five virtues chosen here, the point can better be made with the hypothetical virtues required to join the police. One understanding of this job might suggest a requirement for the virtues of courage, loyalty, honour and perseverance, whereas an alternative version of policing could place a requirement on the virtues of kindness, patience, compassion and integrity. While these dissimilar lists apply to the same job, they speak to very different interpretations of how that job ought to be done.

Third, does this mean that teachers with different sets of virtues/personality traits are better off working within other domains in the education system? We might consider that ‘patience’ is a universal requirement for all teachers, but the above list certainly makes no space for ‘humour’, which is the cornerstone of many teachers’ pedagogy. It could be implied from this that teachers for whom the virtues of humour, enthusiasm, joyfulness and optimism perhaps belong less within the walls of special education units, and more on the school playing fields, or in the drama centre.

Fourth, if so, should we then screen education students for the virtues deemed necessary to do their chosen jobs well? Hypothetically, this could include a couple of foundational virtues for all teachers – say, patience and wisdom – and a few more selected virtues for given curriculum areas, or educational specialties, such as the above list for special education teachers. What happens to those individuals who do not possess these character traits, and yet still believe they have much to offer the field? Do we refuse them entry?

Finally, if students don’t possess such virtues upon entry to tertiary teacher education training, should we then make that part of their university curriculum? One would have to wonder whether the relatively brief duration of a 4 year teaching qualification was sufficient time in which to inculcate the virtues of patience and wisdom into a student, when, by definition, the preceding 12 years of education, let alone the rest of their moral education, had failed to do so.

It is most likely the case that neither of the last two ideas – the pre-screening approach, nor the tertiary moral training strategy – are particularly practical ways of ensuring the most appropriate virtues go to the correct teachers. So what then? Perhaps in reality such lists of virtues are mostly symbolic in their role, there to give an indication of some of the difficulties and requirements of the job, a cautionary tale, rather than as defining pre-requisites for professional competence. However, as the next section will demonstrate, the very notion of ‘*lists of appropriate teaching virtues*’ tell us something more generally about virtues, and virtue ethics – or more specifically, the shortcomings of the approach.

3.5 If Virtue Ethics Is So Good, Why Isn’t It the Dominant Approach?

It is undoubtedly the case that most of us try and shape ourselves as ‘good’ people. None of us may be as perfect as we would like, but the vast majority understands that our characters are important, and that we should always try and become better than we were. So, whether we realise it or not, this is the central logic of virtue ethics, and it constitutes a significant component of all our ethical lives. While the rightness and wrongness of individual actions is clearly not irrelevant, it is contended here that it’s the moral character of the actor that is of greatest importance. And surely if every single person worked on shaping themselves according to the virtues of kindness, benevolence, compassion and respect, there wouldn’t be much need for a book about the ethics of inclusive education.

So what’s the problem? If the issue with utilitarianism is its inability to guarantee the rights of individuals and minorities – such as the disabled – and the issue with deontological ethics is its inflexibility and its problems regarding conflicting duties, what’s the trouble with virtue ethics? Well actually, there are two:

3.5.1 Which Virtues?

As we have worked our way through the history and structure of virtue ethics, there have been continual hints as to the first problem. For example, the discussion of Plato’s contribution to the field, in terms of the cardinal virtues, involved his use of the rather dodgy metaphor of the charioteer. That is, the cardinal virtues were chosen on the basis of his beliefs about human psychology, our ‘three-part souls’, and his rudimentary grasp of horse management – hardly the strongest ontological foundations for an entire system of ethics. Who knows ... if Plato had an interest in hamsters instead of horses, the entire history of Western ethics might’ve been different. Likewise, with the issue of which virtues are required to join the police: if policing is primarily regarded as involving the chasing of criminals, and the physical enforcement of the law, then courage and tenacity might come out on top. If policing is regarded as one component of social management, a ‘police service’ rather than a ‘police force’, then patience and compassion might be more important.

This same subjective assessment of exactly what should constitute the ‘right virtues’ in any given context is an issue that applies just as much to teaching as it does to policing. The evidence would suggest that there is very little agreement of just which virtues a teacher should possess. In a book published just after his death in 1719, John Baptist del la Salle, a highly influential educational reformer within the Catholic tradition, articulates precisely what it takes to be a good teacher. He contends that educational excellence is made manifest through the development of twelve specific virtues (Table 3.2).

Table 3.2 Virtues of a good teacher (1972)

The twelve virtues of a good teacher (John Baptist de La Salle, 1720 – patron Saint of Teachers)	
(1) Gravity	(2) Silence
(3) Humility	(4) Prudence
(5) Wisdom	(6) Patience
(7) Reserve	(8) Gentleness
(9) Zeal	(10) Vigilance
(11) Piety	(12) Generosity

Table 3.3 Virtues of a good teacher (2013)

The top ten virtues of a good teacher (Cook, 2013)	
(1) Creativity	(2) Fairness
(3) Honesty	(4) Humour
(5) Kindness	(6) Leadership
(7) Love of Learning	(8) Perseverance
(9) Social intelligence	(10) Teamwork

This represents an interesting set of choices; two are of particular note. He contends that ‘Silence’ is crucial to teachers, since this avoids the defect of ‘loquacity’, as wordiness should always be eschewed by teachers, who must also demonstrate the virtues of Gravity and Reserve. Likewise, ‘Piety’ is deemed crucial to teaching, and this love of God must not only be internal, it must also be external, and visible to all in the classroom.

So clearly then, the virtues deemed necessary for teaching are not only subjective, they are historically contingent. Contrast the virtues chosen by John Baptist de La Salle, with those regarded as being important within contemporary schools (Table 3.3).

And the above list is only one of many contemporary lists currently available – each of them somewhat different. The point here is that there is no real agreement upon the most important virtues in any given context, or even if some virtues are relevant at all. Is the ability to work in a team really one of the most important virtues of the modern teacher? Is it more important than Respect, or Empathy?

So it would appear then that the *substance* of virtue ethics can slide around all over the place. After all, there is also a different set of cardinal virtues, of which there are seven (chastity, temperance, charity, diligence, patience, kindness and humility – virtues which stand in opposition to the seven deadly sins). Virtues then can be seen as subjective and context-bound, culturally, historically, and professionally specific, and to some, hopelessly nebulous.

This fundamental flaw within virtue ethics is best summed up in the movie *Gladiator*, when the character Commodus, Emperor-in-waiting and general bad-guy, speaks to his father, the stoic philosopher and soon-to-be ex-emperor, Marcus Aurelius.

You wrote to me once, listing the four chief virtues: wisdom, justice, fortitude and temperance. As I read the list, I knew I had none of them. But I have other virtues, father. Ambition:

that can be a virtue when it drives us to excel. Resourcefulness, courage, perhaps not on the battlefield, but . . . there are many types of courage. Devotion, to my family and to you. But none of my virtues were on your list.

Perhaps, when it comes to this flaw within virtue ethics, we should simply follow the advice of the real-life stoic philosopher Marcus Aurelius, as set out in his text *Meditations*: 'Waste no more time arguing what a good man is. Be one.'

3.5.2 *But What Should We Actually Do?*

The second criticism of virtue ethics involves its apparent inability to provide clear direction as to conduct. Flawed though they undoubtedly are, both utilitarianism and deontological ethics can be used within any given ethical dilemma to arrive at some kind of conclusion as to how to move forward. For example, in the case of *L vs Minister for Education* discussed in the last chapter – where a young girl with some special needs was excluded from a mainstream classroom – utilitarian ethics justified that exclusion on the basis of 'the greater good'; alternatively, it was speculated that Kantian ethics may well have pointed in precisely the opposite direction.

So what kind of guidance would virtue ethics give at this point? Most likely, none at all. Some of the teachers at the centre of the controversy in *L vs Minister for Education* case stated that they felt unable to give other children the attention they needed when L was in the classroom – and there is every reason to believe that these were 'good' people. However, there were a number of other stakeholders who felt that L's difficulties were not so severe that she couldn't take her rightful place in the class with the rest of the children. These too can lay a claim to being 'good' people.

This dilemma can be extended into the entire academic and policy field of inclusive/special education. It is probably fair to say that this book lies squarely within the corpus of texts and research which stand firmly in favour of educational inclusion. That is, the authors are two of a great number of academics and teachers who believe that educational exclusion should be a last resort, that contemporary schools have become part of an increasingly effective machine for determining who is 'in' and who is 'out', and that 'special schools' are not really the way forward if we wish to build a society where difference is to be welcomed and celebrated, rather than pathologised and banished. The academics and teachers who adopt this policy position are (generally speaking) kind, thoughtful and committed individuals who, by most people's reckoning, would rise to the level of 'good'.

Alternatively, there are also a great number of academics and teachers who take the opposite position. They are in favour of 'special schools'; they see educational and social advantages in placing children with special needs within their own tailored learning environments, and they do not necessarily regard such environments as a symptom of a wider agenda involving an ever-more finely grained normalisation of schooling populations. Likewise, the academics and teachers who adopt this policy position are also (generally speaking) kind, thoughtful and

committed individuals who, by most people's reckoning, would rise to the level of 'good'.

The problem here is an obvious one. It appears that two equally good people can make diametrically opposed choices: a good person can find 'special schools' problematic, and a good person can also be one of their champions. Given this, what then does being 'good' even mean? What is the point of being 'good' on the inside, if this doesn't give you any coherent guidance as to how to act on the outside? After all, both sets of academics and teachers could score highly on a test of the cardinal virtues, both could be wise and just, and yet this doesn't seem to help at all in deciding what should be done in this particular instance. At least utilitarianism and deontological ethics, flawed though they are, would be able to point in a particular direction if you set the problem up clearly enough.

The implication here is that if you are a good person, you will know what to do, and in some circumstances, this is true – particularly if the problem is clear enough. Within those ethical dilemmas, the 'WWJD?' logic will work perfectly adequately:

I'm a bit hungry, but I've got no money on me. Should I steal a donut?
What would Jesus do?
Dammit!

However, this doesn't seem to work as well with complex policy dilemmas:

Should we put more funding into special schools, or try and make mainstream educational institutions more inclusive?
What would Jesus do?
I have absolutely no idea . . .

Indeed, your answer will likely depend upon how you phrase the question:

Should we make all children, irrespective of their differences, fully welcome within mainstream schools?
What would Jesus do?
He would make them welcome . . .

Alternatively:

Should we provide every child with the best possible learning environment for their individual needs?
What would Jesus do?
He would provide for their needs . . .

So . . . when it comes to deciding what we should actually *do*, it would appear as if virtue ethics is a fairly limited position. Indeed, virtue ethics can't get around either of these two criticisms: there is no real agreement on what it means, and there is no real guidance given for deciding between moral choices.

At this point then, maybe there is some mileage to be gained in a more focused example of Virtue Ethics; at least in this way the first of the two criticisms might be somewhat negated. Rather than trying to decide which of the multitude of virtues might be relevant to the shaping of a 'good' person, perhaps an effective moral position can be constructed around one specific virtue. This is of particular relevance

within the context of inclusive education, as the virtue in question here is *benevolence* – more generally referred to as 'care'.

3.6 An Ethics of 'Care'

This focus on the virtue of 'care' has resulted in the development of entire ethical framework, which will now be discussed here. Eva Kittay, one of the central figures in what has come to be called 'care ethics', makes a point which not only acts as a rationale for the development of this moral position, but also for the writing of this very book.

People with disabilities continue to suffer from discrimination in jobs, education and housing, and are deprived of capabilities as basic as the freedom to move about . . . Disability is in search of an ethics that will both articulate the harms faced by people with disabilities – discrimination that threatens dignity as well as well-being – and offer moral resources for redress. (Kittay, 2011, 49)

In suggesting that *'disability is in search of an ethics'*, Kittay clearly has 'care ethics' in mind as a solution to this deficiency. Care ethics is premised upon the understanding that we all have to depend on each other in various ways – some more than others – and that in terms of this dependence, the greatest weight and consideration should be given to those with the greatest degree of vulnerability. In her book *Love's Labour* (1999), Kittay goes on to propose an animating principle for this form of ethics (with thanks to Marx): *'To each according to his or her need, from each according to his or her capacity for care, and such support from social institutions as to make available resources and opportunities to those providing care'*.

It can easily be argued that existence of a principle mandating the *'greatest care for those who need it most'* is a necessary prerequisite for the entire project of inclusive education. This hypothetical prerogative could be evidenced in a number of ways: extra teacher support for classrooms containing students with disabilities; additional physical resources to help out where possible; specific curricular modifications to facilitate augmented individual learning; architectural and spatial modification to ease issues of access and availability; allocated funding for travel and transportation needs; supplementary training for teachers, at both pre-service and in-service levels; greater access to technological innovations and assets; increased domestic carer support; improved integration of community services and facilities, and so on.

The list could continue for pages, but the underlying principle would be the same: the greatest care for those who need it most. Of course, some of these are already firmly in place, others are not (to anywhere near the required degree), others still are not even on the policy agenda. Whatever the state of play, there is little doubt that the notion of 'care', and the ideas that support it, have a generalised role to play within any ethic of inclusive education. The question is however: how pivotal is this role, or ought that role be?

Part of answering this question involves understanding the intellectual trajectory and scope of care ethics as an intellectual force. As has been discussed, care ethics emerged as a focused component of virtue ethics; that is, it is a laudable attempt to expand a specific virtue – benevolence – into an overarching ethic for life. However, it can also trace its origins, to probably an even greater degree, to feminist theory. Having already touched on the work of Kittay, examining the work of three further 'care' theorists will not only illustrate how the ideas evolved, but also give a clearer picture of their scope, application and limitations. The four writers are Gilligan, Noddings, Held and Tronto. Taking these in turn:

3.6.1 Gilligan – The Gender Bias of Moral Development Research

In 1973, Kohlberg created a model which became the dominant paradigm for attempting to understand moral development. His three level, six stage theory begins with pre-conventional notions of punishment and reward, and exchange relationships; the conventional level progresses through relationships and learning respect for rules of the group, and the post-conventional level ends with contracts, and an appreciation of the abstract notions of rights and justice. Kohlberg's research found boys to be more morally mature than girls, an 'objective' fact of moral development that Kohlberg asserts continues through into adulthood.

Gilligan (1982), a former student of Kohlberg, contends that there is an implicit male bias in Kohlberg's model, in that the final stage of moral development is heavily slanted in favour of abstract forms of thinking. This form of 'male voice' prioritises notions such as rights, justice and impartiality, and understands morality to be most effectively and honestly articulated through a lens comprised of laws, rules and transcendental, universal principles. Gilligan argues that this is not some kind of ontological fact about the true nature of morality, rather it is the product of how gender roles, identities and priorities are historically and culturally shaped. Instead, a moral framework based around a 'female voice' would be more likely to prioritise interpersonal and situational issues, such as empathy, trust and care. As Gilligan (1982, 100) concludes from her research:

The moral imperative that emerges repeatedly in interviews with women is the injunction to care, a responsibility to discern and alleviate the 'real and recognisable trouble' of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfilment.

It is this conclusion which acts as both the conceptual and paradigmatic starting point for the theory of 'care ethics'. And not only is the foundational domain of this form of ethics the realm of the interpersonal, as opposed to the abstract, it positions its primary response in terms of the foregrounding of a specific virtue – i.e. care.

3.6.2 *Noddings – Caring Relationships*

If it is Gilligan's ideas that formed the epistemic foundations for the care approach to ethics, it is Noddings' work that turned it into a coherent normative ethical theory (Noddings, 1984). Noddings takes Gilligan's observations about care and ties them to some of Hume's foundational ideas about the relationship between morality and feelings. That is, morality is not to be understood as something 'out there', and framed in terms of objective reason and abstract universal principles, rather it can be more accurately located within the realm of emotions, feelings and relationships. According to this logic then, morality becomes an 'active virtue', requiring first and foremost, the sentiment of natural caring.

As with Gilligan's work, Noddings begins her arguments from a specifically gendered perspective, even though, as we shall see, the implications of those arguments extend well beyond this casting-off point. Noddings' (1984, 2) contends that women '*enter the moral domain through a different door, so to speak*' and whereas the dominant, male approach has been principle-based, women are more focused upon '*receptivity, relatedness and responsiveness*'. It is as a result of this alternative entry point to debates over morality that she is able to state that justice is not some intangible principle, rather it is founded in relationships; indeed, 'justice' would be of limited interest to us if it wasn't already underwritten by a foundation of care, as it is care that is the balm that keeps those relationships intact, not abstract laws.

A prime question for the care approach is to ask why we develop rules at all. The answer could be that they are to keep the social order, perhaps. However, the response from a feminist ethics of care is that the primary function of justice is to repair, restore and maintain human relationships. As Noddings articulates in her theory, then, care is the foundation of justice. (Gibson, 2014, 124)

Framing her analysis (somewhat contentiously, as she adopts something of an essentialist position) as an extension of 'natural' maternal perspectives, Noddings posits caring relationships as the fundamental foundation of human existence. Such caring relationships are always comprised of two parties: the one-caring, and the cared-for. These parties are always to be understood in terms, not only of obligation and reciprocity, but also in terms of the specific local contexts that give care its meaning.

This position clearly has significant implications for the general field of disability. Given the relationship between disability, vulnerability and caring relationships, it becomes obvious that any moral theory that seeks to conceptualise and foreground the importance of care for the vulnerable has the potential to be an important contributor to any coherent ethic of inclusive education.

3.6.3 *Held – Building Upon, Not Rejecting, the 'Rights/Justice' Approach*

Held (2006) shares many of Noddings assumptions about the nature and importance of care. For example, she also places mothering, and the domestic sphere, front and centre of her conceptual framework for improving broader social relations, suggesting that as long as men and women experience problems differently, and experience different problems, then it is perfectly reasonable to expect moral theories to reflect women's experiences as fully as it already does those of men (Held, 1987). Likewise, she is also more interested in actual lived experience and not abstract intellectual constructs, reasoning that there is much more to gain from focusing upon the lives of real people, rather than hypothetical legal and moral principles. Finally, she agrees that justice, as one such relatively abstract principle, depends upon a preceding foundation of extensive social care. She makes the point that there can be care without justice, but not the other way around: *'there has historically been little justice in the family, but care and life have gone on without it. There can be no justice without care however, for without care no child would survive, and there would be no persons to respect'* (Held, 2006, 17).

While voicing a concern about the extensive focus on universalised liberal principles within much of traditional ethics, Held is not suggesting that these approaches, or the issues they highlight, are bunk. Instead, she contends that such liberal positions have significant deficiencies for which the broader adoption of care ethics can compensate. More specifically, she proposes that caring relationships between fellow humans should constitute the broad canvas of ethical concern, while people should be treated as liberal individuals for the limited purposes of legal and political interactions.

Held also suggests that it is wrong to try to limit the influence and scope of care ethics to the private realm, and that the importance of care, as a virtue, needs to be understood and enacted with equal effect within the public domain. This is based upon the premise that if one of the founding principles of care ethics is accepted – that care is the fundamental of all human virtues – then to restrict its relevance to the local and the interpersonal, is as ridiculous as placing similar limits on cardinal virtues such as wisdom and justice.

3.6.4 *Tronto – A Framework for Care*

Tronto (1993) shares Held's opinion that, even if the 'domestic realm' and 'mothering relationships' provided the impetus for care ethics, the paradigm has much to offer beyond these borders. She also draws a distinction between those obligation-based philosophies which result in asking the question *'What obligation, if any, do I have for this person?'* with responsibility-based ethics, which involve question such

as, '*How best can I meet the responsibility to care?*' and which involve developing a habit of 'care' (Keller et al., 2003).

Importantly, Tronto makes a series of political points about just who does the caring in society, how this relates to political and social power, and how the dynamics of caring relationships are organised. She observes that 'caring' has consistently been devalued, largely by associating it with powerless groups, limiting it to the private sphere, and restricting its applicability to the moral domain. In contrast to this devaluation, she asserts that there needs to be a fundamental rethink of how we go about structuring our Western democracies, a rethink based upon elevating the value of a caring perspective. According to Tronto, we now face a 'caring deficit', and that various categories of citizen – for example children, the elderly, and people with disabilities – are not being looked after adequately. Perhaps in the same way as the Bhutanese have decided to make 'happiness' the central driving rationale for their society, as opposed to economics (and hence their 'Gross National Happiness Index, as opposed to our Gross National Product), Tronto (2015) argues for the need to make care, not economics, the central concern of Western democratic political life.

Rather than leaving care as a somewhat indistinct virtue, loosely tied to a generalised set of potential applications, Tronto (1993) formulates a clearly defined framework for its conceptualisation and deployment, a four-part model that has not simply gathered dust in ethics journals, having been successfully utilised as a conceptual framework within environments based around caring, such as the nursing profession. She delineates four phases/aspects of caring, each with their own associated sub-virtue of care. These are:

1. Caring about – which involves recognising that care is needed in the first place. The associated virtue is *attentiveness*, as it requires an individual to '*suspend one's own goals, ambitions, plans of life, and concerns, in order to recognize and be attentive to others*' (Tronto, 1993, 128).
2. Taking care of – which means holding yourself accountable for the care of those that need it. The associated virtue is *responsibility*.
3. Caregiving – which is the active, involved part of care. This is the inter-personal, physical component of the caring process. Given this is the part which actually requires knowing what to do, the associated virtue here is *competence*.
4. Care receiving – this is the feedback loop of ascertaining the success, or otherwise, of the preceding stages, and the assessment of whether or not the cared-for person's needs have been met. The associated virtue is *responsiveness*.

In summary, care ethics has sought to utilise both virtue ethics and feminist theory in a way that foregrounds not only the importance of beneficence as a virtue, but also the experiences of women as moral subjects. It questions the self-evident ontological validity and objectivity of more 'masculine' ethical systems, based around atomist understandings of rights and justice, and draws some important contrasts between these abstract and universalising principled positions, and an approach based upon emotions, relationships and social context.

3.7 Problems with 'Care'

It is probably not surprising that care ethics has been no more successful in escaping criticism than any of the other ethical systems discussed so far in this text, and while it undoubtedly offers a series of advantages for addressing particular kinds of chronic social/ethical difficulties, it brings with it its own problems and limitations. Five of these will be discussed here.

The first is that, in the final analysis, it lacks any real difference from the broader field of virtue ethics. That is, 'care' is really just a particular virtue, like any other, and hence it can be treated as a sub-branch of virtue ethics, with all the difficulties and flaws of that broader position. The most significant and applicable criticism here is that, as with its older sibling, virtue ethics, it gives little concrete guidance for conduct when the ethical circumstances get complicated.

As before, the case of *L vs Minister for Education* provides a good example of the difficulties of applying this position to a complex ethical dilemma. It is possible to demonstrate care for L by keeping her in the mainstream classroom, by incorporating her within the life of a normal school, by providing her with the means necessary to remain where she wants to be, by not, as she would see it, exiling her to an institution for 'different' children away from her regular life. Alternatively, it is possible to demonstrate care by placing L in a learning environment more able to meet her particular needs, assuming that it might, an institution with specially trained teachers, with additional physical resources, with a higher staff-to-student ratio, and with more established links to medical and community expertise. Both these positions can demonstrate that they have adopted an ethic of care; or to put it another way, you can be an exceptionally caring person, as most teachers are (and in particular, special education teachers), and still not know what to do.

The second problem is that the notion of care is itself rather nebulous and indistinct. As discussed above, it is indistinct in a theoretical sense as it has been regarded as both part of virtue ethics and part of feminist theory; neither of these issues are a problem *per se* but, particularly with virtue ethics, it has made it somewhat difficult to argue that it really brings much that is new to the table. However, it is also indistinct in terms of the particular virtue around which it is built. Just what is meant by 'care'? The word is employed in different ways, at different times, by different groups, dependent upon context, method, purpose, resourcing, cared-for population, and intended outcome – all of which makes deploying it as an effective strategy somewhat problematic. The overall consequence here is that the notion of 'care' can simply become a moral bromide, one that means little in practical terms, other than pointing to a general field of concern.

The third problem revolves around what Nietzsche (1844–1900) refers to as a slave morality. Nietzsche contrasts *master morality*, with its traits of bravery and nobility, with the *slave morality*, based upon, humility, sympathy and care (Nietzsche, 1966, 1967). The argument here is that the characteristics required to survive in a given social position are always then translated into self-justifying virtues – after all, humble slaves persist; brave slaves perish. As Card (1990, 106) observes: 'We

can take up the perspectives of others out of sheer necessity for survival, the necessity to anticipate others' needs in order to be a good servant or slave, for example. Women learn well to do this with men'.

Critics of care ethics contend that behaviours traditionally expected from particular subordinate social grouping – women – have *ergo* been translated into a set of worthy, laudable virtues, of which 'care' is the foundation. This is not to say that care is a bad thing, however given the struggles that women have faced to expand their social, cultural and professional possibilities, it can be argued that this form of ethical system simply reinforces outdated stereotypes about how women ought to shape themselves. Of course, this is not to say that care ethics only applies to women, but it is a social fact that the vast majority of primary care in our society (whether that be domestic, medical or educational) is done by women.

Fourth, the question arises as to whether the need for care is an individual or a structural matter. This is particularly the case when addressing issues of care and disability. Arguably, someone is 'disabled' when their needs are not met effectively within existing social arrangements, and as such they are only in need of 'care' because other aspects of such an individual's social, educational, and special/architectural life are insufficient, or have not been organised appropriately enough (Oliver, 1990, 1996). Within this social model of disability, 'impairment' is not inherent to individual lives, it is the product of failing to meet socially created difficulties – which then have to be cared for.

In 2018, a wheelchair athlete felt compelled to drag himself through Luton airport on the floor after his wheelchair had been left behind (Coleman, 2018). Clearly, in this instance his problems were created by the absence of his regular means of transport, in that he was rendered 'disabled' – i.e. unable to make his way across the airport – as a result of socially created circumstances. To make matters more complicated, the athlete was actually offered a wheelchair in which to sit; however, he refused. The wheelchair in question was of a design requiring it to be pushed from behind, rather than being self-propelling. The young man stated that he did not wish to have his independence compromised, *'Someone whose chair is their legs shouldn't be forced to be reliant on others for help'*. The point here is an important one. The need for 'care' is not an unproblematic and self-evident matter. The athlete did not want 'care'; he felt he was being placed in a situation where care was being forced upon him. The requirement for care is therefore both circumstantial and structural, not simply an issue of self-evident personal need. As Herring (2014) notes, there is a complex tension between the deployment of 'care' as the manifestation of a worthy moral value, and the deployment of 'care' as a paternalistic exercise of power.

Finally, the question arises as to the boundaries of care ethics. It would appear that this ethical approach applies very well to the private, interpersonal domain. The caring of one person for another is rightly positioned as one of the most crucial components of human life. It has rightly been pointed out that this does not apply as well to the public domain.

The public realm is filled with people who aren't in close relationship, so it's difficult to see how care ethics would function in that sphere. This has led to the objection that perhaps care ethics isn't meant to be applied to all situations. Instead, it should be restricted to situations within the private sphere of life. This objection is a strong one. (Panza & Potthast, 2010)

As has been discussed above, a number of care theorists have argued that while care may well fit more easily within the private realm, it can act as a complement to those more universalising, principle-based approaches that now dominate contemporary public life.

3.8 Review

Virtue ethics asks a different set of questions to those which animate consequentialist and deontological ethics. The central point at issue here is not the rightness or wrongness of any given course of action, rather it is about the character of the person making the decision. Even though these two principle-based normative ethical systems have significant problems, and in particular consequentialism, the evidence would suggest that virtue ethics is not some kind of unproblematic solution to the problem. Indeed, it has very significant problems of its own, not least of which is the fact that it offers no concrete guidance as to what to do in complex ethical circumstances. There doesn't appear to be much agreement as to which virtues are of importance, and how they might be consistently applied.

Of course, this is not to say that fostering specific virtues – both in education students, and in those who work within the field of inclusive education more generally – is not a very good thing. Having special education teachers who manifest character traits such as wisdom, justice, kindness, patience and organisation, is clearly desirable. However, irrespective of these local benefits, virtue ethics probably doesn't rise to the level of all-encompassing approach for solving the problems within the field.

The same is true of a subset of virtue ethics – care ethics. Surely 'care' is almost always a good thing, with the possible exception of some very specific circumstances, (such as the case of the wheelchair athlete in the airport, discussed above). In spite of the inherent desirability of care, it does appear to have some limitations to its scope as a lens by which to understand the totality of the ethics of inclusive education. Its central domain of applicability does appear to be the private and the interpersonal. That said, there are convincing arguments which suggest it can act to augment broader, justice-based ethical theories which can function more effectively within the public domain.

Therefore, having discussed the strengths and weaknesses of the three most basic normative ethical systems (utilitarianism, deontological ethics and virtue ethics) and having found all of them wanting as a potential foundational framework for an ethics of inclusive education, maybe a better strategy is to step outside these systems altogether. Perhaps a productive way forward will be to approach the problem from within an entirely different theoretical register – that of 'rights'. The notion

of 'rights' can be used to understand and articulate an ethics of inclusive education, and while in some ways a 'rights' approach has developed as the flip side of deontological ethics (in that 'duties' can give rise to 'rights'), this approach will bring with it an array of new advantages, insights, possibilities. . . and problems.

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Chapter 4

Disability and the Limitations of ‘Rights’



Abstract Perhaps then, a way forward within the inclusion space involves a shift from traditional ethical concerns over determining right and wrong conduct (however loosely we might mean that here) to a greater focus on the language of ‘rights’. It certainly seems that ‘rights’ has a significant role to play, both for structuring the lives and opportunities of people with disabilities, and for organising their relationship with educational institutions – at least in theory. If rights are ‘justified claims upon others’, what kind of claims can citizens reasonably make upon their social institutions, their communities, and their governments?

Part of the problem is that rights come in all shapes and forms. Not only can they mean different things to different people (are they protected choices? interests? trumps?), they often operate in contradictory ways ... and then whose rights count? There are also ‘legal rights’ and ‘moral rights’, with a complex relationship to each other. And then when it comes to the contested notion of ‘natural rights’, can we convincingly allocate them to individuals, and from there, forge some basic human rights? And even if we can’t, can we somehow arrive at a set of basic human protections and benefits anyway?

There are a lot of questions here aren’t there. Not all of them have very good answers. As a result, discourses centring upon rights have a number of their own problems and ambiguities – particularly within the field of inclusive education. These problems often centre upon the issues of conflicting rights, the complex contexts in which rights are asked to operate, and the philosophical underpinning of the concept of rights itself. While rights provide an indispensable foundation for an ethics of inclusive education, it will be argued that these difficulties point instead in the direction of the associated concept of ‘justice’.

Keywords Rights · Natural rights · Moral rights vs legal rights · Hohfeldian immunity rights · Human rights · Universal Declaration of Human Rights

4.1 Schools, Rights and Disability

In February 2018, Donald Trump signed an executive order setting out his intention to reduce 'unnecessary regulatory burdens'. This prompted a number of departments within the US government to embark on a regulation-culling spree, thereby reducing the impact of what Trump continues to depict as pointless legislative intrusion and overreach, following the traditional Republican mantra of 'the fewer government regulations the better'. US Education Secretary Betsy DeVos took to this task with gusto. On the 21st October, she rescinded 72 policy documents relating to the rights of students with disabilities.

This provoked an immediate response from Democrats, educators, stakeholders within the people with disabilities' communities, disability advocates, human rights lawyers, and concerned citizens. Bobby Scott, a Democratic congressman from Virginia, stated that the elimination of these policy documents was '*the latest in a series of disturbing actions taken by the Trump Administration to undermine civil rights for vulnerable Americans*' (Balingit, 2018). While it is certainly the case that a proportion of the documents rescinded by DeVos were outdated, duplicated or no longer relevant, those unhappy with this decision suggest that in the final analysis, the real reason behind the cull is an attempt to reduce community knowledge about disability rights, and hence reduce the amount of trouble disability causes, and the amount of money disability costs.

Whether this is correct or not, it is interesting to note the degree to which a perceived attack on 'disability rights' is met with such ferocious opposition. 'Rights' are one of the central touchstones, not only within any discussion of an ethics of inclusive education, but also within any assessment of the fabric of Western, liberal democracies. And any threats to our rights are therefore a threat to the very stuff of our democracy. It would be fairly easy to argue that, in a number of significant ways, the debates around disability, othering, educational inclusion, and special schools, have been built around the notion of rights, and as such, this chapter will attempt to examine whether – given the shortcomings of the other frameworks addressed so far – this is the most productive way forward.

The international community has long recognised the importance of 'rights', and more latterly, the concept of 'human rights' (which will be dealt with in more detail later in this chapter). In 2006, the *Convention on the Rights of Persons with Disabilities (and Optional Protocol)* (CRPD) was adopted by the United Nations. It has now been signed by 187 countries worldwide, and ratified by 177 (although, interestingly, not the USA). Some elements of Article 24 (the part of the Convention that deals with education) are of particular relevance to this book:

- 24(1) – States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels ...
- 24(2) – In realizing this right, States Parties shall ensure that:

a) persons with disabilities are not excluded from the general education system on the basis of disability . . .

c) reasonable accommodation of the individual's requirement is provided . . . To summarise: states must ensure that there exists a system of inclusive schools, and that children with disabilities have a right to not be excluded from those schools. Of course, when qualifying phrases, such as 'reasonable accommodation', are thrown into the mix it all gets a bit more complicated, but we can address those issues later. We have earlier referred to this kind of legislative 'hedging' as '*clauses of conditionality*' (Slee, 1996).

One of the foundational logics that drive Article 24 of the CRPD – or indeed all of the Convention – is the belief that those with disabilities should have the same rights under domestic law as the able-bodied, and that discrimination against people with disabilities should be eliminated. In Australia, these beliefs are evidenced within the *Disability Discrimination Act 1992* (Cth) (DDA), and in particular Section 3:

The objects of this Act are:

3(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of work, accommodation, education . . .

3(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community.

Once again, these rights are heavily qualified by the phrase 'as far as practicable', which, to most commentators within the field, is both a necessary recognition of real-life difficulties faced by those with a disability, as well as being a ready loophole in the legislation approximating the size of a very large bus.

However, qualifications aside, international instruments and domestic legislation of the types set out above make it clear that the entire domain of contemporary education is cross-cut by the many legislated rights of the various stakeholders, including people with disabilities. It is therefore reasonable to assume that 'rights' constitute a perfectly appropriate focus for one section of our discussion on the ethics of inclusive education.

4.2 From Normative Ethics to Rights

The previous two chapters have addressed the ethics of inclusive education from the starting point of three traditional normative ethical frameworks. These have been about right and wrong, and about being a good person, or not. Before embarking on an analysis of the potential of 'rights' for providing the ethical foundation we are looking for, it would probably be useful to locate discourses about rights in relation to these three frameworks, just in order to get our bearings. To put it another way, in terms of ethics more generally, how do we understand/locate rights? It may help to use a worked example here.

In 2015, in a submission to a federal government review into disability standards for Australian education, the Australian Education Union stated that safety is a common concern among teachers who work with students with disabilities.

Supporting this assertion, the President of the Queensland Teachers Union pointed out that, in an educational environment where teachers generally have classes of 28 students, students with disabilities are more likely to hurt their teachers because they are not getting the attention they require. He stated, *'We have kids who are operating at a preschool level who have the physical strength of a 14-year-old front-row forward. There is a significant difference between their chronological age and their physical capacity'*. As a consequence of these concerns, the West Australian Education minister admitted that students were still put in isolation rooms and in the ACT, as discussed elsewhere in this book, a cage was built in a classroom for a boy with autism (Bita, 2015).

This form of segregation for children with disabilities, as a means of disciplinary management, can be approached from all three normative ethical perspectives addressed so far. For the consequentialist, a straight-forward utility calculus would assess whether the greater good was served by having the child in the classroom, with all the potential disruption that might entail, or whether their unhappiness at being excluded/contained was outweighed by the general extra learning that might occur. For the deontological ethicist, the issue would centre around a teacher's duties, and given that the practical imperative states that no-one shall be used as a means to someone else's ends, it is unlikely that they would regard the caging of children to be part of any teacher's list of professional obligations. Likewise, for the virtue ethicist, even considering the inherent flexibility of this position, it would appear that locking up children with disabilities may not really be the best way to manifest the cardinal virtues of wisdom, justice and courage.

Using this same issue, the question can be asked, would anything change if the entire problem was couched in terms of 'rights'? That is, at a fundamental level, just how compatible are these three normative positions with the concept of rights? In the review of the Disability Standards for Education – 2005 mentioned above, the Australian Education Union stated that teachers have the *right* to safety in the classroom, noting at the same time that this right can conflict with the right of all students to participate in mainstream schooling. So how do rights interact with utilitarianism, deontological ethics, and virtue ethics?

For the utilitarian, it would appear that rights sit uneasily with their approach. After all, if the greater good is served by removing a child from the classroom, for whatever reason, then this is the correct course of action – and their 'rights' are irrelevant to the calculation. A utilitarian would argue that you can have all the rights you like, but unless there is some way of factoring them into the utility calculus – which is not at all what 'rights' are for – then the correct thing to do is to simply ignore them.

At this point, the committed utilitarian might suggest, as discussed in Chap. 2, that adopting 'rule' utilitarianism would solve the problem, in that over the long term, following the rule of 'don't violate children's rights' may well maximise the good, even if this results in some short term losses. However, as was also discussed in Chap. 2, rule utilitarianism has a bad habit of collapsing back into act utilitarianism when pushed, so this isn't really much of a defence. Consequently, it would seem that rights are not a good fit with utilitarianism.

Deontological ethics would appear to be a better fit with the notion of rights. If deontological ethics is all about duty, it is not hard to see that rights are very closely linked to that; after all, in many ways they are two sides of the same coin – for every duty there must be a corresponding right. If a teacher has a duty to teach a child in their classroom, then that child must have a right to be there; if a teacher has a right to a safe working environment, then their employers have a duty to provide it. In addition to this connection between the two approaches, it would also seem that the language of rights is also taken from the deontological approach. Just as Kant placed the ‘*rational human being*’ front and centre of his ethical framework, so too do rights have their ontological origins within the inherent dignity of this construct – i.e. rights are ascribed to individuals because they possess capacities that warrant the special protection that rights theoretically provide.

Like utilitarianism, virtue ethics also appears a somewhat uneasy fit with discourses about rights. In order to shape oneself as a virtuous person, an individual must freely choose to develop their character in certain ways – ways which are deemed laudable and which will lead to human flourishing, such as those associated with the cardinal virtues of wisdom, justice, courage and temperance. However, when rights are thrown into the mix, there are no longer free choices to be made, rather there are obligations, adherence to which is neither admirable nor otherwise; they are simply particular forms of required social conduct. After all, if a student has a ‘right’ to be in a given classroom, irrespective of their disability or their conduct, a teacher can no longer deploy the virtues of wisdom, justice and benevolence by freely choosing to include them; their compliance is now mandatory, and character becomes irrelevant.

And so, if ‘rights’ discourses are an extension of any of the previous normative systems, it’s deontological ethics. This certainly structures its conceptualisation, and as we shall see, it helps determine which rights there are, and why they should be respected. At the core of this connection between rights and deontological ethics is the belief that human beings are rational creatures, and that they have an inherent dignity which justifies and protects the attachment of rights.

4.3 So, What Exactly Are Rights?

This is a much more complicated question than it first appears. As will be discussed late in this chapter, a ‘right’ can take several forms, and operate in a number of different ways, and the various available definitions of rights speak to this ambiguity. In this definition of a right, which, if including all the additional qualifications and explanations, stretches to over two pages of his book, Freedman (1991) defines a right as:

... a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of human being; that it is intended to serve as a protective capsule for those attributes; and that appeals for deliberative action to ensure such protection.

A somewhat more manageable definition is provided by Jones et al. (2006), who define a right as ‘*an entitlement to the protection of certain powers, interests or privileges*’. Useful though this definition is, it does not employ the concept of ‘a claim’, and as Hohfeld (whose ideas we will employ in greater detail shortly) notes, ‘*In the strictest sense, all rights are claims*’ (Wenar, 2015). Consequently, probably the clearest and most comprehensive definition of a right is: *A justified claim on others* (Andre & Velasquez, 1990).

Nice and straightforward – we’ll stick with this one. However, having decided what a right is, a different question then arises.

4.3.1 What Do Rights Do?

We talk about rights all the time. We assert our rights, we talk about the importance of rights, we discern rights in others, we speculate about the existence of particular rights, we elect governments to change or preserve our rights, and we make rights claims over the rights of others. Within all this babble about rights, we rarely ask ourselves, just what is it that rights actually do? It’s a bit like the word ‘truth’: we all use it regularly, we know it’s important, we all use it to mean pretty much the same thing, but in reality its meaning has been subject to debate for nearly 2500 years. When we say ‘*All children have a right to an education*’, and more importantly, given the context of this book, ‘*Children with disabilities have the right not to be excluded from mainstream education*’, the important question here is, what does that right consist of? What does it actually do?

It is easy enough to *locate* this right within various legislative instruments. At an international level, the United Nations delineates this right in a number of places. For example, there is Article 26 of the *Universal Declaration of Human Rights* (1948) (UDHR), and Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). This right is further elaborated in Articles 28 and 29 of the *United Nations Convention on the Rights of the Child* (1989), and in 2001, the United Nations’ *Committee on the Rights of the Child* published a ‘*General Comment*’ which set out the parameters of this right. This right to education is also elaborated in Articles 5 and 7 of the *Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD), Articles 10 and 14 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDW), and Articles 9, 21, 24, and 26 of the *Convention on the Rights of Persons with Disabilities* (2006) (CRPD).

At a domestic level, in Australia for example, the right to education is primarily guaranteed through state and territory governments, and the ‘right’ to an education is translated as mandatory attendance between the ages of 6 and 16. There is no specific federal legislation with puts in place a clearly defined right to education, however a number of laws – for example, the Higher Education Funding Act (1988), The Indigenous Education (Targeted Assistance) Act (2000) and the Schools Assistance

Act (2008) – all speak to the Commonwealth’s responsibilities with regards to the right to education.

Once again, all these instruments succeed in fleshing out the *content* of the right to education, but they don’t help us to understand what it is that rights actually do. It’s important to try to find an answer to this question because the various different solutions on offer lead us to very different conclusions about just who can have rights, what those rights can mean, and where they might lead us. There are two main theories about what ‘rights’ do: the first is ‘Will’ theory, normally associated with the work of Hart (1982), and the other is ‘Interest’ theory, associated with Raz (1986a) and Kramer (2001). This debate has continued since the time of Kant and Bentham. Taking these positions in turn:

Will theory, also called choice theory, begins with the premise that a right gives you power over others. That is, a right-holder has control over other people’s duty towards them. Hart (1982) memorably states that a right turns an individual into a ‘small scale sovereign’:

The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person’s duty so that in the area of conduct covered by the duty the individual who has the right is a small-scale sovereign to whom the duty is owed. (Hart, 1982, 183)

According to will theory then, a right-holder has a choice: they can enforce the performance of the duty correlative to the right, or they can waive that performance (Wenar, 2013). And so, if a child (with a disability) has a right to a mainstream education, the state has the duty to make good on that right if the child chooses to enforce it. Alternatively, the child might waive their right by not enforcing that duty, choosing to go to a special school instead.

Two main problems emerge with this theory. The first is that it implies that all rights can be waived, if the right-holder so wishes. However, as MacCormick (1977) points out, some of our most important rights cannot be simply waived by the right-holder if they so wish – for example, the right not to be enslaved, tortured, or murdered. The second problem is of even greater importance, particularly within the context of this book. Will theory requires that the right holder be in a position to exert their power over others – that is, they are required to be rational, competent and capable of acting as ‘*small-scale sovereigns*’. This would mean that individuals in a coma don’t have rights. Following the same logic, children with intellectual disabilities (called learning disabilities in the UK) would not have the competence to enforce their right to attend a mainstream school; indeed, children in general – who are also regarded by the law as not fully competent – could not enforce that right either (as their rights are generally ceded to parents).

The second, alternate approach – Interest theory – understands what rights do in a very different way. According to this approach, rights are not associated with the entitlement to exert will over others, but rather with furthering the interests of the right-holder. That is, the owner of a right has not acquired a set of associated choices, as is the case with will theory, rather the person in possession of a right is in a better position than if they did not possess that right. So an improved set of circumstances

for the right holder form the foundation of rights according to 'interest theory', not an augmented set of protected choices.

Individual interests are grounds for rights, and rights are grounds for duties, duties being peremptory reasons for action. A right exists only if an interest of the right-holder—i.e., an aspect of her well-being—is of sufficient importance to hold others to be under a duty (Raz 1986a, 195–6). Thus, although rights are not the only grounds of duties, to each right corresponds at least one duty. (Zanghellini, 2017, 26)

The two main criticisms of the will theory of rights outlined above do not hold for interest theory. First, this approach can accommodate the notion of unwaivable rights, as waiving the right not to be tortured, enslaved or murdered is clearly not in the best interests of the right-holder. Secondly, this approach does not require the right-holder to be fully rational or competent. Therefore, those in a coma, or children, or even animals, can still be deemed to be the bearer of rights, unlike with will theory. In which case, children with disabilities can enforce their right to be enrolled in mainstream classrooms – which seems perfectly reasonable and appropriate.

It should be pointed out that interest theory is also not without its weaknesses. As Raz (1986b) points out (even though he is an advocate of the theory), sometimes having a right does not hold others to a duty. For example, it may well be in the interests of journalists to protect their sources, however this does not place the rest of the community under a correlative duty. Similarly, there isn't a direct link between interests and duties when looking at issues like disability support payments. Parents have a right to payments from the state, but arguably the payments are not in their interests, but rather the children's.

While these criticisms may seem relatively trivial in comparison to the perceived flaws evidenced within will theory, they have been sufficient to spawn an academic cottage industry trying to come up with other theories of rights that can avoid all these pitfalls. Consequently, there has been 'constraint' theories of rights (Scanlon, 2003), 'hybrid' theories of rights (Sreenivasan, 2005), 'trump' theories of rights (Dworkin, 1984), and 'role-based' theories of rights (Wenar, 2013). While this text will most generally follow an interests approach to rights, it may well be the case that there just isn't a single, comprehensive theory that can encompass all the different functions that rights may manifest. Indeed, it may well be that what rights are, and what they do, are fundamentally social in nature, in that they only make sense within given social and historical contexts. This epistemological flexibility stands in direct contrast to the following, highly influential notion of 'natural rights'.

4.4 Natural Rights

So having decided (among a wide range of other options) that rights are 'justified claims on others', and that they further the interests of those who hold them, the question now arises of what gives rights their substance. When we say that disabled

people have the right to be treated just as well as anyone else, including being allowed to attend mainstream schools, what lies at the root of this assertion? Is it because rights just seem like the fair thing to give to people? If that were the case, that would be more of an argument about justice, which will be dealt with in the next chapter. If not, then what is the supporting foundation for rights?

At this point, most people would point to ‘natural law’, which was discussed at length in the last chapter’s discussion of St Thomas Aquinas. The argument there is that we have been given laws, either by nature, and/or by God, which structure how we ought to behave. The correlate here is that this ‘natural law’ is comprised of ‘natural rights’, and whereas natural law refers to some kind of constraint on conduct, natural rights refers to some kind of liberty (Iverson, 2008). And therein lies the most common answer to the question, where do rights come from? The answer here is that they are deemed to come from nature; nature provides the grounds for rights. As we will see, this has proved to be both a highly influential theory (to put it mildly), as well as a highly criticised one.

Evidence of our social and political reliance upon ‘natural rights’ is almost everywhere we look, particularly within the foundational documents that have shaped our notions of liberal, western democracy. Natural rights are not simply an interesting historical artefact, or the province of ivory-tower philosophy professors, they are part of the rhetoric of our political freedom.

In 1776, the Second Continental Congress met in Philadelphia to formally adopt *The Declaration of Independence* for the 13 American States from the rule of Great Britain. The second paragraph of this document famously begins, ‘We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness.’ In a similar vein, during the French Revolution of 1789, the French Assembly published *The Declaration of the Rights of Man and of the Citizen*, a document comprised of 17 Articles. While Article 1 stated that, ‘All people shall have equal rights upon birth and ever after’, Article 2 sets out the importance of natural rights: ‘The aim of all political associations shall be to preserve man’s natural and imprescriptible’ rights.

These are not just two vaguely-interesting textual relics from a couple of two hundred year-old revolutions, they express ideas which have formed a central part of the fabric of contemporary civil society. It doesn’t take much hunting around to find loud echoes of these aspirations – and the continuing role given to ‘natural’ and ‘inalienable’ rights. Take, for example, the first of the great international human rights instruments to emerge from the United Nations after the carnage of the Second World War, the *Universal Declaration of Human Rights* (1948, 1), which begins with:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . now, therefore, the General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .

These echoes are also present in the documents that relate to children, and to disability. Both the *United Nation Convention on the Rights of the Child* (1989), and the *Convention on the Rights of Persons with Disabilities* (2006) begin with the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

So as we can see, much of the fundamental intellectual foundations of western political systems is built upon the idea of natural rights; it has been, and continues to be, very important and influential. However, this concept did not just miraculously appear in the Declaration of Independence or the Declaration of the Rights of Man and of the Citizen out of nowhere, and arguably, understanding where the idea came from, and how it came to take the form it has, will better allow us to understand what it's main flaws are, and what it may still have to offer. After all, there are a number of complexities in relation to how we are to understand natural rights, and in particular, their relationship to natural law. Iveson (2008) asks the important question: does natural law provide the foundation for natural rights, or is natural law derivative of natural rights? This is significant because we can either;

understand rights as providing a foundation for moral and political order, or as derived from a prior objective moral framework. The former might seem to entail moral subjectivism, the latter that rights are not foundational, but ultimately derivative of an objective moral theory in which duties are primary as opposed to rights. (Iverson, 2008, 47)

Like natural rights themselves, opinions about the historical and philosophical emergence of natural rights are far from uncontested. Some writers see embryonic stirrings of the concepts within the *Magna Carta* of 1215, which sought to both delineate the liberties of English citizens and to constrain the power of a somewhat despotic king, and the *English Bill of Rights* of 1689 which helped set the stage for the joint reigns of William and Mary, and the political beginnings of the Enlightenment (Clapham, 2015). While these two documents played a very significant role in the shaping of English civil and political life, most commentators locate the rise of discourses about natural rights as lying with three other documents: Hobbes' *Leviathan*, written in 1651, Locke's *Second Treatise of Government*, from 1689, and Rousseau's *The Social Contract*, from 1762.

4.4.1 Thomas Hobbes (1588–1679)

Although the term begins with Rousseau, Hobbes is probably most well known for his notion of the 'social contract', which he sets out in *Leviathan*. Hobbes has very little time for 'natural law' which, as has been discussed already, has its origins in the work of Aristotle and Aquinas. In particular, he has even less time for the idea that natural law, which manages the relationship between reason and human nature, somehow leads us to a utopian wonderland of good and happiness. Quite the contrary. He regards the true natural state of humanity as that of constant,

self-interested warfare (see *ethical egoism*, in Chap. 2), and left to our own devices – that which he calls ‘the state of nature’ – there would be none of the things we take for granted: arts, writing, community, commerce, culture, agriculture or industry. In fact, our lives would be ‘solitary, poor, nasty, brutish and short’ (Hobbes, 1994, 84). The only solution at this point, according to Hobbes, is to enter into a social contract, where we give over some of our freedoms to a central authority, generally a sovereign, who exerts absolute power of everyone within the social ‘commonwealth’. This authority enforces a range of laws (nineteen in all), such as the keeping of promises, inherent equity, adjudication of disputes and so on, thereby providing order, and preventing us collapsing back into self-interested chaos.

The important point here is that having given over their rights to the sovereign, in an act of rational self-interest and collective will, the only individual right that remains is the ultimate and singular natural right: the right to self-preservation. Hobbes considers reasonable self-defence to be the sole remaining natural right, since the desire not to be killed is the very reason we agree to enter into the social contract in the first place. In delineating this natural right, Hobbes distils down all the extraneous, overly-optimistic teleological guff floating around with existing theories of natural law; he provides a solid, minimalist foundation for a general theory of natural rights; and he sets the stage for philosophers like Locke and Rousseau to take the notion of natural rights and run with it.

4.4.2 *John Locke (1632–1704)*

While this one idea from Hobbes’ work, that we have a natural right to self-preservation, is deemed by later writers to be a good one, he is also considered to be an ardent supporter of absolute rule – not so good. After all, Hobbes’ sovereign has, via the social contract, unqualified totalitarian authority over the commonwealth of citizens, which is not exactly an intellectual precursor to democracy principles. (Perhaps unsurprisingly, Hobbes was a supporter of Charles 1 during the English Civil War, and wisely bolted to Paris just before the fighting started).

John Locke sees the world somewhat differently. While he also believes that the social contract elevates humanity above the state of nature, unlike Hobbes, he contends that citizens always have the right to withdraw their consent from a sovereign/government if that government doesn’t behave in ways which honour important elements of their mutual contract. As far as Locke was concerned:

Laws must fulfil three conditions: they must be equal; they must be designed for the good of the people; and they must not impose any taxation without consent . . . a ruler who violates these rules, and governs in his own interest, rather than for the common good, is then at war with his subjects, and rebellion is justified as a form of self-defence. (Kenny, 2010, 719–720)

This logic formed an important component of the legitimating rationale for the American War of Independence, as the Founding Fathers were well versed in Lock's *Second Treatise on Government*, from which these ideas were taken.

Locke also builds upon Hobbes' single natural right, to the set made famous in the American Declaration of Independence, ie. life, liberty, and the pursuit of happiness. To this he also managed to add a natural right to property (an important addition in an era when capitalism was really starting to get going) – not an easy task, given that the question arises, how does private property actually exist in a state of nature? Locke got around this by contending that when an individual mixes their labour with natural resources, they acquire rights to those resources. Furthermore, these rights precede the existence of any social contract.

4.4.3 *Jean-Jacques Rousseau (1712–1778)*

Inalienable rights also had a major role to play in the French Revolution, understood within that context as 'natural and imprescriptible', and the writings of Jean-Jacques Rousseau were cited extensively at that time, and were even used later by Napoleon as justification for his own understanding of rights. Rousseau considered an appropriate understanding of natural rights as crucial to our ability to construct free societies, given his most-quoted phrase, 'Man is born free, and everywhere he is in chains'. (Rousseau, 2016, 1). So once again, we have a natural right to be free, to liberty, and yet our social arrangements often mean that this is not the case. This observation became part of the intellectual foundation of the revolutionary movements that burgeoned in the seventeenth and eighteenth centuries, and was particularly associated with the belief that resistance against tyrannical governments and unjust laws is morally justified.

Rousseau also makes some interesting distinctions between public and civil interests, as part of the social contract. While it is logical to think that we sacrifice most of our rights when we enter into a relationship with the state, Rousseau contends that in fact the opposite can be the case. Individuals certainly have a private will, and private interests, and these may have little in common with the general will of the collective commonwealth, but by being forced to become part of the greater whole, and giving up some of their private will, individuals in fact profit from the bargain. Rousseau (2016, 8) suggests that, 'What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses.' That is, individuals may lose the right to grab whatever they can, whenever they like, but in return they gain the right to the secure ownership of their goods and property.

While problems remain with ascertaining exactly what is meant by the 'general will', and how this can be determined (the will of a Hobbesian sovereign? Votes of parliament? Plebiscites? Elections?), the notion still operates as a powerful symbolic indicator of the central workings of a particular type of governance. And whereas Locke's ideas may have come to dominate the social changes in the eighteenth

century new world, it was Rousseau who led the charge. Kenny (2010, 724) indicates Rousseau's political and intellectual importance within Europe by citing the words of a dying Napoleon: 'Who can tell whether the world would be a better place if Rousseau and I had never lived.'

4.4.4 *Nonsense on Stilts?*

It is indisputable that the notion of natural rights – and its sibling, natural law – have been wildly influential within both the history of western thought, and with the development of contemporary liberal governance. However, both have also been subject to trenchant criticism, and it is worthwhile to try and assess how much of either of these positions survives as a viable intellectual, legal, or ethical force.

As was discussed in the last chapter, natural law does not really hold much weight within contemporary legal and philosophical circles, and it has few remaining supporters, if any. First, it is inherently conservative, in that it falls for what has been referred to as 'the naturalist fallacy', or the 'is/ought' problem, i.e. extrapolating from the natural world (the 'is') a set of presumptions about appropriate behaviour (the 'ought'). It is probably the case that accusation of committing this fallacy can also be levelled against natural rights theory, but certainly nowhere near as easily. After all, perceiving natural social constraints and moral precepts within the behaviour of a pack of wolves, and then extrapolating into an 'ought' for humans, as with natural law (Green, 1997), is a far easier proposition to accept than studying the same pack of wolves as somehow discerning that they have natural rights as part of their social arrangements. (The allocation of natural rights to animals, as opposed to humans, is arguably a separate issue.)

Also, given that we are now talking about rights, rather than laws, we are therefore talking about freedoms, rather than constraints, and as such, the accusation of conservatism doesn't really apply – indeed quite the reverse. As has been discussed above, natural rights have found their way into almost every important revolutionary document of the last three hundred years.

The final criticism of natural law – that its content and boundaries are uncertain and highly contested – is equally applicable to natural rights. After all, 'Nature' is a very nebulous, slippery and ambiguous concept. In the same way that the 'virtues' of virtue ethics has been subject to endless rounds of debates about precisely what we mean by virtue, which virtues are important, and what virtues are required in which contexts, so too are natural rights the subject of considerable dispute. Whereas Hobbes only delineated one natural right, the right to reasonable self-defence, Locke and Rousseau pointed to a small cluster, and by the time we get to the issue of 'human rights', as will be discussed in the final third of this chapter, there appears to be a small army.

In truth, the central problem with the notion of natural rights, is that it is very hard to believe that they actually exist. We may allocate them to ourselves, perfectly appropriately, as part of our beliefs about human dignity, or fundamental human

worth, or the importance of the social contract, but that doesn't mean that they exist in any kind of ontological sense, and importantly, this is a sense implied by the use of the term 'natural'. That is, natural rights exist independently of what we think about them; they exist, even if absolutely no-one acknowledges them; and they would exist, even if we didn't (even though they apply to us).

The utilitarian philosopher, Jeremy Bentham, whose ideas were discussed at length in Chap. 2, is particularly scathing about the possible existence of natural rights. In what is probably his most quoted phrase, he describes natural rights as, 'simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts (Bentham, 1921, 501). While he does not deny that it might be a good thing if such rights did exist, and that citizens may have very good reasons for wanting them to exist, but that is ultimately irrelevant, as 'want is not supply – hunger is not bread'. He argues that the only rights that matter, that have reality, are legal rights; the rest is just a combination of self-delusion and wishful thinking. He spells out this position with unambiguous clarity: 'There is no such thing as natural rights – no such thing as rights anterior to the establishment of government – no such thing as natural rights opposed to, in contradistinction to, legal. (Bentham, 1921, 500).

In many ways, this laid the groundwork for, or is an early exemplar of, the jurisprudential notion of *legal positivism* (which was itself eventually replaced by *critical legal studies*, and then *postmodern jurisprudence*) – that is, an understanding of the law as written, or posited. Within this model there is no appeal to any kind of transcendental authority, such as nature, or morality; the only law that counts is the law of the judicial norms established by the state. This also means that it doesn't matter if the law is good or bad, right or wrong; it's the law. We might want the law to be shaped in different ways, as Bentham states, but inventing 'natural rights' as a way of bringing about those changes isn't the answer. Of course, many of the people who have benefitted from the establishment of those rights may not agree.

There are probably two main reasons for Bentham's hostility to theories of natural rights – other than, of course, their ontological questionability. The first was the historical and political context in which he writing. In England, after the revolutions in both France and America, the idea of natural rights was directly associated with the overthrow of governments, worse still, it was associated with being a possible French sympathiser (bad), a possible Jacobite (very bad), or even an anarchist (terrible) (Smith, 2012). It is not surprising that Bentham was so publicly hostile to these ideas. The second reason was that he was advancing his own moral theory – utilitarianism. As discussed at length in Chap. 2, according to Bentham, the only driving principle that ought to act as a foundation of social governance is that of the greatest good for the greatest number; everything else, including natural rights, are simply distractions. And whereas natural rights might act as a means to the *end* of social utility, why bother? It makes far more sense just to go straight there in the first place.

In summary, the notion of natural rights has been exceptionally important within western intellectual and political life; furthermore, it remains highly influential, and symbolically important, as it now underpins many of our most important

international human rights instruments. However, irrespective of this, natural rights are now largely regarded as a useful fiction, a projection of our political desires into the realm of ethics and social governance. Moreover, the fact that these rights are useful fictions makes them historically and culturally contingent, and therefore relatively easy to deny when necessary.

In the absence of natural rights, most of the debate now revolves around the notions of moral and legal rights. Moral rights are generally positioned, as natural rights once were, as those rights which are still morally and socially important to us, although they are not given the protection of the law (indeed, arguably natural rights are a subset, a type, of moral rights). While Bentham would still dislike them intensely, since they do not claim the status of natural facts, it remains much harder to deny their existence.

4.5 Moral Rights vs. Legal Rights

The idea of legal rights is a fairly simple one. Following on from our understanding of rights discussed earlier, a legal right is *an interest in a claim recognised and protected by law imposed by the State*. This type of right can take a vast array of forms, as evidenced by the complexity of our legal system and the number of different areas of law in which these rights operate. For example, we have a legal right not to be killed, and that right is protected within criminal law; we have a legal right not to have people wander through our property without our permission, and that right against trespass is protected within civil law; we have a legal right not to buy defective televisions, and that right is protected within consumer law; and we have the legal right to a mainstream education, even if we are disabled, and that right is protected within anti-discrimination law.

These kind of rights – i.e. those protected by law – are not the only kind of rights we have. Arguably, we have rights which we know exist, or we feel should exist, but are not protected by the legal system; that is, moral rights are about what we think the legal rules *should* be (Steiner, 2007). Moral rights are defined as *an interest in a claim which is morally recognised, irrespective of whether the validity of that claim is safeguarded by law*. At various recent historical moments, there may have been no legal right to certain forms of protest against apartheid, or deforestation, or the treatment of asylum seekers, but there was certainly a moral right. Importantly, this moral right generally relates to the notion of *justice* (which will be dealt with in much greater depth in the next chapter), as opposed to other types of interest. As Steiner (2007, 461) states:

Theories of moral rights are inherently theories about what the basic content of those legal rules should be: their accounts have constitutional reference. A standard form of complaint against a legal rule is that it fails to advance or protect a persons' moral rights – it fails to be just – whereas its failure to satisfy other moral requirements, for example, benevolence, is not commonly seen as being equally damning. While we do not expect legal systems to enforce generosity, we do expect them to uphold our moral rights.

4.5.1 *Disability, Legal and Moral Rights*

The issue of disability and educational inclusion is one which exemplifies many of the connections, differences and difficulties in the relationship between legal and moral rights. Until the enactment of the Disability Discrimination Act (1992) (DDA) in Australia, children with disabilities did not have the *legal* right to attend mainstream schools, if the school chose to insist that they went to a special school instead. However, irrespective of what the law stated, irrespective of the absence of a legal right, arguably those children still had a *moral* right to attend regular neighbourhood schools; that is, it was *just* that they should not be discriminated against based upon their disability.

As will be seen here, particularly in relation to the issue of educational inclusion, as social attitudes towards disability have shifted, so too has the belief in the existence of a *moral* right to education become more widely held. Unfortunately, enacting equivalent *legal* rights has proved to be a significantly more difficult proposition. This might seem a strange claim to make, given that the DDA has been in place for over 25 years, and the DDA puts in place a clear legal right for children with disability not to be excluded from mainstream education. Add to this the long list of international instruments that set out the educational rights of children with disabilities, as well as an impressive selection of case law, and it seems as if it's case closed.

Well, no it isn't. A closer analysis of the practical implementation of this legal right shows that it doesn't always end with the child with disabilities being able to exercise that right and thereby going to the school of their choice. That's one of the difficulties with rights: everybody seems to have them. The Department of Education has rights; the school has rights; the teachers have rights; and the other pupils have rights. More often than not, the issue becomes one of balancing competing rights against each other, and often that balance is struck according to the kind of utilitarian reasoning discussed in Chap. 2 – with all the attendant problems that causes for those in the minority.

A good example of the distance between a legal right, and its effective implementation involves one of the benchmark cases in this field – that of *Purvis v State of New South Wales* (2003). While it reaffirmed that schools could not discriminate against students with disabilities, the High Court of Australia ruled that they could however exclude children on the basis of disability-related behaviour. To put it another way, they ruled that schools could not exclude a child for having ADHD, but they could exclude a child *with* ADHD for running around a lot, being noisy in class, and not listening to teachers. This was problematic, to put it mildly, given that the very way you diagnose a child with ADHD is that they run around a lot, are noisy, and don't always listen to teachers; after all, if they didn't exhibit these behaviours, they wouldn't have ADHD.

The point here is that simply giving someone a right, of whatever kind, is rarely the unproblematic end of the matter, and the rights surrounding disability and educational inclusion exemplify this fact. Dickson (2018) notes that even after the

DDA (1992) was amended to ensure that the manifestations of a disability are to be included in the disability itself, this didn't really change all that much. Apart from some technical legal explanations for this inertia, she also points to three more general reasons as to why children with disabilities are prone to having their right to educational inclusion overridden. The first, as discussed above, is because of competing rights.

It is clear from the decided cases that many students with behavioural and intellectual impairments are guaranteed fewer educational opportunities than students with other impairments or without impairments. These students have fewer opportunities principally because their inclusion in the mainstream classroom is perceived to interfere with majority rights. (Dickson, 2018, 370)

Some of the many flaws in this type of utilitarian reasoning have been discussed in the case of *L v Minister for Education for the State of Queensland*. Not only are these legal decisions likely to be far removed from the 'objective' calculations that Bentham envisaged when he first devised the system, but also that minority rights come a distant second to the perceived will of the majority – predictably bad news for people with disabilities.

The second reason involves the legal notion of 'unjustifiable hardship', as set out in Section 11 of the DDA (1992). Assuming it is possible to demonstrate, for example, that a school has acted in an obviously discriminatory manner by excluding a student with a disability, the school can then claim that they don't really have a choice in the matter, because if they were forced to include the child, this would cause them 'unjustifiable hardship'. An assessment of such hardship includes taking into account the benefit or detriment likely to accrue, or to be suffered, by stakeholders, the effect of the disability on all those involved, and the financial circumstances, and the estimated amount of expenditure required to be made by the school in order to include the student.

As can be seen, this legal caveat or get-out clause is a comprehensive one, and has proved to be an effective way of countering a student's right to a mainstream education. In addition to the 'L' case, Dickson (2018) also cited the cases of 'P' and 'K', wherein the schools were also found to have discriminated against the children, and yet on each occasion, the schools were able to claim the exemption of unjustifiable hardship, and thereby legally validate the exclusion.

The third reason is associated with the second, and involves the issue of 'reasonable adjustments', as set out in Section 6 of the DDA (1992). Under this section, schools can be found to have directly discriminated against a student with a disability if they do not attempt to make reasonable adjustments to allow for the inclusion of that student. The problem here is that just what might be considered 'reasonable' is a very subjective and context-bound matter – particularly given these things are likely to cost money, whether in terms of extra support, infrastructure, or technology. Any interpretation of the issue will then be dependent upon how the school organises its budget and its priorities, which then links back easily and directly to the second matter of 'unjustifiable hardship' discussed above. Dickson makes a very good point here:

Anti-discrimination legislation, such as the DDA, aims to eliminate discrimination 'as far as possible' (DDA s. 3) acknowledging that sometimes discrimination will be lawful where it is fair to allow it. Care must be taken, however, that discrimination which is not 'fair', but which is simply 'convenient' or 'expedient' or 'cost effective', is not allowed to flourish under an inflexible and unsympathetic regime which accords more respect to the letter of the law than to the interests of people with impairments. (Dickson, 2018, 371)

4.5.2 *Covert Limitations on Rights*

Of course, these black-letter law legislative restrictions and qualifications on the rights of people with disabilities are just one of the ways in which such rights are reduced and curtailed. Not all the mechanisms for limiting access to mainstream education are as explicit, or directly involve the use of the fine print in the anti-discrimination legislation. An equally effective way of excluding children with disabilities, irrespective of their rights, concerns the practice of 'gatekeeping'.

Graham et al. (2016) contend that educational exclusion occurs, not simply by directly refusing entry for children with disabilities into regular schools, but also by a series of covert mechanisms which make attendance more difficult, and which act to manipulate parental choice. While all school types appear to have exclusion strategies, such practices are more common within the private sector, as they regard themselves as more vulnerable to the marketplace of exam results and school league tables, and hence are more focused on, and competitive about, getting the 'best' students. Consequently, it is now not uncommon for private schools to request NAPLAN results as part of the application process, results which can then be used to screen out less high performing students, and of course, students with disabilities and learning difficulties. However, equally effective gatekeeping mechanisms are more informal, three of which are worth discussing in greater detail.

First, parents with children with disabilities are often pressured to pay additional fees, ostensibly in order to cover additional resources or specialist support staff. Not only does this place additional socio-economic limitations on precisely who is able to apply to private school (yet further increasing the over-representation of children with disabilities and learning difficulties within state education), it also acts as a significant disincentive for enrolment.

Second, such children are only given restricted, or qualified, places. That is, they are not denied absolute access to the school, thereby (loosely) staying on the right side of the anti-discrimination legislation, but neither will they have the status of a full student. This can involve the promise of only permitting attendance on certain days – i.e. when there is specific allocated funding available – or of being only offered a place within a separate support class.

Finally, and perhaps most effectively, schools manipulate the notion of 'parental choice'. Parents have the right to choose whatever school is available to them, and their children – disabled or otherwise – have an equal right to be considered for attendance. However, the evidence suggests that there is an informal process of

guidance from schools which often steer parents of children with disabilities in other educational directions. This is most frequently done by gently and quietly advising parents that their children would be happier, or better served, elsewhere.

While these practices are more common at private schools, state schools are not without their own forms of gatekeeping. One mechanism is a selective enforcement of catchment area rules. As Graham et al. (2016) note, these boundaries are sometimes used selectively to deny enrolment to selected children, who just happen to have extra support needs.

In summary then, children with disabilities have a moral right to a mainstream education; in addition, they also now have an additional legal right to that education – a right guaranteed through both international instruments such as the United Nations *Convention on the Rights of Persons with Disabilities* (2006), and the *Disability Discrimination Act* (1992). However, there is a disjunct between *having* that right, and being able to *exercise* that right effectively, and the impediments to exercising that right are not only written into the legislation itself, but they also exist as more covert barriers erected within specific educational practices and contexts.

4.6 Types of Legal Rights

In order to fully understand legal rights – and rights in general – it is important to be aware of the various forms they can take, and the potential scope and nature of those rights. Not all rights are the same, and they don't function in the same ways. Variations occur relating to who has the rights in question, what the right relates to, and why the right is held in the first place. All of these affect how the right is likely to operate. Moreover, the term 'right' covers a lot of ground itself: there are four basic types of right (liberty rights, claim rights, power rights, and immunity rights). These can be variously categorised into first and second order rights, positive and negative rights; and active and passive rights. Importantly for us, all of these differences have implications for the relationship between disability and educational inclusion, when seen through the lens of 'rights' (and this will particularly be the case when we discuss the relationship between rights and justice in the next chapter).

The best place to start our dissection of the scope and operation of rights, is with the work of Hohfeld (1919), an American jurist who set out the basic framework for understanding the mechanics of legal rights. Far from being a single concept, Hohfeld delineated four basic types of rights: liberties, claims, powers and immunities – categorising them as either first order or second order rights. Taking these rights in turn:

A *liberty* is the right to do something, in the absence of a duty not to do that something. As Lazarev (2005) correctly notes, someone may have the liberty to stand outside a building to smoke a cigarette, since they have no legal duty *not* to smoke there. Equally, because you are eating a sandwich right next to them, you also have a (liberty) right – to cough loudly and talk about secondary smoking and lung cancer (as you have no duty not to). A liberty right is the weakest of all rights, in that

in the right circumstances, it can be trumped by all the other types of right. Your liberty right alone will not stop that person from smoking.

A *claim* is a right possessed by someone, which directs someone else to perform a duty for them. If you go back into the sandwich shop to get a new sandwich (because your old one now smells of cigarette smoke), and you hand over the required money, you now have a (claim) right to that sandwich – i.e. you now have a claim against the person selling the sandwich, and they have a duty to hand it over.

These are both *first order rights*, which are the simplest, and most straightforward of rights. They are direct rights over conduct and property. However, there is another type of right – *second order rights* – which involve the potential alteration of those first-order rights; these are the power and the immunity.

A *power* is the ability to alter your own, or someone else's liberties and claims. A policeman has the power to make the smoker put out their cigarette – thereby restricting their first-order liberty – because you have realised they were smoking within a pedestrian precinct outside a designated government building (a no-smoking area), and your liberty to run and tell the policeman was unaffected by this new revelation. These kind of (power) rights, which alter the authority of others, are fundamental to all western legal (and political) systems (Wenar, 2015).

Finally, when a person is in the position where others lack the ability to alter that person's liberties and claims, then they are said to have an *immunity*. If the policeman comes to tell the smoker to put their cigarette out, but it turns out that the smoker is actually the Commissioner of Police, who is therefore allowed to smoke wherever they damn-well like, then they can be said to have an 'immunity right', such that no junior officer has the practical power to tell them otherwise.

To put all this into the context of disability and educational inclusion: it can be argued that students with disabilities have all the same *liberty* rights as students without disabilities – the liberty to listen to whatever music they like, or the liberty to support whichever football team they like, the liberty to own a dog, and the liberty to go to school with everyone else. When they are at school, that student has the *claim* right to receive an education; that is, the school has a correlative duty to that student that it does its job and provides an effective education. Schools then generally have the *power* right to exclude students who cause them trouble; while this might include students who assault teachers, or smoke drugs behind the bike sheds, it may also (covertly) include students who, as a result of their disability, require more care, more resources, more infrastructure and more teacher time – with the suggestion that perhaps they attend a 'special school'. With this power right in mind, the student now has an *immunity* right – as set out in the *Disability Discrimination Act 1992* (Cth) (DDA) – which prevents their exclusion from mainstream schooling, based solely upon their disability, and which prevents the modification of their 1st order claim right to an education.

Of course, the school has an immunity right of its own, as it can point to the exemption clauses within the DDA such as those concerning '*unjustifiable hardship*', which then give them an immunity right against the exercise of the student's immunity right. In many ways, this exemplifies one of the perennial difficulties with

the notion of ‘rights’ – i.e. everybody has them, and so the question becomes, whose rights get to count the most?

While it is a useful exercise to delineate the various types of right, and to illustrate how second order rights can alter, waive, annul or transfer first order rights, it starts to get more interesting with the issues of active and passive rights, and from there, negative and positive rights, as well as 1st and 2nd generation human rights. These latter distinctions in particular will become important when addressing the degree to which we can reasonably expect assistance from fellow citizens, or whether we have any responsibility to help others at all – a question which will be discussed at greater length in the next chapter.

To make the point more clearly, below is a tabular representation of Hohfeld’s four types of right, applied to the issue of disability and education – as adapted from Wenar (2015). Active and passive rights, as well as negative and positive rights, which will be discussed next, are included in this schema (Table 4.1).

Active rights pertain to a right-holder’s own activities and behaviours, and consequently these incorporate first-order liberty rights and second-order power

Table 4.1 Hohfeldian rights

1 st order rights	<u>Liberty-Right</u> <i>E.g. the right of a disabled student (X) to attend their local state school</i>	<u>Claim-Right</u> <i>E.g. – X’s right that once admitted, the school fulfils its duty and provides X with an education</i> · a <u>Positive Right</u> (mostly) (entitling goods, services and/or the fulfilment of a duty) · see 2nd Gen. Human Rights: (social justice rights)
2 nd order rights	<u>Power-Right</u> (to modify 1st order right) <i>E.g. The school’s right to exclude ‘difficult’ students (and to exclude X, if it wants)</i>	<u>Immunity-Right</u> (against others modifying 1st order right) <i>E.g. X’s right to prohibit the school from not providing an education, (based upon their disability - DDA)</i> · a <u>Negative Right</u> (entitling non-interference) · see 1st Gen. Human Rights: (civil and political rights)
	<u>Active Rights</u> (X has the right to do Z)	<u>Passive Rights</u> (X has the right that B does Z)

rights (right to do). That is, active rights within the domain of disability and educational inclusion/exclusion means that a person has the liberty right to choose their own school, but the school has the power to delimit that right. Passive rights pertain to the ability to exert control over other's activities and behaviours, and these incorporate first order claim rights, and second order immunity rights (rights to have things done). A disabled student (or any student) has the claim right over the school which controls the fulfilment of its duty to give the student an education. Likewise, such students have an immunity right, as set out in the DDA (1992), which generally gives them (some) control over the school's ability to exclude them.

The next, and perhaps most contentious, categorisation of rights involves the difference between negative and positive rights – two subsets of passive rights. The normal distinction here is that negative rights confer the obligation of inaction, of non-interference (generally immunity rights, which include freedom of speech, freedom from assault, and freedom of religion), whereas positive rights confer the obligation of action, of someone else doing something for the right-holder (generally claims, which include a right to education, the health care, and to public housing). This is a very important distinction, and one which has significant socio-political implications.

There are a number of writers, most notably the conservative philosopher Nozick (1974), who have very little time for positive rights. This form of largely libertarian thinking, is founded upon political philosophy that, in the final ethical analysis, we really only have the right to be left alone. A significant foundational element of this understanding of rights is that we have no legitimate entitlement to force other people to act against their will. That is, the enactment of positive rights (for example, the universal rights to affordable healthcare or to an education) impact upon people's negative rights (for example the right to be left alone . . . and not to be asked to pay any of their money towards poor people's healthcare or education). Indeed, those with little time for positive rights often refuse to characterise them as rights at all, rather they regard them merely as social hopes and aspirations. This is an important issue, particularly with regards to disability and what are often referred to as 'social justice rights' – the rights of those who need help, to receive help. This will be discussed in greater detail in the next section, specifically when addressing the three generations of human rights.

4.7 Human Rights, Civil Rights, Social Justice Rights

When conceptualising the links between disability, educational inclusion and the notion of rights, it is inevitable that the discussion will eventually turn to a specific subset of right – that of *human rights*. That is, when discussions about the *legal* rights associated with disability and education head into a cul-de-sac, as they have a habit of doing, the next step in the discursive process is to shift the focus to the broader framework of *human rights*.

Generally speaking, human rights (as opposed to rights in general) have three central characteristics: they can act as ‘trumps’ over other types of right, they are regarded as being immutable, and they are political impositions of the state. Consequently, human rights can be understood as: *basic, over-riding protections and benefits, possessed by all individuals, most typically against the state*. Taking these in turn;

Human rights are important – probably our most important rights. After the chaos and carnage of the Second World War, and the behaviour of the Nazi regime in Germany, it was deemed a hugely symbolic (and practical) step forward to outline, globally, just what we would tolerate, and what we would not. The *Universal Declaration of Human Rights* (UDHR) (1948) therefore set out some basic entitlements that all of us could reasonably expect, irrespective of where we come from. What makes these rights so important is that they are designed to supersede all other rights, to genuinely act as what Dworkin (1984) refers to as *trumps*. These rights should over-ride (or under-write) all other rights, whether legal or otherwise. Nations enact laws every day, across the widest possible range of issues, and some of these laws act in a manner contrary to the human rights set out in the UDHR. Given their role as trumps, this should not happen, and when it does, those laws should be changed – at least in theory.

Second, human rights refer to the most basic safeguards and supports that can be expected within all human societies. Human rights begin as moral rights; that is, they begin as morally recognised claims, claims which may often not be safeguarded by law – as is the case with legal rights. However, just to reiterate an issue raised earlier, this does not mean that they are therefore *natural* rights; natural rights have a somewhat different lineage, and bring with them some complex philosophical baggage. But what they do have in common with natural rights is that they can exist independently of any frameworks of legal rights which may or may not surround them. There are many places on earth, indeed probably all of them (to varying degrees), where human rights – whether basic or otherwise – are most definitely *not* safeguarded by the law.

Finally, human rights chart the relationship between the state and its citizens. That is, human rights are not about civil disputes, or individual criminal behaviour, they are about how we can expect our government to act, and how we expect it to treat us. To put it more clearly:

If I am bashed in a pub, no doubt my right not to be assaulted has been violated, but we do not describe it as a violation of my human rights. However, if it is the Australian Security Agency that is responsible, then well we might. We may describe the abominable state of the health of Aboriginal people in Australia as a violation of their human rights because we feel the harm they suffer from is, in many ways, officially sanctioned . . . (Iverson, 2008, 203)

In summary then, human rights are powerful, comprehensive protections against the misconduct of nation-states. As we shall see, those protections extend beyond what we expect the state *not* to do – i.e. kill us, torture us, stop us speaking out – they are protections in the sense of the kind of help we can expect from the state – i.e. providing food, safe working conditions, and an education.

Regardless of the apparent clarity of the concept itself, human rights are not a straightforward matter; there is often disagreement about what they are founded upon, what rights should be covered by this term, how widely they can be applied, and how they might actually be enforced. The scope of human rights also seems to continue to be expanding, but in spite of these uncertainties, human rights continues to act as a fundamental moral anchor, and a touchstone, within the international community.

Arguably the most fundamental of all international human rights documents – the United Nation's *Universal Declaration of Human Rights (UDHR)* (1948) mentioned above – had its 70th anniversary in 2018. While the impact of this document has been enormous, recent commentators note that the optimism that came with its ratification is beginning to look somewhat ill-founded. As Hodal (2018) states, citing Nils Melzer, the United Nations Rapporteur on Torture:

The global erosion of human rights is just one crisis among many, said Melzer, from migration and the environment to financial instability, energy poverty and cyber security. Rather than provide solutions to these problems, however, world leaders are instead 'promoting regressive policies focused on national interests and decrying human rights as a threat to national sovereignty and security.'

Two points are of note here. The first is that these are strange political times, and the rise of populism and nationalism has raised some questions about the international acceptance of some human rights which, at one time, appeared to have been long behind us. The second is that the array of human rights detailed above speak to only a small section of such rights now in existence. As a way of understanding the ways in which those rights operate, Vasak (1977) set out a three-part system, based upon three generations of rights. These different generations link neatly back into debates over negative and positive rights outlined in the last section.

4.7.1 *Three Generations of Human Rights*

What are referred to as *1st generation rights* were the first set of human rights to be widely accepted. These are largely *civil and political rights*, and are primarily negative in nature – i.e. they concern the right to be 'left alone'. Not only were these the kind of human rights set out in the foundational documents of the American and French revolutions, they are also detailed in Articles 3–21 of the UDHR (1948). The articles begin with the right to life (Article 3), the right not to be enslaved (Article 4), the right not to be tortured (Article 5), and the right to be treated equally by the law. From there, this type of right was then further enshrined within the *International Covenant on Civil and Political Rights (ICCPR)* (1966). As stated previously, these are the kind of rights championed (to the exclusion of the rest) by libertarians.

The next set of human rights – *2nd generation rights* – have continued to emerge with greater force after the initial acceptance of 1st generation rights. These newer

human rights have often been referred to as *social justice rights*, in that they relate to social, cultural and economic issues. The underpinning logic here is that individuals have the right to a base level of equality within human societies. We all have a right not to starve to death if there's plenty of food; we all have a right to reasonable treatment at work, and a minimum standard of living; we all have a right to an education. Unlike 1st generation rights, these are positive rights – they place an obligation on others to act in certain ways. Issues concerning disability generally fall within this category. That is people with disabilities have a legitimate expectation to be treated equally, to have help when they need it, and be able to access the places everyone else can access.

The final set of human rights – *3rd generation rights* – are the most contentious. Like 2nd generation rights, these are also positive rights compelling actions in others, and are usually referred to as *collective rights*. Such rights cover areas such as the environment, the right to self-determination, and the right to the recognition of cultural heritage. In the era of global warming, various attempts to enforce collective rights on the environment (such as *The Kyoto Protocol* (2005), *The Copenhagen Accord* (2007), and *The Paris Agreement* (2015)), to compel governments to act as an issue of human rights, have continued to prove relatively unsuccessful.

Regardless of the hostility of some nations toward 2nd and 3rd generation rights (hello America), this isn't really the main problem with these United Nations human rights instruments. The main problem is that just because a country stands up at the United Nations and speaks in favour of the noble principles underpinning such rights, and then publicly ratifies the documents to much international applause, doesn't mean that those rights then undergo the active political process of becoming part of that country's domestic legislation (and then become civil rights). For example, just because Australia is a signatory to the *United Nation Convention on the Rights of the Child* (UNCRC) (1989) doesn't mean that it has implemented all of its elements (see Article 37: the prohibition against the arbitrary detainment of children, and the detainment of children with adults).

4.7.2 Human Rights and Disability

The evidence suggests, certainly in Australia, that domestic legislation pertaining to disability also falls equally short of its stated international obligations and intentions, as largely set out in the United Nation's *Convention on the Rights of Persons with Disabilities* (CRPD) (2006). This gap between international aspiration and domestic implementation with regards to disability is set out clearly by *People With Disability Australia* (PWDA), a national disability rights, advocacy and representative organisation. This group articulates the very significant number of ways in which Australia has failed to live up to its ideals, both directly, in terms of domestic legislation that does not meet its international obligations, and indirectly, in terms of the ongoing acceptance within society which still places a significant number of unnecessary obstacles in the way of disabled people's full participation in social and cultural life (PWDA, 2018).

For example, overt violations of our international obligations under the CRPD include Article 18, which relates to the right to liberty of movement and nationality. The Australian *Migration Act* (1958) remains exempt from the provisions of the *Disability Discrimination Act* (1992), and migrants to Australia are subject to health examinations prior to being granted residency, an examination which estimates how much any health issues may cost the country.

The health test means that migrant and refugees with disability are routinely refused entry to Australia as a result of an assessment of the potential health costs associated with their illness or disability. It also means that many families supporting people with disability make a difficult decision to leave behind a family member in order to build a life in Australia. (PWDA, 2018)

Not only does this practice contravene our international agreements, with all the implications this has for disabled people, it also *a-priori* positions migrants with disabilities as burdens-in-waiting, with no weight given to their potential contributions to the social, cultural and economic life of the country.

More indirect issues arise across a wide range of areas. Article 16 of the CRPD relates to the right to freedom from exploitation, violence and abuse, and yet Australians with disabilities are more likely to face abuse and neglect than are the non-disabled. This is particularly the case for those living in supported accommodation and those with cognitive impairments. Articles 12 and 13 relate to the right to equal recognition before the law and to equal access to justice, and yet disabled people are less likely to have acceptable physical and informational access to the machinery of justice, let alone appropriate protections under the law. Article 21 relates to the right to freedom of expression and access to information, and yet disabled people have more limited access to information, more limited access to support and advocacy service, and more limited access to educational opportunities. Finally, in the preamble to the CRPD, there is statement concerning the rights of Indigenous people with disabilities, and yet Indigenous Australians with disabilities often experience a lack of the most basic of human rights, including adequate shelter, healthcare and education.

As has been discussed before, deciding that certain moral rights ought to become global human rights, and then turning those human rights into civil rights, and particularly into mundane legal rights, is a long and precarious process. This particularly appears to be the case when it comes to turning the human rights of people with disabilities into practical and workable legal rights – i.e. the liberties, claims, powers and immunities that most of the rest of us take for granted.

4.8 Criticisms of 'Human Rights'

While it is clear that the notion of human rights has been instrumental in setting some minimum global expectations for the conduct of nation states (as articulated primarily within instruments such as those endorsed by the United Nations), not only have such rights struggled to become the universal standards that they were intended to

be, but also they are subject to no little criticism. This criticism concerns both the content of the rights, and perhaps more importantly, criticisms of the intellectual foundations of the very concept of human rights themselves, as they are widely understood.

First, as discussed above, there has been significant criticism of those rights that are generally classified as 2nd and 3rd generation rights, or more explicitly, all those rights which are not negative civil and political rights. America in particular has been very wary of enshrining any kind of right which imposes positive duties on nations, such as those associated with social justice rights, and collective rights – to the extent that the United States has yet to ratify even the *United Nation Convention on the Rights of the Child* (1989). Unfortunately, disability rights largely belong within this category.

Second, from the initial *Universal Declaration of Human Rights* in 1948, which set out a basic framework of minimum expectations, there are now over two dozen United Nations human rights conventions and declarations. These include, obviously, the *Convention on the Rights of Persons with Disabilities* (2006), however they also include instruments on torture, migrant rights, and enforced disappearances. While these are undoubtedly highly significant issues, which fully deserve a human rights focus, they do add to a crowding of the field such that claims over violations of human rights have become relatively commonplace. Anders Breivik, the Norwegian neo-Nazi mass murderer, who killed 77 people from the youth wing of the Norwegian Labour party, successfully claimed that his human rights had been violated due to periods of solitary confinement (in his three-room prison apartment, containing exercise equipment, a DVD and games console) and the fact that he had to eat microwave meals, which he stated was 'worse than waterboarding' (Henley, 2016).

Third, following on from the criticisms of 'natural rights' discussed earlier, there are arguments that point to the fact that human rights aren't really fixed, absolute, and unequivocally binding, in the manner they are generally portrayed in the United Nation's human rights declarations and conventions. That is, they are not objective independent facts, in some kind of 'realist' sense. Instead, like all rights (whether moral, legal, human, or civil) they emerge, and have their authority, within specific social and historical contexts. As Pagden (2003 172) correctly observes, rights are 'cultural artefacts masquerading as universal, immutable values'. While this might be regarded by some as a fatal flaw within the logic of human rights, in that it alienates those rights from their supposedly ontologically permanent seats in the moral universe, this need not necessarily be the case. After all, they have a genuine existence now, ingrained as they are within so many important political and legal documents, which, in the final analysis, is arguably what gives all rights legitimacy (Iverson, 2008).

Finally, human rights have not always been regarded as the neutral and self-evidently wonderful creations that western public discourse would have us believe. As was discussed in Chap. 3, abstract, transcendental ideas such as 'rights' can be seen as an inherently masculine way of approaching issues of ethics and social relations. A similar kind of criticism can be raised over the issues of human rights, in

that they are underpinned by a series of domain assumption based upon western, liberal understandings of individuality, justice and moral conduct.

As currently constituted and deployed, the human rights movement will ultimately fail because it is perceived as an alien ideology in non-Western societies. The movement does not deeply resonate in the cultural fabrics of non-Western states, except among hypocritical elites steeped in Western ideas. In order ultimately to prevail, the human rights movement must be moored in the cultures of all peoples. (Matua, 2002, 14).

Of course, ongoing questions remain concerning the degree to which the notion of global human rights can retain a coherent core meaning while still recognising the importance of social and cultural diversity.

4.9 Review

Discourses about 'rights' have had, and continue to have, a vital role to play, not only for those with disabilities, but also for all those who have been on the receiving end of the negative exercise of power. The largely Roman concept of 'rights' continues to constitute an important, indeed indispensable, foundation upon which large swathes of Western law, justice and ethics are built. In particular, the notion of human rights, articulated through international instruments such as those associated with the United Nations, have been incredibly important in setting out some fundamental expectations about how we all deserve to be treated.

One of the many reasons that rights are important is that at least they put specific issues on the table for action and discussion – even if a closer inspection of those issues/rights (such as those relating to disability and educational inclusion) lead to the conclusion that the government is not living up to its responsibilities. A right constitutes a baseline of entitlement and command that cannot simply be ignored or easily denied. And so, in many ways, it doesn't matter that moral rights or human rights are just useful fictions, and probably aren't somehow written into the fabric of existence; our lives are largely better for them anyhow, and they provide significant leverage for the creation and enforcement of legal rights. Indeed, the legal and civil rights that we have been allocated – some of the direct descendants of natural rights – are absolutely fundamental to the establishment of a 'good life'.

However, rights are not the magic bullet for eliminating social inequity, unfairness and exclusion. Any given social problem is likely to be awash with people who have conflicting rights. Disability and educational inclusion is a perfect example. As has been discussed earlier, students with disabilities and learning difficulties have a right to attend mainstream education; however, according to judges who have commented on specific legal cases, so-called 'normal' students have a right to an education uninterrupted by students with disabilities. At this point in the process, judges appear to weigh the merits of conflicting legal rights, most frequently using the consequentialist reasoning set out in Chap. 2 – and we know how well that generally goes for anyone in a minority. It would appear then that, before the advent

of disability rights, those with disabilities were simply removed from mainstream classroom . . . and now, after the advent of such rights, the same thing happens. The same battles will be fought out as before, and more often than not, the same people will probably win (because they too have rights).

Other factors also cut across the issue of rights. They are context-dependent creatures, and have not emerged from a social, cultural, political and historical vacuum – irrespective of how we might try and convince ourselves otherwise. In the final analysis, rights are currently understood and operationalised in very (neo)-liberal, western, masculine terms, and this ‘atomistic’ approach often does not translate well across all cultures, religions, and eras, and consequently they almost certainly don’t deserve the ‘objective, rational, self-evident’ label they are often allocated.

Hence, the question then has to be asked: are rights the best vehicle for prying open ethical issues within the field of inclusive education? Probably not; they are certainly an important component of any analysis of this domain, but they are not the solution to the problem, any more than the other frameworks covered so far are. So maybe a better answer lies with an approach already indicated by some important parts of rights discourse – i.e. the notion of ‘Justice’. The next chapter will address this possibility.

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Chapter 5

Justice, Fairness, Equity and the Inclusive School



Abstract The final conceptual framework for shaping an ethics of inclusion involves a greater emphasis upon the symbolically significant notion of ‘justice’. The focus here is not upon a determination of right and wrong, or upon the claims that citizens might reasonably make upon others, but rather upon how we can produce a fair society. Employing arguments from within the field of distributive justice, and mostly employing an underpinning Rawlsian foundation to the discussion, we can ask questions about what it would take to organise an equitable, fair and just society, particularly as it relates to the management of human difference. In addition to this, Nussbaum’s ideas about core social entitlements, and Fraser’s position about striving for equal economic, cultural and political representation and participation are addressed as part of the process for setting an ethical mandate for a genuinely inclusive schooling system. By way of rebuttal, the question is asked as to whether libertarian or utilitarian criticisms of Rawls have anything useful to tell us about better ways of creating a just society, and furthermore, whether the seemingly inherently political nature of ‘social justice’ dooms it to failure from the outset. The answer to those questions is probably that they do not.

Keywords Justice · Distributive justice · Libertarianism · Social justice · The veil of ignorance · Core social entitlements · Participatory parity

5.1 So, What Is ‘Justice’?

Even within the different areas already discussed in this book (such as formal ethics, right and wrong, determining the parameters of virtuous conduct, being caring, legal and moral rights, human rights, and so on), more often than not, the notion of justice is still lurking around just under the surface of the analysis. That is, there is something about ‘justice’ which underpins large swathes of the terrain of ethics. Sometimes this is overt, as within legal and political philosophy, but often it occurs covertly, as it does within mainstream ethical reasoning, where ‘good’ is often used interchangeably with ‘just’, as if they are cut from the same cloth. To the extent that this is true, ‘just’ also shares one of the same central problems as ‘good’: both are

burdened by a disconcerting and confusing degree of ambiguity. Justice is far from self-evident as a concept.

In 2018, the UK held the first ever Global Disability Summit, with the intention of highlighting the discrimination and stigma faced by the up to one billion people who have a disability. The specific objectives of the summit were to focus upon neglected areas of disability, to bring in new voices and approaches to broaden engagement, to mobilise new commitments on disability, and to showcase ‘best practice’ (International Disability Alliance, 2018). As part of the preamble to the summit, Theresa May, the UK’s Prime Minister at the time, stated a commitment to ‘transforming the lives of the world’s most vulnerable’. Penny Mordaunt, her International Development Secretary, stated that ‘Discrimination and stigma against disabled people is a global injustice – one that has been ignored for too long – and one that we need to fix urgently’ (Open Access Government, 2018). But what exactly is meant by ‘injustice’ here, and what is it the opposite of? Other than as a motherhood statement to express how badly disabled people are often treated, what would it then mean to treat disabled people in a just way? Perhaps not surprisingly, when you start to look closely, ‘justice’ can be a particularly slippery term. As you have seen with most of the other concepts in this book, justice too is plagued by philosophical dispute.

5.1.1 2500 Years of Disagreement

It all started off well enough. Plato was the first to be convinced he had outlined the crucial tenets of a completely objective understanding of justice. Within his system, justice is deemed to play the pivotal role of holding the disparate elements of any society together; it is the fundamental logic that generates and maintains social order, and as such, it is best understood as having a largely instrumental, as opposed to abstract or intrinsic, worth (Plato, 1974). His pupil, Aristotle, goes on to position justice as the process of making sure that everyone gets what they deserve in life, a practice contingent upon exactly what is being distributed, and to whom. As he states in his book *Politics*, justice concerns two factors: *things*, and the *people* to whom those things are given (Aristotle, 1999, 68). Or, to put it a simpler way, it is about deciding who gets what, and why. Importantly, Aristotle contends that these issues can only be properly addressed when we have found a satisfactory answer to the crucial underlying ‘virtue’ question of, ‘What is the best way to live?’ (as discussed at length in Chap. 3).

St Augustine, the early Christian theologian, shares many of these beliefs about justice. While it is also about ensuring that ‘each is given what belongs to each’, justice is positioned as both the cornerstone of the social order, and the foundational component of a virtuous person, upon which all other virtues are to be built – all as part of a love of God (Minch, 2011). St Thomas Aquinas, one of the key architects of early medieval Christian theology, sees things somewhat differently. He regards justice, at least initially, as an act of constant and perpetual will, a will which results in rendering to each according to their due. He then divides this into general justice

(essentially legal justice) and particular justice (such as commutative and distributive justice – more on which later) (Aquinas, 2014).

Hobbes, writing in the seventeenth century, is somewhat closer to Plato than to Aquinas. Like Plato, he also sees justice as a foundational element of social order, but instead ties it to the righteous power of an absolute monarch. 'Just' conduct involves obeying the laws of the community, and since those laws are given by the sovereign, if we all only do as we are told, we will, by definition, have a just society (Hobbes, 1994). Locke develops his theory of justice, one running somewhat counter to Hobbes' position (see Chap. 4), as part of the underlying logic of this theory of natural rights, and in particular, property rights. Indeed, Locke contends that justice is largely inconceivable without personal property, which can cover a range of different things, and where there is no security for personal property, there can be no justice (more on this later too) (Youkins, 2000).

Perhaps not surprisingly, given their many disagreements outlined in Chap. 2, Mill and Kant have very different ideas about the notion of justice. Following his underpinning utilitarian logic, Mill regards utility as the principal yardstick for justice. He states that 'justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class' (Mill, 1985, 259). So, for Mill, yes, justice is very important, but not in any essential way, rather only as it relates to calculations of the greater good. In contrast, Kant contends that the outcomes of any given ethical calculation are irrelevant to an assessment of their moral standing; justice requires a consideration of the absolute rightness or wrongness of an act, irrespective of the consequences. As Pomerleau (2013) notes, Kant's theory of justice fits neatly within his Categorical Imperative, wherein the rules of justice are universalisable, are designed to respect persons as intrinsically valuable (the Practical Imperative), and conform to the principle of autonomy.

And three hundred years later, like Hobbes, Foucault ties the notion of justice to political power, but in a more ambiguous way. He argues that 'justice' provides a vocabulary for legitimating existing forms of political organisation. However, it also provides a rationale to others who wish to challenge those same arrangements. According to Foucault:

Justice is an idea which in effect has been invented and put to work in different types of society as an instrument of certain political and economic power, or as a weapon against that power . . . the notion of justice itself functions within a society of classes as a claim made by the oppressed classes and as a justification for it. (Foucault & Chomsky, 1973: 138)

And these are not even all of the main players in shaping contemporary theories of justice, rather they are just some of the many philosophers who have had something interesting, and different, to say on the topic. Important contemporary writers such as Rawls, Nozick, Nussbaum and Fraser will be discussed in more detail later in the chapter.

According to MacIntyre (1988), it shouldn't come as a surprise that we can't pin down a single theoretical or operative definition of justice that would make sense to everyone, within all cultures, and in all eras. After all, our notion of justice, and even

the mechanisms we use to bring it into focus – our rationalities – are formed by our intellectual traditions and inheritances. This would include, at various times and in various places, the traditions of Aristotelianism, Augustinianism, the Scottish theories of Calvinism and Hume, and Thomism. As such, there is no fixed, stable and trans-historically valid version of justice that can be applied unproblematically in all circumstances, and with equal degrees of success. This belief is, he states, just an illusion associated with modern liberalism, and in particular with its most significant manifestation – ‘liberal individualism’.

When explaining MacIntyre’s ideas about justice, Williams (2014) uses the vivid metaphor of ‘justice as a pile of ruins’. He states that our current ideas of justice are simply bits and pieces of old buildings that, on closer examination, make no coherent sense. We may try to bring a single narrative to the rubble in front of us, but to no real avail. Indeed, the closer we look, the more we can see that the ruins aren’t even from a single building, but rather from any number of long-abandoned structures, half built on top of each other – a situation that dooms us to ‘endlessly inconclusive and conflicting arguments about questions of justice’ (Williams, 2014, 283).

5.1.2 Shaping Some Coherent Ideas About ‘Justice’

While we may not be able to easily point to a single workable conception here (any more than we were able to with ‘right and wrong’ in Chap. 2), sketching out some of the main elements of our current understandings of this pivotal idea is still a vitally important and worthwhile thing to do. This is certainly the case in relation to the issue of inclusive education, particularly given that other potential frameworks outlined in the previous chapters appear to have fallen somewhat short. Probably the most significant observation here is that two central understandings of justice have emerged from this 25 century long melange of often-conflicting ideas and arguments.

The first understanding is that if the field of ethics, in its most general sense, is taken to be a set of principles based upon moral values, then ‘justice’ is one of the most important of those principles. Indeed, one of the dominant approaches to justice is that it is a legal or ethical principle by which fairness is administered. The second understanding is that a sense of justice is one of the most crucial of human virtues. As discussed in Chap. 3, Plato delineated what he regarded to be the four most important virtues – wisdom, courage, temperance and justice – asserting that it is the virtue of justice which holds together all the other elements of his ideal society. Indeed, as will be discussed at greater length later in this chapter, Rawls (1971, 3–4) argues that justice is not just a personal virtue, it is also a civic one, famously stating that ‘justice is the first virtue of social institutions’.

So, according to this binary, justice is both a principle and a virtue. While accepting the validity of these two different understandings of justice, Sandel (2009) actually positions the main elements of this argument somewhat differently (although reaching essentially the same conclusion). He asks the question of whether

any society with an interest in justice should then promote this virtue among its citizens. Alternatively, should societies take a more impartial approach to the specific virtues possessed by its citizens, allowing them instead the freedom to choose their own ways to live? He notes that, as discussed earlier, Aristotle argues justice is about making sure people get what they deserve in life; however, prior to being able to do this, decisions have to be made about what we value and what we don't, about which virtues are to be lauded, and which are not. That is, Aristotle contends that you can't reach any real conclusions about justice, and the laws which support it, until you first figure out the central parameters of the best way to live – the 'good life'. In contrast to this, Sandel argues that more recent philosophers have tended to take a different approach, one which doesn't hinge upon virtue:

Modern political philosophers – from Immanuel Kant in the eighteenth century to John Rawls in the twentieth century – argue that the principles of justice that define our rights should not rest on any particular conception of virtue, or of the best way to live. Instead, a just society respects each person's freedom to choose his or her own conception of the good life.

So you might say that ancient theories of justice start with virtue, while modern theories start with freedom. (Sandel, 2009, 9)

So, though we have had two and a half thousand years of disparate views on justice, arguably then, one effective way of making sense of some of the differences has been to tie some to notions of virtue, and others to ethical principles. The question then arises as to whether, following Wittgenstein, there are perhaps a set of family resemblances common to our various understandings of justice, resemblances that can act as some kind of unifying framework. Miller (2017) proposes precisely this kind of model when he suggests that four core concepts are common to all uses of the notion of justice, or to put it another way, there are four necessary conditions for the use of the term 'justice' to be appropriate: that justice must involve individual claims, enforceable obligations, impartiality, and agency. Let's take these in turn.

First, Miller asserts that justice is always about how individuals (or categories of individuals) are treated. Appeals are made to 'justice' when conflicting claims are made by individuals as to what they are legitimately entitled, whether this be with regard to particular outcomes, opportunities, freedoms or resources. By way of example, we can return to the 2018 Global Disability Summit and the statement by the UK's International Development Secretary, Penny Mordant, that 'Discrimination and stigma against disabled people is a global injustice' (Open Access Government, 2018). People with disabilities often do not have access to the same opportunities or resources as those who do not yet have disabilities, and the argument here is that this is, according to Miller's definition, an issue of justice, since individuals with disabilities can make a legitimate claim regarding the discrimination they face on the basis of that disability.

Second, justice is not only about individual claims; those claims must be of the type that give rise to corresponding enforceable obligations. That is, justice involves the ability to *make* others give individuals their rightful due, and not just because it seems like a good idea, or because someone might think it's the right thing to do. Discriminating against people with disabilities is an injustice because, for the

most part, equal opportunity legislation exists which allows for the enforcement of those obligations. This is not to say that in the absence of any legislation those obligations would magically vanish, but rather that the issue revolves around the more complex notion of 'rightful' due.

Third, inherent to the notion of justice is an important sense of impartiality – the sense that if all other elements of the problem/issue are the same, then the outcome will necessarily be the same. Justice implies the possibility of a detachment, an objectivity and consistency of decision-making that ensures fair and uniform outcomes, irrespective of any otherwise irrelevant characteristics of the individual or group involved. Following on from this, discriminating against those with a disability can be regarded as a 'global injustice' because it involves what we now understand to be an essentially arbitrary decision to deprive some people of many of the rights and opportunities that most others take for granted, for reasons that don't actually matter.

Finally, justice requires the existence of an agent to whom an appeal can be made. That is, there can be nothing unjust about a state of affairs that is simply the result of chance, other than in a more abstract sense of a 'cosmic' injustice; to invoke any notion of justice, there must always be an adjudicator who has the legitimate right to preside over the process, and to whom appeals can be made. Take the somewhat left-field example of being marooned on a desert island: it may be a terrible injustice to be marooned by your fellow pirates for a crime you did not commit, but unfortunately it is nothing but a cosmic injustice to be marooned on that same island simply as a result of a shipwreck. Likewise, being born with an impairment or chronic illness may be regarded by some as a *cosmic* injustice, however it is the discrimination, that we will call ableism or, following Oliver (1990) *disablement*, often associated with this impairment or chronic illness that is the *actual* injustice, because an appeal can then be made to someone – i.e. the legal institutions of our government – who have the power to do something about it.

5.2 Different Types of Justice

Having attempted to trace out some of the most important common features of our various different theories of justice – so at least we can all just about agree on what it is we're talking about – the next step is to address the different ways in which justice is normally categorised. After all, is sending someone to jail for stealing really the same thing as ensuring fair and equitable practices in the workplace? Is participating in a meeting with the person who graffitied your fence, so that they can apologise, really the same thing as voting for a more progressive taxation system? Clearly not, although all involve notions of justice, however generalised, in one way or another.

While there is a significant amount of slippage in the use of these terms (for example, see various other notions of justice: commutative, interaction, substantive, and so on) there are now widely considered to be four central types of justice. They are retributive justice, restorative justice, procedural justice and distributive justice.

All of these have relevance to issues of disability and educational inclusion – particularly distributive justice – with the evidence suggesting that people with disabilities struggle for justice in each.

5.2.1 *Retributive Justice*

This represents one of the most familiar and widely-held understandings of the concept of justice: the idea that if you do something wrong, and you know the act is wrong, then one way or another, you need to pay for it. Arguably, this approach lies at the core of our criminal justice system. If someone steals from a local shop, then clearly the rights of the shop-owner have been infringed. The question is: how might this injustice be managed? To avoid getting into the moral quagmire of ‘stealing to feed their hungry children’, let’s assume a case of beer was stolen (thirsty children?). If the thief is apprehended immediately and the case returned to the shop, then the owner has suffered no loss, and the matter could arguably be considered closed. However, for most of us, this seems insufficient. Most of us have some kind of underlying intuition that there must be a price to pay for the attempted theft, some sort of tangible social retribution. We often add to this intuition a consequentialist logic that, though such punishment may be founded in a shared psychological propensity of revenge, it also serves the greater purpose of deterring others in society from trying to grab every case of beer they see, safe in the knowledge that, if they get caught, the worst that can happen is they have to give it back.

Though retributive justice seems fairly straight-forward in its logic, on closer scrutiny, it takes a number of different forms. Cottingham (1979) delineates nine different philosophical approaches to punishment, all of which he argues can be clustered together under the banner of retribution. For example, he discusses ‘Repayment Theory’ (from the Latin, *re+tribuo*, *to pay back*); i.e. people who steal cases of beer now need to pay some kind of debt to society. Alternatively, there is ‘Penalty Theory’. Following on from Kant (widely considered a retributivist) and his Categorical Imperative: would it be OK if everyone stole beer? No, so we have a rule against it, with an associated penalty for infractions. There is also ‘Desert Theory’. This comes directly from the Augustinian notion that justice is giving to each their due: you stole the beer; you are due a punishment. And so on.

While all this is very interesting, it does raise the question of what relevance this has for issues of disability and inclusion. By way of an answer, any number of different examples can be used here to illustrate that, like the other types of justice soon to be discussed, people with disabilities seem to come out on the losing end more frequently than those who are not disabled. The evidence suggests that within Western legal systems – and in particular, those parts which deal with criminal conduct – disability is a factor which significantly reduces the chances of receiving a just outcome. In Australia, people with disabilities are more vulnerable to crimes, crimes against people with disabilities are often regarded as less serious, they are less likely to be reported, and are less likely to be pursued by the police (Nixon, 2019).

Likewise, in the US, people with disabilities are more likely to be stopped, arrested and killed by the police – and the police are likely to face less consequences as a result.

The police are often the first responders to a person in crisis. In 2015, the Washington Post reported that 124 cases of officer shootings (27% of all officer shootings that year) involved a mental health crisis; in 36% of those cases, the officers were explicitly called to help the person get medical treatment, and shot them instead. (Oberholtzer, 2017)

5.2.2 *Restorative Justice*

A second type of justice, often regarded as a more humane and progressive alternative/addition to retributive justice, involves efforts to repair the harm between victim and offender. The intention here is to give the victim a sense of agency within the process, and make the offender take responsibility for their actions, thereby trying to ameliorate some of the harm they have caused.

Zehr (2014) argues that dominant models of criminal justice tend to ask the following questions: What laws have been broken? Who did it? What do they deserve? In contrast to this, restorative justice asks: Who has been hurt? What are their needs? Whose obligations are these? As such the emphasis shifts from the offenders getting what they deserve, to a concern with the needs of the victim and the offender taking responsibility for repairing harm. Sharpe (1998) summarises this by stating that effective restorative justice programs focus upon putting key decisions into the hands of those affected by the crime, making justice more or less a healing process, and setting the context for reducing the likelihood of future offences.

The general processes associated with this form of justice involve practices such as restorative inquiry and discussion, community engagement, mediation, apology and forgiveness. Under this new model of justice, the alcohol thief from the previous section perhaps no longer faces a retributive six months in juvie (juvenile incarceration) for their failed beer-heist, but rather is required to publicly reflect on the harm done to the shop owner and the community, apologise for their actions, understand their obligation in working towards correcting that harm, and maybe spend a few weekends washing the shop windows and getting to know the owner as person worthy of more respectful treatment. It should also be pointed out that restorative justice has found a place beyond the boundaries of the criminal justice system, and is now employed within contexts such as school and workplace bullying, cultural reconciliation, and recidivism reduction programs.

Importantly, the issue of disability also has a place in discussions about this form of justice. While disability increases the likelihood of being a victim of the types of problem normally dealt with by retributive justice, disability appears to have a negative impact for those seeking to employ restorative justice as a more progressive and acceptable way of addressing their own transgressions. Cunneen and Goldson (2015, 14) point out that a central requirement for an offender being deemed able to participate in the restorative justice process is for them to articulate effectively

‘reflective narrative accounts of their offending and their remorse’. This therefore becomes an excellent vehicle for those with the cultural and linguistic capital to engage in the process effectively – middle-class, English as a first language, more educated, and more confident. However, if you start to remove any of these characteristics, and the likelihood of satisfying the authorities, or the victims, that your engagement is genuine starts to decline dramatically: ‘low levels of confidence and self-esteem, educational deficits, learning and other disabilities, mental health issues and patterns of drug and alcohol misuse are all likely to impact negatively’ (Cunneen & Goldson, 2015, 14).

So, while restorative justice is a welcome addition to our pool of strategies for dealing with various types of legal, social and educational transgression, we should be aware that it is not of equal utility for every offender. The evidence would suggest that those with certain types of disability will more likely remain subject to good ol’ retributive justice, a system within which they are already disadvantaged.

5.2.3 *Procedural Justice*

The third of the four types of justice under discussion here is procedural justice. In its broadest sense, this can be understood in terms of the notion of ‘fair play’, the idea that citizens are to be subject to reasonable and impartial treatment within the various institutions that preside over their legal, professional, and educational lives. There is an assumption shared by most of us that if we are engaged in legal proceedings, or are trying to work our way through the decision-making processes of our local council, or are suffering through a formal dispute in our workplace, we will be given ‘due process’. With due process, the focus is not upon the substance of any decision – the outcome – but rather upon the fairness of the process that produces that outcome. In Australia, the term ‘procedural justice’ is often expressed instead as ‘procedural fairness’, or more frequently ‘natural justice’. Creyke et al. (2015) contend that procedural/natural justice is a fundamental element of good administration: it promotes better decision-making by ensuring all relevant information is considered, all issues are considered impartially, and the activities are all conducted in a diligent manner – all of which reinforces public confidence in the process.

One way of breaking down the notion of procedural justice has been to delineate four foundational aspects. Kunard and Moe (2015) state that the four pillars of successful procedural justice are fairness, transparency, impartiality and representation. Whether a process is deemed just is not solely about the outcome, but is also shaped by the fairness, consistency and respect shown within the proceedings. Likewise, there is an expectation that the central elements of the process, as well as the rationales underpinning the conclusions, will be visible to all the stakeholders. Crucial to the success of any institutional adjudication is also the belief that it will be conducted in an impartial and unbiased way; decisions are always to be based upon the evidence presented, and not on personal opinion, rumour or guesswork. Finally, stakeholders have the right to have their voices heard, to tell their side of the story,

and have their concerns taken into considerations. All of these components are necessary elements of an effective and comprehensive model of procedural justice.

Once again, the question now arises of the relationship between this form of justice and disability. A good example of this can involve the relatively frequent situation where those with a disability are discriminated against in the workplace. This can take a number of forms: people can be sacked because of a disability, or not hired in the first place; workplaces can fail to reasonably accommodate someone with a disability; a person with disabilities can be harassed at work, be discriminated against because of a past disability, or because others just *think* they are disabled (Heuer, 2011). In Australia, the statistics suggest that workplace discrimination is still a significant problem. Only 53% of Australians with a disability are employed, as opposed to 83% of the general, working-age population, putting Australia in the bottom third of OECD nations on this social indicator. Disability discrimination cases constitute the largest category of cases lodged with the Australian Human Rights Commission (AHRC), with mobility (40%), sight (15%), mental health (10%) and hearing (9%) being the leading categories. As Darcy and Taylor (2017) state: ‘in reading the summaries of the complaints to the AHRC, it is apparent that employers, co-workers and third-party organisations (e.g. insurance companies) directly or indirectly treat people unfairly, or, in the worst cases, display open hostility to Australians with a disability’.

As discussed in Chap. 4, while disability discrimination legislation has been a large step towards protecting the rights of people with disabilities – while providing broader support for our commitment to procedural justice – it still often fails to be fit for purpose. A recent case in New South Wales found that even though a disabled employee was treated in an ‘unfair and irrational’ manner by his employer, this did not constitute unlawful discrimination. The employee, who disclosed that he had Asperger’s Syndrome, successfully completed a physical examination for a job, including strength and flexibility tests. After working in the job for a number of weeks, during which time his line managers were happy with his performance, the general manager declined to give him the job – on the basis of the strength and flexibility test results showing some areas of ‘potential vulnerability’, even though the general manager was not a doctor. In spite of pointing to the irrationality of the decision, and the fact that its apparent arbitrariness undermined the existing medical testing protocol (as well as the status of the actual doctor), the tribunal could not directly tie the decision to the employee’s disability, and hence the case was dismissed (NSW Anti-discrimination Board, 2015).

The evidence suggests that, while comprehensive moves to enshrine and protect procedural justice are welcome and appropriate, people with disabilities again find themselves in a position where none of it works quite as well for them as it seems to do for everyone else. This perhaps isn’t surprising. As Morris (1991, 26–27) states:

We receive so many messages from the nondisabled world that we are not wanted, that we are considered less than human. For those with mobility or sensory disabilities, the very physical environment tells us we don’t belong. It tells us that we aren’t wanted in the places that nondisabled people spend their lives – their homes, their schools and colleges, their workshops ...

As discussed, procedural justice deals with the fairness of the mechanisms by which decisions are made: i.e. due process. The final type of justice to be addressed here concerns instead the *outcomes* of those processes (and of broader social, cultural and institutional practices), outcomes which speak to the equitable distribution of rights and resources. This final type of justice – *distributive justice* – will provide the focus for most of the remainder of this chapter, as it covers much of the terrain central to those interested in disability and educational inclusion. That is, distributive justice acts as an umbrella term, one which overlays issues of social and economic justice, as well as, importantly, discussions about the allocation of rights and resources within the field of education.

5.3 Distributive Justice

In 2016, one of Australia's most prestigious private schools, Scots College in Sydney, received \$7 million in government funding, in addition to its almost \$60 million in funding from fees and other sources (Singhal & Gladstone, 2018). The school is now building a five story \$29 million school library, one resembling a Scottish castle, replete with a rooftop terrace overlooking Sydney harbour, a turret and bay windows – all in the 'Scottish Baronial architectural style' – and which includes a grand hall, a 100 seat theatre, and a dining area for events (Gorrey, 2019). The new library will replace the existing four-story library built in 1988.

At virtually the same time as Scots College received its \$7 million, a senate inquiry was told that teachers could no longer do their jobs properly with regards to educating children with disabilities without a significant increase in funding (Davey, 2015). A lack of resources, human and material, as well as a lack of general teacher expertise, meant that some children were having to be tied to chairs to keep them under control, or even locked away in seclusion. In 2016, of the 470,000 Australian school age students receiving some kind of disability support, more than half are being forced to attend school without any further government financial assistance at all to help them with their education (Hermatt, 2017).

This disparity between private and state school wealth and resourcing is particularly pertinent when discussing issues of disability. The statistics suggest that 45% of those with a disability are living either near or below the poverty line; this is more than twice the OECD average of 22% (ABS, 2015). One obvious observation to be made here is that while Scots college most likely has a number of disabled students of its own, who we suggest are not within the 45% of people with disabilities in Australia living below the poverty line – in spite of many private schools having a relatively long and notorious history of discriminating against enrolling students with a disability (Kerin, 1999; Guest, 2010; Cook, 2017) – in Australia, the financial cost of supporting the education of the greater majority of children with disabilities falls disproportionately upon the state and its schooling system.

The issues raised above speak directly to the most significant of the four types of justice delineated here – distributive justice – and certainly the most significant as it

relates to issues of disability and educational inclusion. Distributive justice refers to a set of concerns over how we choose to distribute goods, rights, duties and privileges among our citizens. Importantly, there is not a single solution to this problem; indeed, trying to find an acceptable collective approach to distributive justice is a problem that has continued at the heart of social and political philosophy for nearly 2500 years. Should everyone get the same goods and privileges? Should they be allocated on merit? Should they be allocated according to need? Should you get what you deserve? Should you keep whatever you've got, as long as you don't break the law? Should the government stay out of it, and just let us all fight it out? All of these philosophical positions have their supporters (even the last one), and arguably some work better than others for those with an interest in, and a commitment to, issues of disability.

Lamont and Favor (2017) outline a range of different theories of distributive justice. Only three will be addressed in detail here: the desert-based approach, the libertarian approach, and the difference/fairness approach. The four other approaches outlined by Lamont and Favor – strict egalitarianism, luck egalitarianism, utilitarianism and feminist approaches – will be discussed, but only very briefly.

Before addressing each of these in turn, it is worth noting that the authors conclude their analysis with an interesting and valid point about the criteria for ultimately deciding which of the theories holds the most water:

If it is uncertain or indeterminate how a particular distributive principle might in practice apply to the ordering of real societies, then this principle is not yet a serious candidate for our consideration. This is also true of principles whose implementation is practically impossible given the institutional, psychological, informational, administrative, or technical constraints of a society. Distributive justice is not an area where we can say an idea is good in theory but not in practice. If it is not good in practice, then it is not good in theory. (Lamont & Favor, 2017)

Within the context of this book, this test of 'Is it good in theory but not in practice?' can be extended to the question of 'And moreover, does this approach work for those with a disability?'.

5.3.1 Four Other Approaches to Distributive Justice – Briefly

The four theories touched upon here – strict egalitarianism, luck egalitarianism, utilitarianism and feminist approaches – are not necessarily of less intellectual or practical value than the three which will be discussed in detail. However, there is often significant overlap between some aspects of those positions and ideas which have been addressed, and challenged, earlier in the book. Brevity is therefore justified. Taking these in turn:

First, strict egalitarianism is a relatively straight forward approach to how we should organise the distribution of goods and privileges throughout society. To put it simply, every person should be given the same amount of stuff, and every person should be given the same access to benefits. Questions do arise over how this

equality will be measured, and how such radical equality might be maintained over time. In light of the ‘is it good in theory but not in practice’ test, various attempts at strict egalitarianism have not always ended well (see Pol Pot).

Second, luck egalitarianism is a theory linked to both notions of equality of opportunity, and Rawls’ fairness approach which will be discussed in significant detail later. The central proposition here is that equality of opportunity only goes so far in ensuring the equitable distribution of goods and benefits, since some are lucky enough to have acquired the ‘right’ parents, or be a member of the ‘right’ ethnic group, or be born with a prodigious amount of athletic talent, which can then be turned into huge wads of cash. Writers like Dworkin (2000) discuss the possibility of somehow compensating citizens who lack these endowments. Quite what this might mean has never really been worked out to anyone’s satisfaction.

Third, utilitarianism has been discussed at considerable length in Chap. 2, and doesn’t really need to be revisited to any great extent here. This approach suggests that the welfare of the majority should provide the driving rationale for deciding upon how goods and benefits should be distributed. While this sounds admirable, and has some strengths as an ethical foundation, its weaknesses more than swamp those strengths, with the evidence suggesting that a utilitarian moral universe can be an unpleasant place for anyone not in the majority – such as people with disabilities.

Finally, feminist approaches have also been discussed in detail in Chap. 3, when addressing Care Ethics. This position rightly points out that the liberal logic driving many of the debates over justice is already underpinned by a range of domain assumptions that neither reflect a gender-neutral understanding of the rational free individual, nor speak to differences in the practical lived experiences of women. These criticisms offer a thoughtful challenge to the status of ‘theories of justice’ as abstract, objective conceptual entities in their own right.

5.3.2 *Desert-Based Distributive Justice*

The first theory of distributive justice to be discussed in more detail concerns the notion of ‘just desert’, and is most generally associated with John Locke. The simplest way of understanding this position is to regard it as standing in direct opposition to strict egalitarianism. Whereas that position argues that the most ethically defensible approach to distributing goods and benefits is to ensure that everyone gets the same, desert-based approaches contend instead that everyone should get what they deserve. After all, if I’m a good person and you’re a bad person, why should you get the same as me? If I go to work early and make things, and you sit on your PlayStation all day, why should you get the same as me? If I do useful stuff, and you do useless stuff, why should you get the same as me?

All of these questions are premised upon the same logic: that you should get what you deserve . . . and I deserve more than you. However, while the questions may lead to roughly the same place, each has a somewhat different underlying set of assumptions that are worth briefly expanding upon. Unsurprisingly, the idea that the lion’s

share of life's benefits belongs to the best people, to the most virtuous, originates with Aristotle. This extends beyond the economic, to issues of augmented social and political power. After all, Aristotle asserted, who better to rule than those who have demonstrated they have the character to use that power wisely. We have long looked at our political leaders – Abraham Lincoln, Winston Churchill, Nelson Mandela, Mahatma Gandhi – and felt that their power was entirely appropriate to their strength and goodness of character. Today's presidents and prime ministers? Perhaps not so much ...

In contrast to this, others have argued that it is not your character that matters – your virtue – but rather how much you contribute that determines how much you deserve. This position is most frequently associated with the ideas of John Locke, as expounded in his *Two treatise on government*, published in 1689. In this text he contends that when people take objects in nature and combine them with their labour, this then becomes their property (with the important proviso that this doesn't utterly ruin it for everyone else – i.e. that there be 'enough and as good left in common'). The general logic here is that if people want to put the work in to turn 'natural stuff' into 'their stuff', then those who do the work, deserve the reward.

While still following on from Locke's foundational argument, more recent versions have traced out differences between what kind of work deserves reward. Is it to be greater effort, or greater cost to the worker, or is it the perceived value of that labour? Riley (1989) adopts the latter position, arguing that it is up to the market to decide what labour is of value, and what is not, and hence how rewards are to be distributed. This is more as a matter of simple practicality than philosophical and ethical reflection: 'Economic freedom is a measure of general expediency rather than justice and moral right' (Riley, 1989, 133). By way of summarising recent thought in the area:

According to the contemporary desert theorist, people freely apply their abilities and talents, in varying degrees, to socially productive work. People come to deserve varying levels of income by providing goods and services desired by others ... Distributive systems are just insofar as they distribute incomes according to different levels earned or deserved by the individuals in society for their productive labors, efforts and contributions. (Lamont & Favor, 2017).

This position has been subject to significant criticism. The first, and most general, criticism is that, irrespective of how hard we work or how much we deserve better, we often have very limited control over our economic destinies. As the luck egalitarians point out, if you are unlucky enough to choose your parents poorly, or your first language, or your sex, or the colour of your skin, or the country you are born in, in terms of the likelihood of achieving success, it will often not matter how hard you work. The cards you are initially dealt will have all-but determined the trajectory of your life. Desert has little to do with it.

A second criticism pertains directly to the issue of disability. Locke wrote about property being the direct outcome of combining nature with human labour. The more you work, the more property you make – and it is perfectly right that this should form the basis of the distribution of goods. But too bad though if, as a result of the lottery of life, you have an impairment and as a consequence you are disabled. What if you

are therefore physically or cognitively unable to work to the same degree as others, if at all? How are you then supposed to acquire any reasonable share of property? Clearly then, following Locke's logic, you do not deserve access to, or ownership of, the wide range of goods and services that your healthy and hardworking neighbours enjoy.

Surely, by almost any measure, this is an ethically unacceptable position to adopt. In the article of economic value and desert mentioned above, Riley (1989, 148) quietly notes that the issue of disability does appear to put a huge hole in the viability of any desert-based theory of distributive justice: 'Evidently, property rights grounded on desert do not apply to anyone who is incapable of productive labor. Another secondary principle of justice is required . . .'

So, if 'desert' has significant shortcomings as a primary rationale for distributive justice, particularly as it relates to disability, how else might we address this problem? An alternative 'libertarian' approach has been proposed which shifts the focus from the configuration of outcomes of any distribution, to the rules which govern the ownership and transfer of property.

5.3.3 *Libertarian Distributive Justice – Robert Nozick (1938–2002)*

Libertarianism is a political philosophy, one normally understood as representing the last word in 'hands-off' government. Much beloved by the American political right, libertarianism supports the notion that government should be as small as possible; the state should not interfere in the lives of its citizens unless it absolutely has to, and even then, it should think twice. Operating at the opposite end of the political spectrum to socialism (which generally supports state intervention, social safety nets, progressive taxation systems, and state ownership of essential services), libertarianism supports individual freedom, private ownership of almost everything, and the state minding its own damn business (except if it has to save banks or other large corporations in the inevitable times global financial crises).

High priest of this philosophical position is Robert Nozick, who wrote the highly influential book, *Anarchy, state and utopia* (1974). This text remains the touchstone for those who believe that true justice is only possible when individual freedom necessarily and clearly trumps the rights of the state.

Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state? . . . Our main conclusions about the state are that the minimal state, limited to narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. (Nozick, 1974, ix)

When writers like Nozick talk about the notion of ‘individual freedom’, it is meant in the strongest possible terms. For example, they would contend that no-one has the right to tell anyone else what they can and can’t do with their body; this is their own property. If they wish to sell one of their kidneys to someone else, then that is up to them and not the government. Even further down the same logical track, if they wish to sell themselves into slavery, that’s nobody’s business but theirs either. Likewise, why should they be forced by the state to help anyone else if they don’t want to. Their wealth is their own, if legitimately acquired, and to require them to pay income tax to fund social projects – such as helping people with disabilities for instance – is nothing but theft. If they want to help the poor, the homeless, or people with disabilities, they’ll do it themselves. The state has no right to their property; or to put it another way, their rights as an individual outweigh any other kinds of right.

Nozick’s position, once founded upon the inviolability of individual rights, then addresses how property can legitimately be owned and exchanged. His rules are very simple:

- 1) If you acquire something fairly, it’s yours;
- 2) if you transfer ownership to someone else fairly, it’s theirs;
- 3) No-one else can have anything, except via 1) and 2).

And that’s pretty much it. According to libertarians, we are all little islands, surrounded by a high wall of impenetrable rights. Our stuff is our own, and no-one – particularly not the government – can make us do anything with it against our will, even if it is in our best interests. This includes forcing us to get inoculated, or even educated, forcing us to wear seatbelts or motorcycle helmets, forcing us give up our extensive collection of machine guns, or forcing us to pay taxes – even if this goes towards ‘good causes’, as we are under no moral obligation to share what we have with anyone else. One of the central points here is that libertarians are not really concerned with what Nozick calls ‘patterns of distribution’ – who has how much, or by what criteria this should be decided. Libertarians are instead concerned with the protection of individual rights, rights by which, as they see it, ‘true’ justice is guaranteed.

Three main criticisms are usually directed at this approach. First, huge disparities of wealth are of no concern to libertarians. Whereas almost all the other approaches to distributive justice fret about who deserves what, about whether it’s acceptable for some to be affluent and not others, and about why some might deserve help and others might not, libertarians are solely concerned with the legitimacy of people keeping what they already have. If a few individuals are phenomenally rich while most others are grindingly poor, then this is not a significant ethical concern – just as long as the rules of ownership and exchange are deemed to have been followed appropriately. Perhaps it is not surprising that this political philosophy has its largest following in a country widely regarded as home to laissez-faire capitalism – the USA. Many other countries regard such vast disparities in wealth with something approaching distaste, and consider these disparities to be the very reason why debates over distributive justice occur in the first place.

Second, there are concerns over the degree to which you have the right to own your own body, given some of the implications that go along with this. As stated above, libertarians generally believe you have the right to sell a kidney, if you wish (even both of them). However, such exchanges are never conducted in an economic vacuum; if I have limitless resources, and you have nothing except a very hungry family and a pair of functioning kidneys, then in reality this is closer to financial extortion than any kind of fair and genuinely voluntary trade. And do we want to live in a society where the rich can purchase the body parts of the poor? As Sandel (2012) rightly notes, surely there are moral limits to the market. Not for libertarians.

Third is the issue of reparation. Nozick rightly notes that not all property has been acquired fairly, and, given his ‘three rules of property ownership and exchange’, that some form of reparation would need to be arranged to compensate for any initial injustice. But how would this work? Restating Lamont and Favor’s (2017) assertion that if it is not good in practice, then it is not good in theory, then without a functioning model of reparation, libertarianism is fatally flawed as a theory of distributive justice. Take the American economy for instance. While it is possible to acquire large amounts of real estate, lease it, sell it, and make huge amounts of money from it, almost all of this real estate was taken from First Nations Americans in the first place, for little or no valid compensation. Before libertarians can talk about the moral irrelevance of huge disparities in wealth, by their own account they would need to pay all their historical debts – incalculable and unknowable in their number, vast in their extent.

To conclude, the first of these criticisms – the acceptability of disparities in wealth and the immorality of taxation – speaks most directly to the issue of disability. Under this model of distributive justice, the state (or what’s left of it under its ‘no-tax’ approach to governance) would be under no responsibility to provide support for those groups who may need it the most, such as people with disabilities. All financial help then, if any existed at all, would have to come in the form of voluntary philanthropy. It almost goes without saying that this would be even less acceptable as a philosophy than the desert-based approaches discussed earlier.

The last of the three major approaches can be traced to the ideas of the American philosopher John Rawls (1921–2002), and having pointed to such significant flaws in the previous models, it is perhaps unsurprising that this is the dominant model within contemporary theories of justice. Consequently, it deserves much closer analysis.

5.4 Justice as Fairness – John Rawls (1921–2002)

In spite of their vast intellectual differences, John Rawls and Robert Nozick were contemporaries, colleagues at Harvard, and friends. Rawls published his seminal text *A theory of justice* in 1971, and Nozick completed his *Anarchy, state and utopia* three years later, partially as a response to Rawls’ book. Each came to occupy a canonical position within the Western political landscape – Rawls for the liberal left,

Nozick for the conservative hard right. In many ways, nothing much has changed; if anything, the positions have become more entrenched. Both texts have been subject to significant criticisms, although Rawls' ideas have arguably survived the process more unscathed (Nozick's supporters have never really managed to provide a satisfactory answer over the issue of just acquisition/reparation), and now probably provides the intellectual foundations for the dominant position on distributive justice, and has done for nearly 50 years. But what are those foundations, and how does this all apply to issues of disability?

5.4.1 *Two Principles of Justice*

In attempting to construct a comprehensive theory of justice, Rawls is most frequently associated with the notion of 'fairness'. This is not to say that he has no interest in issues of rights and liberties, the driving rationale behind all of Nozick's work – far from it. However, as we shall see, he tempers this with a range of other concerns, such as equality of opportunity and the welfare of the worst off in society. Rawls proposes two foundational principles of justice, the second in two parts. The principles are placed in order of importance, and each is given priority over the ones below:

- 1) Each person is to have an equal right to the most basic liberty compatible with a similar liberty for others;
- 2) Social and economic inequalities are to be arranged so that they are both:
 - a) attached to positions and offices open to all under equal conditions of fair equal opportunity, and
 - b) to the greatest benefit of the least advantaged.

The first principle – *equal liberty* – guarantees that your basic freedoms are in no way determined by who or what you are: poor, landless, women, all races and ethnicities, people with disabilities and the downtrodden – all are to be given the same fundamental freedoms. Also, no-one gets any freedoms that rise to a level where they detract from the freedoms of others. The basic liberties Rawls is referring to here include freedom of speech, the right to vote, freedom from arbitrary arrest, liberty of conscience, the right to hold property, and so on. Importantly, while this is not really a principle of distributive justice, it is positioned in first place, as it regulates the issues covered by the subsequent (two-part) principle.

The second principle (part a) – *fair opportunity* – argues that there must be equal chances for everyone when it comes to getting the good jobs and positions of advantage within society. This is subordinate to the 'equal liberty' principle – i.e. we don't dispose of our most important rights and liberties just for the sake of equality of opportunity – but it is still of fundamental importance for the shaping of a just society. Rawls is not a strict egalitarian, as discussed earlier, in that he sees advantages in some differentiation between statuses and incomes for disparate social position, as long as those positions are assigned fairly. For example, it can be argued

that paying some highly qualified teachers more to teach in remote areas has a range of broader benefits for the community, in that these kinds of incentives can ensure that otherwise-disadvantaged children get access to a quality education. Likewise, paying surgeons more than bartenders is both a remuneration for years of extra study, but more importantly, it reflects the greater benefits we all gain from having access to successful kidney transplants, as opposed to competently made margaritas.

This raises a significant point for the second principle (part b) – *the difference principle* (which regulates inequalities in wealth and income). Rawls argues that where we have social and economic inequities, we allow those to the extent that overall, they benefit the least well-off. The argument here is that an entirely level playing field is not necessarily the best way forward, socially or economically; some differences can have benefits from the bottom up. Crucially though, we don't pay rural teachers or renal surgeons more simply because it's good for them and they like it, or because Rawls thinks that unfettered capitalism is a good thing, we do it because (and to the extent that) it can be of great benefit to the least advantaged. Once again, Rawls' lexically prioritises *equal liberty* over *fair opportunity*, and *equal liberty* and *fair opportunity* over the *difference principle*.

The question now is, having figured out some governing principles of justice, how might we actually begin the process of organising a society based upon these principles? What on earth would that 'just' society look like? It's hard enough agreeing on how much taxes each of us should pay, or how we should fund our schools, or what our educational priorities should be, without trying to agree on the *really* hard stuff. After all, we generally have too many vested interests to agree on much at all. In any given randomly-selected group of 100 people, there'll probably be men and women, ethnicities galore, Christians, Muslims, atheists, the poor and rich, left wing and right wing, the disabled, vegetarians, the elderly, children, bank robbers and Manchester United supporters. Each of these will be arguing from their own perspectives, in their own interests, and with their own often largely unrecognised domain assumptions. Agreement on how to shape a just society appear highly unlikely. However, Rawls proposed a hypothetical thought experiment:

5.4.2 *The Veil of Ignorance*

Rawls asks the question, what kind of rules and structure for a society would people agree to if they had no idea what kind of role they were eventually going to occupy in that society? It's easy to think a particular social arrangement is just if you are one of those who, directly or indirectly, benefits from that arrangement. For example, the Indian caste system probably looks perfectly fair from the perspective of someone who already knows they have been born a Brahmin; this opinion is unlikely to be shared by those who have been born a Dalit (Untouchable). But what if you didn't know what you were going to be, Brahmin or Dalit? What kind of social arrangements would you agree to then?

Rawls proposes the situation where each citizen is taken back to a circumstance of fundamental equality within a hypothetical contract negotiation – ‘the original position’. From this position, everyone would share the same basic status as free, equal and autonomous citizens, but entirely unaware of their own existing personal characteristics, attributes, biases, allegiances, and status. Rawls argues that from behind this ‘veil of ignorance’, citizens would then make genuinely reasoned and objective decisions about what kind of society would be best for all of us.

Take the hundred citizens described earlier. If they were placed behind the veil of ignorance, unaware of their existing status, religion, age, political preference, physical capability, or footballing affiliation, arguably it would be highly irrational for any of them to negotiate in favour of system that prioritised any one over the other. After all, would anyone really argue in favour of an Indian-style caste system, when it may well turn out that, when the veil of ignorance was removed, they were actually a Dalit? Likewise, would anyone argue in favour of a society where women were to be deprived of many basic civil liberties men take for granted? If so, they then would have a 50% chance of shooting themselves in the foot.

One of the driving rationales throughout this process, as evidenced above, is called the ‘maximin’ rule. The logic here is that given any range of alternatives available to citizens charged with producing a just society, the choices most likely to be made will be those that lessen the impact of the worst-case scenarios. Disability is probably an appropriate example here. From a range of possible alternatives, our panel of ‘veiled’ citizens would be highly unlikely to choose (by way of a distribution of rights and resources) any social structure which starved people with disabilities of the assistance they often require, marginalised them within educational institutions, extensively restricted their employment opportunities, and subjected them to significant social stigma – just in case it ended up describing the circumstances of their own lives. More likely, the chosen structure would ensure that they enjoy a life every bit as valid, as educated, as protected, and as fulfilling as everyone else. If only.

5.4.3 Some Strengths and Weaknesses

The main strengths of the position are fairly self-evident. It promises a mental mechanism – however hypothetical – for establishing the parameters of a society which many of us would intuitively recognise as being ‘just’. The veil of ignorance, combined with the ‘maximin’ premise, goes some way to ensuring against the worst excesses of inequity, in all their potential forms – economic, religious, social, cultural, sexual ... and potentially those concerning disability. This is quite an achievement for any theory of justice.

The second self-evident strength of the position is the damage it does to its main rivals. When each is subjected to scrutiny of the ‘original position/veil of ignorance’ thought experiment, they all struggle to pass the test. Rawls (1971, 158) explicitly criticises utilitarianism, noting that the position ‘may allow for slavery and serfdom,

and for other infractions of liberty. Whether these institutions are justified is made to depend upon whether actuarial calculations show that they yield a higher balance of happiness'. So, who then, in their right mind, would support a social system that included slavery, if they were unsure whether or not they were going to be one of the slaves? Libertarianism (particularly the American version, with its acceptance of vast disparities in wealth) would be great, but only if you can be certain that you will be one of the few rich and privileged, and not, as is infinitely more likely, one of the many very, very poor and underprivileged – which you can't – so who on earth would vote for that either? Finally, Desert theory fares little better. As has already been discussed, irrespective of how hard we work, we often have only limited control over how well we do in life, in that to a very large extent, your personal demographics are often your destiny. Once again, too bad if, when the veil of ignorance is removed, you aren't in an advantageous social category, or you're disabled. You probably won't 'deserve' very much.

The criticisms of Rawls' position are largely predictable, and whether or not they are accepted is generally based upon the philosophical starting point of the critic. Utilitarians have criticised Rawls' position because his approach does not increase overall utility, or because they already consider it to be utilitarianism in disguise (Rogers, 2004; Fremantle, 2017). Libertarians have criticised Rawls because his approach does not offer sufficient protection for important individual liberties (Nozick, 1974 – of course). Desert theorists have criticised Rawls because he does not give sufficient weighting to personal effort and talent (Zuckert, 1981).

Some further, separate, criticisms may perhaps have more mileage. Rawls assumes that from a neutral contract negotiating starting-point (the original position) and from behind the veil of ignorance, citizens would make uniformly rational decisions about how to structure a just society. Things may not actually be this straightforward; after all, it may be the case that, through perfectly clear and defensible reasoning, different citizens can come up with different conclusions about the best way to structure a just society. For example, there is no necessary guarantee that the 'maximin' rule would be the only way forward for distributing primary goods; it could be that some version of a weighted average might be more appealing (having ruled out utilitarian justifications for infringements of basic rights). Also, there is the hint of a circularity of argument in some of Rawls' logic, in that he requires the citizens to have some sort of pre-existing psychological sense of justice ('reasonableness') – above and beyond the ability to be rational – in order to engage in the process of shaping a just society (Miller, 1999). While this may seem a trivial point, it could be that the way Rawls assumes the process will work already assumes part of this preferred outcome.

5.4.4 Rawls, Nussbaum and Disability

As an initial analysis, and as has been described here extensively, Rawls' approach to justice seems to offer unequivocal benefits for people with disabilities. It would

seem logical that under the veil of ignorance, rational citizens would obviously seek to construct a society that made sure that people with disabilities were included as full and functional members wherever possible, well-resourced and supported. This may well be the case, but upon closer inspection, the full implications of the issue of disability run far deeper, and not just for Rawls, but for all liberal theories of governance.

Although Rawls' theories seem to be a simple thought experiment about how, under ideal conditions, we might all choose to live, it is still premised upon a range of assumptions based in contract theory, assumptions traceable back to the seminal texts of Hobbes, Locke and Rousseau. After all, the citizens placed in the original position behind the veil of ignorance are essentially engaged in a negotiation for the creation of a mutually-acceptable contract. The presupposition here is that these citizens are of equal standing, fully rational and self-representing – as has always been the domain assumption within liberal theory (see Chap. 4). However, as writers on gender and race have long noted, not everyone fits this idealised model:

Rawls emphasised homogenous reciprocity. Commentators concerned about justice for women and for racial minorities have insisted over the past quarter of a century that social contract theory incorporating this feature is flawed. The thrust of their arguments is that the social contract model places such outliers, either individually or collectively as group members, beyond the reach of equal justice.

A further application of this 'outlier problem' charges social contract theory with standing between people with disabilities and justice. (Silvers & Stein, 2007, 1619)

If this is accepted as accurate, then an alternate model is needed, or at least an appropriate modification to Rawls' approach. One conceptual candidate for this can be found in 'capability theory' offered by Martha Nussbaum (2006). While stating that Rawls 'delivers answers that are basically right', she nuances his theory to make sure that the needs of people with disabilities and those without disabilities are considered of equal importance. Nussbaum notes that there are significant differences between being the *subject* of justice (one of the group who chooses the parameters of a just society) and being the *object* of justice (one of those who then benefit from those chosen parameters). One important difference here is that social contract thinkers have always founded their argument on the assumption that the framers of the contract are the same group of people for whom the principles are being framed; this is obviously not the case in this instance. A second difference, of course, is that the latter group is almost entirely dependent upon the former. So, what can be done here?

While staying within the same overall speculative terrain as Rawls, in contrast to his primary focus on the *procedure* of structuring a just society, Nussbaum is more interested in the *outcomes* that define that society. She argues that just social systems have an obligation to provide a minimum set of 'core social entitlements', regardless of status, ability or circumstance (Nussbaum, 2006, 75). Without going into too much detail, the ten capabilities she delineates are: life, bodily health, bodily integrity, senses imagination and thought, emotion, practical reason, affiliation, other species, play, and control over environment. The argument here is that genuinely 'just' states will provide the necessary support and resources to elevate

all citizens, irrespective of their physical and mental capacities, irrespective of their disabilities, towards appropriate threshold levels for all of these capabilities. As Nussbaum (2006, 167) states: ‘if people are below the threshold on any one of the capabilities, that is a failure of basic justice’. In the light of these arguments, it should be noted that Nussbaum is not attempting to negate Rawls’ central arguments, but rather to nuance them in ways that provide a greater degree of justice for a wider range of citizens.

By way of summary here, all these criticisms aside (or even including these criticisms), Rawls’ ideas arguably constitute the most substantial and convincing contribution to debates over justice in the modern era. The notion of ‘justice as fairness’ has now become axiomatic to the ways in which the entire field is approached and operationalised; like it or not, anyone discussing distributive justice has to deal with Rawls. Having done just that, we are now left with two main questions: first, how does this all now tie into the pivotal high-profile public concept of ‘social justice’? and second, ‘what does all of this have to say about issues of disability and inclusive education?’.

5.5 Social Justice

The 20th of February has been declared by the United Nations as World Day of Social Justice. This observance began in 2008 at the behest of the International Labour Organisation (ILO), a United Nations agency charged with promoting social justice through the setting of international labour standards. The purpose of the day is to reinforce a global understanding of the importance of social justice as a foundational principle for peaceful and prosperous co-existence, both among individuals and among nations. As the United Nations’ publicity for the day states, ‘We advance social justice when we remove barriers that people face because of gender, age, race, ethnicity, religion, culture or disability’ (UN, 2019).

And this is by no means the only mention of social justice from the United Nations – very far from it. The notion of social justice appears to be one of the driving rationales for how they see themselves as a global organisation. That is, the United Nations not only understands its role as overseeing world-wide legal relationships, providing a forum to voice national grievances, and constituting the first line of resistance against armed conflict, it also sees itself as the home of global justice. Importantly, as the United Nations has stated, it makes ‘no explicit distinction between international justice, or justice among nations, and social justice, or justice among peoples’ (UN, 2006, 11).

‘Social justice’ is most frequently understood as a political doctrine based upon equality, fairness and human dignity. While it is often used interchangeably with the term ‘distributive justice’ already discussed at length, its common usage generally has much broader application, is less philosophically technical, but is significantly more politically charged. From a historical and philosophical perspective, concerns over ‘social justice’ are relatively new. Virtually no philosophers prior to the

mid-nineteenth century worried themselves about the distribution of economic or social injustice, rather this is a concern that has accelerated, such that by the mid-twentieth century:

the concept of social justice had become central to the ideologies and programmes of virtually all the leftist and centrist political parties around the world ... social justice represented the essence and the *raison d'être* of the social democrat doctrine and left its mark in the decades following the Second World War. (UN, 2006, 12).

Interestingly, the United Nations ties the rise of global concerns over social justice directly to the publication of Rawls' *A theory of justice* (which it describes as 'a masterpiece'). While this may, or may not, be an overstatement, there are certainly a number of events and social changes which have contributed to the rise of social justice as both a rationale of governance and as a political touchstone.

5.5.1 The Rise of Social Justice and Educational Equity in 50s America

While the notion of 'social justice' began to put down roots globally from the 1950s onwards, at the time, much of its cultural power as a concept came from the USA. Bankston (2010, 165) points to two historical changes in America which gave rise to what he refers to as the 'broadly Rawlsian approach to social justice' becoming the dominant model. The first is the rise of a mass-consumption economy. During the 1950s, the idea that poverty could be all-but eradicated, and that everyone could participate in, and benefit from, the American economic miracle, became a central driving economic rationality. This belief was of additional importance since continued consumerism (by all) was required to keep that miracle going, and the focus began to fall upon those who were unfortunate enough *not* to be keeping up. As such, Bankston asserts, Rawls came to articulate 'a consumer orientation toward fairness'.

The second was the rise of the civil rights movement, which transformed how Americans understood their relationships with each other, and just as television had provided the medium for the advertising that fuelled the rise of American consumerism, it also brought the public spectacle of racial injustice into their homes. Bankston (2010, 175) rightly observes that 'the power of the civil rights movement as a moral narrative in the mass media made it a model for thinking about social relations in general.'

With regard to social justice, one of the pivotal moments in 1950s America directly involved issues of educational inclusion – although relating to race, as opposed to disability. The case of *Brown vs. Board of Education of Topeka* in 1954 spoke directly to both elements of the nascent social justice movement. First, the case was driven by a concern that the spoils of a wealthy America were not being shared equally among its population (in terms of the equal distribution of high quality, well-resourced schools). Second, the case was also driven by the rise of a vocal national civil rights movement, one that understood that both segregation

(in all its forms) and the continued existence of Jim Crow laws acted as road-blocks for the social, political and economic advancement of all African Americans. The law ended the ‘separate but equal’ doctrine that had barred black Americans from attending whites-only schools. While black Americans had their own schools, the Supreme Court recognised that these were a poor substitute for inclusion in white schools – separate? yes, but equal? No. From this point onwards, where necessary, children were to be bussed to different schools, thereby allowing for a broader mix of ‘races’ wherever possible. Entirely predictably, the ruling caused a firestorm, particularly in the American south. State governments initially refused to implement the law, and where it was implemented, in some instances, the army was required to enforce compliance (see the ‘Little Rock Nine’ in Arkansas).

Influential though *Brown vs Board of Education of Topeka* (1954) was, it took another decade before the US passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which began the complex process of attempting to embed social justice in earnest (at least with regards to race). Now, even though ‘social justice’ has become part of the daily lexicon of most western countries, including America, significant resistance to this philosophy appears to remain; it goes without saying that the US is still far from a racially integrated nation, and their schools remain equally divided (Kozol, 2006). When federally mandated bussing largely disappeared in the late 1980s, having successfully resulted in significant mixing of children from different racial and ethnic groups, the evidence suggests that American schools have since quietly, but quickly, begun the process of re-segregating (Chen, 2017).

Although it’s part of the history curriculum now, *Brown vs Board of Education of Topeka* still has a lot to tell us about the relationship between social justice, education and inclusion. Schools aren’t just sites where occasionally things happen that impact on how we go about constructing a just society; schools can also be institutional exemplars of how justice might work; schools can be nurseries inculcating an understanding of justice and civic responsibility in the citizenry; and schools can be sites which explore the possibilities of effective social inclusion within just communities. But that said, schools are also often sites which can act to *impede* the development of socially just societies. For example, schools can be inherently conservative organisations that fiercely defend the status quo whenever pushed; schools can be places where young people are taught to conform, or else; and schools can be home to a dizzying array of myths (meritocracy anyone?) that tend to reward the already-powerful and marginalise the different (Tait, 2019).

The question now becomes, how then might we theorise the relationship between schools and social justice? That is, rather than simply bouncing back to Rawls and the kind of education system we might choose under the veil of ignorance, how might we further advance our understanding of the best way to shape a comprehensive and defensible ethics of inclusive education? One answer may lie with the work of Nancy Fraser.

5.5.2 *Fraser and ‘Participatory Parity’*

Arguably, the main issue that comes to most people’s minds when they think about distributive justice – certainly those who have been influenced by Rawls – is ‘the fair distribution of stuff’: money and possessions, the material benefits of life that speak to whether someone is doing well, and is ahead of the economic curve, or whether they have less than most others, and can be categorised as disadvantaged. We have seen that some theories are unconcerned by this, considering that the focus should instead fall upon whether the material benefits were acquired fairly (libertarians), or whether the greater good is best served by these disparities (utilitarians), or whether the people with most of the stuff actually deserved to have it (desert-theorists). Fraser is firmly in the Rawls Camp; however, she locates ‘the fair distribution of stuff’ as just one of three elements of her theory of justice.

For Fraser (1996, 2005), the central issue isn’t simply deciding how we choose to distribute goods and privileges among our citizens. It is instead the crucial question of how we can go about ensuring that everyone has an equal chance to participate in society on an equal footing; she calls this ‘participatory parity’. The argument here is that it often isn’t just that some people don’t have much stuff, it’s that this lack of stuff has a whole series of cascading consequences relating to health, education, and employment, all of which affects their ability to engage, to participate, as equal citizens – and this is particularly the case when addressing issues such as disability. Importantly, Fraser identified ‘the economic’ as just one of three dimensions that impinge upon effective participation parity, with the other two dimensions being ‘the cultural’ and ‘the political’. She contends that in order to have genuine social justice, we need to work towards constructing social arrangements which ensure (economic) redistribution, (cultural) recognition, and (political) representation. Taking these in turn:

The most obvious suggestions for redressing general economic maldistribution are relatively familiar. Such strategies might include the redistribution of income and wealth, reorganising structures of property ownership and investment, increasingly progressive taxation arrangements, limitations on inheritance and so on. However, the specifics of effective economic redistribution, as a prerequisite for participatory parity, varies significantly by context. As was mentioned earlier, 45% of Australians with disabilities are living at or below the poverty line. While this is a problem in its own right, it not only places a complex series of obstacles in the way of their effective social participation, it also necessitates the need for very specific forms of intervention and redistribution. As Knight (2015, 105) states:

Persistent poverty means that many with disabilities can barely afford the basic necessities for human subsistence, much less personal care, medicines, and technological aids they may need to live decent and active lives outside of institutions. Additional workforce restructuring to enable people with limited work capacities to contribute to their own financial support, along with more generous entitlements and cash assistance programs for those who cannot engage in wage labour, could go a long way to ensure that disabled citizens have the opportunities and resources necessary to effectively exercise their civil rights.

The second dimension effecting participatory parity involves cultural recognition. Though not directly mirroring class structure, there exists a roughly parallel ‘status structure’ within society which allocates ranking, prominence and authority to members of specific cultural groupings. Fraser (2005, 171) contends that, just as with the economic, people can be ‘prevented from interacting on terms of parity by institutional hierarchies of cultural value that deny them requisite standing’. This denial is manifest in terms of misrecognition, where some groups are denied equal respect and equal opportunity for self-esteem.

Once again, disability is an obvious example here. In addition to the many often-erroneous and disrespectful ways in which people with disabilities are depicted, interacted with, referred to, and understood (all of which act counter to cultural participatory parity), Mladenov (2016) points to the construction of the largely-pejorative notion of ‘dependency’ as a way of marginalising and stigmatising those who rely on the help of others to survive. Drawing, in part, from logic of care-ethics discussed in Chap. 3, Mladenov notes that an alternative understanding of the dependency/interdependency binary would go a long way towards shaping a cultural context wherein people with disabilities could achieve greater respect. In an era of government ‘austerity’, where ‘the disabled’, and here we apply disabled as a verb in accordance with the social model of disability, are often labelled as ‘welfare scroungers’, or in schools, where those with differences are quietly regarded as a ‘burden’ or a ‘disruption’, or students with ‘special education needs’ such forms of cultural misrecognition need to be challenged as an essential component of seeking social justice, and in this context, a component cut from the fabric of ableism..

The final dimension of social justice involves political representation. The issue here concerns who is deemed to belong and who does not, and what are the criteria for this social belonging, and more importantly, who has the right to speak, and who gets to be listened to (Slee, 2019). Certain groups have long been denied the right to effective equal representation, and within this lack of genuine representation, comes an inability to participate as an equal. A quick list of likely candidates here is probably fairly predictable: the poor, the unemployed, racial and ethnic minorities, children and, of course, people with disabilities.

According to Fraser (2005), restrictions relating to political participatory parity can take two forms. The first she refers to as ‘ordinary political misrepresentation’ which covers the usual suspects: deciding how the voting system should work, who gets to vote easily and who doesn’t, how much those votes count for, and how suffrage is restricted or facilitated. The American voting system is an object lesson in this version of misrepresentation. The second is a less obvious form of misrepresentation, which Fraser calls ‘misframing’.

Far from being of marginal importance, frame-setting is among the most consequential of political decisions. Constituting both members and non-members at a single stroke, this decision effectively excludes the latter from the universe of those entitled to consideration within the community in matters of distribution, recognition, and ordinary political representation. The result can be a serious injustice. (Fraser, 2005, 173).

Of the different dimensions of social justice pertaining to the achievement of participatory parity, as delineated by Fraser, arguably misframing is the most significant – certainly when addressing issues of inclusive education. After all, when it comes to mainstream schooling, ‘frame-setting’ determines access to social justice, and raises the important questions of: which children count as valid and viable members of the schooling community, and which count as ‘invalids’ – those count for little or nothing? Whose voices get to be heard, and whose do not? Which children are deemed to be ‘our future’, and which are not? Which children participate as equals, and which do not? The (self-evident) answers to these questions form the logical and practical engine for calls for an ethics of inclusive education based upon social justice.

5.5.3 Social Justice as a Political Football

So, given all the obvious strengths of this approach for dealing with inclusive education – certainly when contrasted against those outlined in the previous three chapters – why not just go right ahead and declare social justice approaches to disability and inclusion the winner, and proceed from there? Sure, it’s possible to nit-pick a selection of relatively minor theoretical problems/contradictions within the Rawls-Nussbaum-Fraser distributive justice conceptual universe, but these seem fairly trifling in comparison to its main rivals’ highly visible, hole-in-the-head level shortcomings.

The answer to this question is that, unlike the relatively arcane disputes between utilitarian and deontological ethicists, or the polite disagreements between classical philosophers over which virtues Plato considered the most important (it was justice), or wrangles between lawyers over exactly how to rank competing rights-claims, the issue of social justice has become highly politicised. As a consequence, the answer to this question – just like whether or not you accept the evidence for anthropogenic climate change – is likely to depend upon what part of the political spectrum you come from. As the United Nations stated earlier, the notion of social justice has been axiomatic to left and centrist governments since the end of the Second World War. It remains, however, anathema to those governments on the political right.

The damage wrought to our culture by the Left is also becoming increasingly prominent in the growing number of badly dysfunctional communities in Australia ... the intellectual Left, which has long been capable of little more than continually chanting the vapid slogans of social justice, has been nothing less than a total disaster for these communities. (Bryant, 2005, 9)

The reasons for this relatively intense dislike stem largely from the issues addressed in the examination of libertarianism, and more comprehensively, in the discussion of 1st, 2nd and 3rd generation of human rights covered in the last chapter. The right is particularly strong on its defence of 1st generation rights; these are largely negative

‘civil and political’ rights and concern the right to be ‘left alone’, to not have the government take anyone’s stuff, or make anyone do things they don’t want to.

In contrast to this, significant sections of the right are relatively dismissive of 2nd generation rights; these are positive ‘social justice’ rights placing obligations on other people, with the supporting logic being that all individuals have the right to a base level of equality within human societies – the right to a fair share of food, the right to a minimum standard of living, the right to an education. Not surprisingly, much of the ‘hard’ right is utterly apoplectic about 3rd generation rights; these are ‘community’ rights, which also places positive obligations upon others, such as those relating to respecting the environment and recognising cultural heritage. The common theme here is a belief that ‘positive rights’ are an infringement upon liberty, and any fruit that comes from that tree – such as social justice – should be resisted at all cost.

As a result of this, it is disingenuous to simply suggest that social justice is the best framework for shaping an effective ethics of inclusive education, as if the political difficulties with the term don’t really exist, or as if by saying blithely enough, no-one will actually notice that it’s been slipped into the policy documents. The term ‘social justice’ has baggage, and enemies, and the difference between libertarians and social justice advocates is not the same as the difference between utilitarians and deontologists. It just isn’t.

That said, two observations can be made here. The first is that the relative strength of the social justice position means that those who are convinced by its effectiveness within the field of inclusive education can move ahead with it anyway, in spite of its baggage and in spite of the opposition; it has a lot to offer, and the theoretical alternatives are flawed. Secondly, it may well be the case that the term ‘social justice’ no longer raises the conservative hackles that it used to. That is, the term has become part of the lexicon of a modern, enlightened and caring society, a term that has become politically almost impossible to oppose. By way of example, in 2017, Scott Morrison, the soon-to be conservative Prime Minister of Australia, stated:

We believe in the inalienable rights and freedoms of all people ... in a just and humane society in which the importance of the family and the role of law and justice are maintained; in equal opportunity and tolerance for all Australians; and the encouragement and the facilitation of wealth so that all may enjoy the highest possible standards of living, health, education and social justice (cited in Bolt, [2017](#)).

5.6 Review

‘Justice’ is not a simple concept. Indeed, it would be hard to find two historians, philosophers, lawyers, teachers – or anyone, for that matter – who share entirely identical opinions as to exactly what it is, or how best to achieve it. Irrespective of this ambiguity, the notion of justice continues to have a crucial symbolic authority,

one that extends far beyond its strategic importance within specifically legal, political, social and educational domains.

Though ‘justice’ may be a slippery little sucker (to draw from philosophical vernacular), both conceptually and practically, it would seem that a few basic lines can be traced through it without too much risk of fomenting violent disagreement. For example, justice is both a virtue and an ethical principle (although quite what that principle is has been subject to considerable ongoing dispute). Also, justice comes in a number of types: punishment, restitution, even-handedness, and fairness, and a few others, depending upon who you are talking to. Most of the really interesting debates, certainly the ones that animate this chapter, concern the notion of ‘distributive justice’ which attempts to answer the question of how the goods, rights, duties and privileges of our society ought to be allotted to its citizens.

Of the available theories of distributive justice, the one associated with John Rawls – ‘justice as fairness’ – seems the most defensible, and when combined with the ideas of Martha Nussbaum and Nancy Fraser, there appears to be genuine potential of an effective way forward for those committed to viable and productive ethics of inclusive education. In particular, not only does Rawls’ idea of a veil of ignorance allow for some relatively objective clarity about how to go about shaping the basic parameters of a fair society, but also Fraser’s benchmark of participatory parity appears to give some kind of goal to aim for.

Of course, it should be mentioned that social justice discourses are by no means free from criticism. Other than the politically-based disapproval, some questions do remain in how ‘justice’ might be both conceptualized and operationalized as the fundamental foundation for a genuinely inclusive school. For example, just as in Chap. 4, where concern was raised that any given ‘rights’ claims (no matter how important) could find itself overridden by some other ‘rights’ claim, so too can principles of justice find themselves over-ridden in favour of other types of moral claim, such as ‘the social good’ or ‘individual rights’. But while the ‘justice as fairness’ approach is not perfect, the criticisms of its central tenets are relatively manageable, and the flaws in its most obvious opponents relatively severe. As a consequence, it would seem that ‘justice’ – and more particularly ‘social justice’ – probably offers the best and most flexible conceptual machinery for founding an ethics of inclusive education.

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Chapter 6

Finding A Way Forward



Abstract In this last chapter we will examine social structure as articulated in education to determine whether it offers justice for people with disabilities. Unsurprisingly, we suggest that the history of disability and disablement in education has been a story of oppression through ableism. Redressing ableism demands “justice” and, therefore, dramatic transformations of the way we conduct the business of schooling.

Keywords Social justice · Surplus populations · Meritocracy · Special educational needs · Recognition · representation and redistribution · Human rights · Ableism

A former Karl Mannheim Chair of Sociology in Education at the Institute of Education in London, Stephen J. Ball (1990), cautioned against the temptation of using the *modernist convention of the conclusion* to tie off loose ends and announce foreclosure on what remain intransigent dilemmas and difficulties. Arriving at a better set of questions, he tells us, is more valuable. We hope that we have done just that. As we forewarned, in our introductory “housekeeping”, this text offers provocations that may provide a springboard for more searching discussions about education and disablement.

A consideration of the philosophical foundations of ethics does bring a discipline to our inquiry. It turns the focus onto the nature of our assumptions, which are so frequently unacknowledged, and their practical effects. However, as we have seen, the philosophical frameworks of ethics that we have presented fall short of resolving the challenges to education issued by disability and disablement – some would say by ableism, in the education arena. Consequently, we contend that other ways of framing our questions using theories of justice and rights is more productive returning us to essential, but still contested, concerns about the fair society.

The former Greek Minister for Finance, Yanis Varoufakis famously arrived at *Number 11* (11 Downing Street, London) to meet Chancellor of the Exchequer, George Osborne, on his motorcycle. The contrast between a pin-stripe besuited Osborne and the leather jacket-clad Varoufakis was emblematic of the differences in their political differences. Our interest in Yanis Varafoukis is in his writing as an economist. In quick succession he has written a series of books that dissect the

economic and political machinations of the European Union, the global financial crisis and the struggles of Greece through the imposition of “austerity”. In 2020 his most recent book, *Another Now* was published. It is a radical text both in form and ideas. Set in 2025, it deploys a “Libertarian ex-banker”, a “feminist-Marxist” and a “maverick technologist” to explore the possibility of a just future.

Varoufakis tells us that Costa, the maverick technologist, had been taught the *Fable of Gyges and the Lydian Ring* by his Cretan scripture teacher:

According to myth, Gyges was a poor shepherd in the ancient kingdom of Lydia who one day chanced upon a magic ring. By rotating the ring on his finger, he could make himself invisible. So, he walked into the palace, seduced the queen, murdered the king, and installed himself as ruler of Lydia. (Varoufakis, 2020: 25)

Varoufakis then reminds us that:

In **The Republic**, Plato has Socrates ask: if you discovered such a ring, would it be rational **not** to use it to do as you please? Costa remembered Socrates’ answer well: anyone who uses the power of the ring to get what he wants enslaves himself to his own appetites. Happiness, and not just morality, hinges on one’s capacity not to use the ring’s exorbitant power. (Varoufakis, 2020: 25)

Costa is not a romantic. He knows that most people would use the ring to satisfy their own desires, yet he still takes up the challenge of Socrates to resist *enslavement to one’s own desires*. The kingdom of Lydia may open the door sufficiently for us to reconsider John Rawls, return to the *original position* to apply the *principle of equal liberty and the principle of equality* thereby freeing ourselves from enslavement to self, or at the very least a system of schooling based on the hegemonic image and rhetoric of a privileged minority protected by what the American philosopher, Michael Sandel (2020), calls the tyranny of merit.

In other words, we suggest that you leave the king, his wife and his realm alone and instead, apply the ring’s magic; let’s call it – *our political will*, to ensuring that the needs of those who enjoy least privilege form the platform for and object of reform and, or in Nancy Fraser’s (2012) words, “recognition and redistribution”. Is it not the case in common conversation that when people ask if something is ethical, they are either asking; is it the right thing to do, or is it the fair or just thing to do? The preceding chapters have laid bare the tyranny of those simple questions through their interpretive latitude. It seems to us that the ethical frameworks and the complex and long-standing arguments they provoke do not sufficiently help us to resolve questions of justice for people with disabilities in education.

In an interview conducted at the Centre de Cultura Contemporània de Barcelona Nancy Fraser (2012) offers a precis of her understanding of justice:

I believe justice is the master overarching virtue; it’s not just one virtue among others, it is **the** one fundamental virtue. If you have a just social order, if you organise the basic structures of society in a just way, then and only then do you make it possible for people to develop other virtues like compassion, or courage, or patience.

For Fraser, it is important to first ask if the social structure is just. “*It is less important to ask if this action or is that social practice just than to ask about the deep structures of society*” (Fraser, 2012). The social structure is only just “*if it*

permits all social actors to interact with each other on terms of parity; all are full and equal partners". The social structure is just when it doesn't exclude or doesn't subordinate and exclude *surplus populations* as the *collateral casualties* of neo-liberal ethics (Bauman, 2004).

In this concluding chapter, we will examine social structure as articulated in education to determine whether it offers justice for people with disabilities. It will probably not surprise you if we suggest that the history of disability and disablement has for the most part been a story of subjugation and immiseration (Stiker, 1999; Snyder & Mitchell, 2006; Titchkosky, 2007; Oliver, 1990; Barnes, 1990; Goodley, 2021). Notwithstanding the attempts at law and through progressive social reform to protect the rights of people with disabilities, the outcomes have been patchy (Minow, 1991; Norwich, 2008; Lawson, 2008; Royal Commission into Violence, Abuse, Neglect & Exploitation of People with Disability, 2019). This remains so for education. Let us quickly test this proposition.

6.1 Disability, Justice, Fairness & Reform – A Bigger Picture

At the request of the Australian government in 2010, the Productivity Commission convened 'a public inquiry into a long-term disability care and support scheme' (NDIS, 2020). Over 1000 submissions were received, and on the 31st July 2011, the Presiding Commissioner, Patricia Scott, handed over the *Disability Care and Support: Productivity Commission Inquiry Report* (Productivity Commission, 2011) to Bill Shorten who was then the Assistant Treasurer in a Labor government.

The Council of Australian Governments (COAG), which is the forum of the federal, state and territory governments in the Australian federation, agreed the need for reform and a year ahead of the Productivity Commission's recommended timeline, the National Disability Insurance Scheme (NDIS) was passed into law in March 2013 (National Disability Insurance Scheme Act 2013, No. 20, 2013). To gain a sense of the nature and ambition of the NDIS it is worth referring to extracts from then Prime Minister, Julia Gillard's introductory comments to the Bill, and also to the objects of the scheme as set out in the Act itself. The Prime Minister (Gillard, 2012) stood in the House of Representatives and said:

The Scheme to be established by this Bill will transform the lives of people with disability, their families and carers.

For the first time they will have their needs met in a way that truly supports them to live with choice and dignity.

It will bring an end to the tragedy of services denied or delayed . . .

This is a complex Bill, yet **at its heart is a very simple moral insight**: Disability can affect any of us and therefore it affects all of us. . . The existence of disability in our community cannot always be avoided.

But the consequences of disability – isolation, poverty, loss of dignity, stress, hopelessness and fear of the future – can be.

Every 30 minutes on average, someone in Australia is diagnosed with a significant disability.

Only those of considerable wealth could possibly afford the costs of lifetime care that are required in response.

Most Australians with disability cannot bear the burden alone, nor should they be left to. Yet in relying on public provision, they are forced to endure a level of care that is often shameful and generally insufficient. . . .

The risk of disability is universal, so our response must be universal. (our emphasis)

Like us, you may have detected the strong vein of Rawlsian thinking about justice and the obligation of the community at large to underwrite the cost of resources to enable people with disabilities the ordinary rights of access, participation and achievement. Prime Minister Gillard foreshadowed the ambition and scope of this bold social reform:

The Scheme is ambitious, and necessarily so.

Because more than 400,000 people are living with significant and permanent disabilities.

Because carers are required to stretch the bonds of obligation and kinship past breaking point.

Because the nation is being robbed of the human and economic potential of people living with disability and the contribution they can make to our shared future.

Because while the promise of fairness and equality that lies at the core of our national ethos is denied to some Australians, we are all diminished.

The Prime Minister's language is charged with invocation of equity, justice and fairness for the most vulnerable members of society, and that this call for fairness is the responsibility of all. Unambiguous is the acknowledgement of the costs: social, economic, individual, incurred by not attending to a radical overhaul of the treatment of and relations with people with disabilities.

Turning to the National Disability Insurance Scheme Act 2013 itself, it is important to carefully read the Objects and Principles of the Act to appreciate what might be described as the ethos or ethical basis of the law. Running to some 9 objects and 17 guiding principles, it is not our intention to restate, elaborate or explain each of them for you. This is something for you to follow up – if you wish. Rather we will identify a clutch of them to further indicate the assumptions behind the Act pertaining to social policy to protect and advance the rights of people with disability to access, and participate and be represented in community life; including work, education, cultural activity, religious observance, sport and play.

The first object (Object a) of the Act will “in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD) done at New York on 13 December 2006” (p.2). We bring this to your attention as it underlines the importance of education reforms also being consistent with Australia's obligations as a signatory to the CRPD (2006). Of course, as we observed in Chap. 4, attempting to establish “rights” raises competing interests often descending into moral, conceptual and legalistic paralysis. The point here is to remind ourselves that the Federal government is a signatory to the Convention and this carries obligations.

Object (e) holds us to “enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports”,

while objects (g) and (ga) “promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community; and protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services”. While reading these objects, we urge you to consider what these kinds of objects of legislation would look like for reforming education. So, imagine the implications of object (h) for the present state of education where a discourse of equity, fairness and inclusion is deployed to describe structures of division and segregation. Object (h): raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability.

Before we return to the question of education, ethics and disability, consider the language of the General principles guiding actions under this Act. Again, we select a sample of the principles; seven out of the seventeen, to convey the underlying assumptions about the rights of people with disabilities in public life in Australia.

Guiding Principle 1: People with disability have the *same right* as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.

Guiding Principle 3: People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.

Guiding Principle 4: People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.

Guiding Principle 6: People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.

Guiding Principle 8: People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.

Guiding Principle 13: The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability.

Guiding Principle 15: Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted.

The National Disability Insurance Scheme Act 2013 represents a large-scale reform of service provision for people with disabilities based upon principles of justice, representation and redistribution to effect ‘participatory parity’ (Fraser, 2010). If we were to apply similar expectations to the education of students with disabilities, what might school reform look like to achieve a just settlement for students with disabilities? To answer this, we intend to provide a snapshot of the state of schooling for students with disabilities to describe the current deal and then suggest the parameters

this implies for change. In this way we are attempting to foreshadow the radical change pursued by the architects of NDIS, but in the context of a broken education system.

Before setting out to do this, let us conclude this discussion of the NDIS by stating the obvious: authentic reform requires more than a legislative overhaul. Critiques of the implementation and operation of NDIS have been vociferous and manifest in David Tune's (2019) independent review and recommendations to the conservative coalition government. Notwithstanding a notable increase of funding from \$7 billion to an estimated \$22 billion with the 'roll-out' (implementation) of the NDIS, expectations for changes in service delivery have fallen short of the promise (Tune, 2019; Henrique-Gomes, 2020; Doran, 2020). Service delivery delays, profligacy, cumbersome bureaucratisation, casualisation of disability service and care workers, and people with disabilities falling between the cracks are just some of the implementation difficulties. Deakin University researchers Whitburn, Moss and O'Mara (2017) identified the disjuncture between the NDIS and education jurisdictions across Australia that remain locked into service delivery according to impairment categories. Ambitious plans underwritten by altruistic aspirations require meticulous attention to the detail of implementation. We will address this shortly when considering the agenda for change in education.

6.2 A Fair and Just Education for Students with Disabilities?

Despite recurrent descriptions of meritocratic schooling that provides equality of opportunity to those students willing to grasp it and apply themselves to securing a prosperous future, one doesn't have to be overly forensic to build a case that tells us otherwise (Tait, 2013; Teese & Polesel, 1999; Teese, 2013; Apple, 2001; Ravitch, 2011). Inequality is an erstwhile element of the DNA of schooling registered in the structures, financing, programmes and outcomes of modern schooling. Schooling can reasonably be described as a boiler room of social inequality. Schools variously articulate and reproduce inequalities marked by race and ethnicity, gender, disability, privilege and poverty, and geographic location (Connell, 1994; Raudenbush & Eschmann, 2015; Lamb et al., 2020). Fairness, equity and justice, expressed as the desire for an inclusive and excellent education has eluded *different* population cohorts. This is unsurprising as the discursive oxygen of schooling is *competitive individualism* (Slee, 2011). Just as meritocracy would have it, there are winners. Axiomatically, schools are also in the business of producing losers. Data on underachievement, disengagement and exclusion affirm the vulnerability of specific population profiles for whom schooling is less than fair and certainly unjust (Keddie, 2012). How is it for students with disabilities? What kind of deal are they getting from schools? Is it fair, is there justice? Let's pursue this further.

Students with disabilities have long been education's afterthought. The past fifty years of global education policy production is cluttered with a rapid succession of inquiries into, reports on and revised policy statements on the education of students with disabilities. Some observers (Cigman, 2007) return to Dame Mary Warnock's (1978) *Special Educational Needs: Report of the Committee of Enquiry into the Education of Handicapped Children and Young People* as the highwater mark for the transformation of education for students with disabilities. There was an attempt to eschew medical discourse by instating educational frames of reference. However, the report does not challenge the long-held assumption that individual 'deficits' of children are the source of disablement in education. Hence the establishment of the behemoth – *Special Educational Needs*. Special Educational Needs has dominated the landscape ever since. Special Educational Needs is an exquisite and ubiquitous catchall assignation for those children who don't fit the standardised notion of the ordinary – acceptable – child for the regular classroom. In effect it has become a euphemism for the disabled child, and indeed its effect is disablement. Unwittingly, it stands as a beacon of ableism in education (Slee, 2018a).

Most observers or cartographers of the inclusive education policy landscape refer instead to what is typically called *The Salamanca Statement* as a more important landmark in the development of inclusive education for students with disability. *The Salamanca Statement and Framework for Action on Special Needs Education* (UNESCO, 1994) emanated from a conference held in the Spanish city of Salamanca convened by the Spanish Ministry of Education and UNESCO. An offshoot of the *Education for All* movement originating at the UNESCO World Education Forum held in Jomtien in Thailand four years earlier in 1990, the Salamanca conference specifically addressed the global conditions of education for students with disabilities. The Salamanca Statement released at the end of the gathering was officially endorsed by ninety-two governments. According to the delegates an inclusive education means that:

... schools should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions. This should include disabled and gifted children, street and working children, children from remote or nomadic populations, children from linguistic or cultural minorities and children from other disadvantaged or marginalised areas or groups. (UNESCO, 1994: 6)

As the 'Statement' (UNESCO, 1994: viii & ix) turns to the specificity of disability and schooling, it becomes more explicit and interesting:

- Those with special educational needs (sic. disabilities) must have access to regular schools which will accommodate them within a child-centred pedagogy capable of meeting these needs;
- Regular schools with this inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all; moreover, they provide an effective education to the majority of children and improve the efficiency and ultimately the cost effectiveness of the entire system.

Notwithstanding such an endorsement of a regular schooling for students with disabilities, *The Salamanca Statement* was of course an object of interpretive latitude

and wide variation in application (Ainscow et al., 2019). Is it not consistent with “Salamanca” to congregate disabled students in the same classroom within a regular school with a qualified and expert special educator and therefore cater for their individual deficits or *special educational needs*? Accordingly, Salamanca allowed education systems to maintain separate special schools as well as installing them, franchise-like, within the neighbourhood school perimeter. In South Australia, this is called co-location. Peter Walker’s (2019) insightful investigation of this so-called inclusive resettlement reveals how the traditional barriers remain intact.

Across all education jurisdictions in Australia, state and federal, there has been a recent flurry of reports from enquiries into the state of education for students with disabilities in public (State) schooling. Some of these reports have been provoked by specific incidents or complaints. This was the case for Tony Shaddock’s review of schooling in the Australian Capital Territory following the cage incident we have previously described and also for the Deloitte Access Economics review of Queensland government schools where storage rooms were routinely used for the seclusion of children with disabilities. Other reports were at the behest of education jurisdictions, government auditors, and the Equal Opportunities and Human Rights Commission (Victoria). Reviews of the implementation of the Disability Standards in Education are a requirement of the Disability Discrimination Act. Table 6.1: *Australian Reviews of Education for Students with Disabilities (2012–2020)* lists the reviews to give you an idea of volume and scope.

Reproducing the findings of these reports would make for a very long chapter. Instead, let us suggest that a good precis may be found in the evidence presented to a public hearing of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Convened in April 2019, the “Disability Royal Commission” was struck to investigate:

- preventing and better protecting people with disability from experiencing violence, abuse, neglect and exploitation
- achieving best practice in reporting, investigating and responding to violence, abuse, neglect and exploitation of people with disability
- promoting a more inclusive society that supports people with disability to be independent and live free from violence, abuse, neglect and exploitation. (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020)

A public hearing of the Royal Commission was held in Townsville from Monday 4 November to Thursday 7 November 2019. This was the Royal Commission’s first hearing at which evidence was taken to inquire into:

1. Inclusiveness in education as it relates to students with disability; and
2. The implementation of existing policies and procedures relating to inclusive education of students with disability, with a focus on the Queensland government education system. (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020: 5)

Amongst the issues identified by expert witnesses to the public hearing were the following:

Table 6.1 Australian reviews of education for students with disabilities (2012–2020)

Date	Jurisdiction	Title	Author
2012	Victoria	<i>Held Back: The experiences of students with disabilities in Victorian schools.</i>	Victorian Equal Opportunities & Human Rights Commission.
2012	Commonwealth of Australia	<i>Review of Disability Standards for Education.</i>	Department of Education, Employment & Workforce Training.
2012	Victoria	<i>Programmes for Students with Special Learning Needs.</i>	Victorian Auditor General
2015	Victoria	<i>Education that fits: International trends in the education of students with special education needs. An internal report commissioned by the Program for Students with Disabilities Review Unit.</i>	Internal report to Victorian Department of Education & Training (Mitchell).
2016	Victoria	<i>Review of the programme for students with disabilities.</i>	Graeme Innes, Victorian Department of Education & Training.
2016	Australian Capital Territory	<i>Schools for All Children and Young People. Report of the Expert Panel on Students with Complex Needs and Challenging Behaviour.</i>	Shaddock, A., Packer, S. & Roy, A.
2017	Queensland	<i>Review of education for students with disability in Queensland state schools.</i> Brisbane, Department of Education and Training.	Deloitte Access Economics
2017	South Australia	Report of the Select Committee on Access to the South Australian Education System for Students with a Disability.	South Australian Parliament (Kelly Vincent)
2017	New South Wales	Education of students with a disability or special needs in New South Wales.	NSW Legislative Council
2018	Northern Territory	Review of Policy & Practice for Students with Additional Needs.	Centre for International Research on Education Systems.
2018	Western Australia	Disability Access and Inclusion Plan 2018–2023.	Western Australian Department of Education.
2018	Tasmania	Accessible Island: Tasmania's Disability Framework for Action 2018–2021 – Disability Action Plan.	Tasmania Department of Education
2019	Commonwealth of Australia	Review of the loading for students with disability: Final report.	National School Resourcing Board.

6.2.1 Gatekeeping

Gatekeeping refers to the practice where a school principal, deputy principal, administrator, or a guidance officer will actively try to prevent access to a school

for a student with disability suggesting that the school is not suitable or that another regular or special school would better suit the child's needs. This practice contravenes the Disability Discrimination Act 1992 and was mentioned in the Deloitte Access Economics 2017 review of the experiences of children with disabilities in Queensland state schools.

6.2.2 Overrepresentation in Disciplinary Absences and Unique Attendance Schedules

In Queensland, when a child is suspended for up to 20 days, or excluded from school, or have their enrolment cancelled and this must be recorded as a student disciplinary absence (SDA). SDAs are not evenly distributed across schools and become more common in secondary schools than in primary schools. Children with disabilities are more likely to incur SDAs than students without disabilities (Deloitte Access Economics, 2017: 103–107). Once again it is important to note that the Disability Discrimination Act 1992 makes clear that a student must not be suspended or excluded for behaviour that is a consequence of their disability.

Parents also report the practice of schools setting an individual schedule of attendance for children with disabilities. The expectation is not that they are required to attend schools for the same amount of time as students without diagnosed disabilities. This places parents and carers in the position of having to find often expensive alternatives for the care of their children when they should be at school. Inevitably children subject to this experience constant interruption to their learning and this is reflected in higher levels of underachievement for students with disabilities.

6.2.3 Lack or Unsuitability of Reasonable Adjustments

Consistent with the Disability Discrimination Act 1992 and the Disability Standards for Education 2005, schools are required to make “*reasonable adjustments*” to enable children with disabilities to access and participate in the school curriculum and activities. Parents of children with disabilities often report that such adjustments are not forthcoming or are not matched to the requirements of the child. Congregating children with disabilities across a range of ages in the so-called inclusion room is frequently offered as the “*reasonable accommodation*”. This amounts to segregation, albeit on-site.

6.2.4 *Bullying and Mistreatment*

Witnesses provided instances of children with disabilities being bullied by other students and mistreated by teachers and other adults. This echoes earlier reports from other jurisdictions (Victorian Equal Opportunities and Human Rights Commission, 2012). In discussions with parents organised by the Queensland disability advocacy organisation – Community Resources Unit – in 2017, it was stated that people chose segregated special schools to avoid or escape bullying of children with disabilities in regular neighbourhood schools.

6.2.5 *Restrictive Practices*

This refers to the isolation and seclusion of students with disabilities. This may take the form of seclusion in purpose-designed rooms; medication; or regulation of attendance to limit access to and participation in school activities. It is commonplace for schools to dedicate a specific part of the school for students with disabilities where the common feature of the students is that they have a diagnosed impairment. The class, unlike the school in general, spans students' ages and paradoxically congregates them for inclusion away from the school in general. For these students access and participation are attenuated; conditional. More extreme forms comprise the establishment of purpose built areas for the isolation of individuals.

6.2.6 *Low Expectations and Underachievement*

Lowering of expectations for students with disabilities is endemic. Specific impairment classifications and descriptions of “special educational needs” repress educational expectations, teachers often setting their expectations based upon medical or quasi-medical classifications rather than being guided by the parents, carers or children themselves.

Students with disability overall face poorer NAPLAN outcomes than students without – however it should be acknowledged that within this group, there is a great variation in achievement. This goes some way to demonstrating the potential for students with disability to improve achievement and, in some cases, reach outcomes commensurate with their peers. (Deloitte Access Economics, 2017: 15)

Discussion of underachievement of students with disabilities requires a more comprehensive engagement with shortcomings in the *Australian Curriculum* and assessment structures and practices (Price & Slee, 2021).

6.2.7 Inadequate or Insufficient Training

Representations by school principals, parents, disabled people's organisations, academics, school support personnel, teachers' union and professional associations registered the ubiquitous acknowledgement of shortfalls in preparation for inclusive education reforms. It is important that this is understood as not being a requirement for special education training for all teachers. Observed in all preceding jurisdictional reports, the requirement for inclusive education capacity building is urgent.

6.2.8 Funding Gaps and Inappropriate Funding Models

Over time, education jurisdictions have applied more sophisticated economic modelling to avoid the perverse effects of funding inclusion on the basis of individual cases according to diagnostic categories and indicators of severity. The predictable outcome of funding according to diagnostic categories and severity of disability was the creation of more children with disabilities at more severe levels of need. The gravity of the model was the production of disability. The challenge has been ensuring that unique funding requirements for access and participation are assured while maintaining the focus of funding on building overall school and system capacity for teaching across diverse population cohorts. The cost of exclusion and segregation requires more careful analysis and difficult political intervention; bifurcated systems duplicate and waste resources.

6.2.9 Inappropriate and Ineffective Protocols and Procedures for Complaint Resolution

Many of the complaint handling mechanisms and procedures reinforce the unequal power relations between students and their parents, carers and advocates and the school and the education jurisdiction. Under prevailing conditions, parents must become either heroic complainants invoking provisions of the disability discrimination legislation and risk further difficulties for their children, or acquiesce to unfavourable treatment of their children. Complaint resolution frequently lacks independent arbitration. Provisions for complaints are legalistic, adversarial and intimidating. Ultimately, they become costly; financially and emotionally. Parents reported giving up and withdrawing children.

We have deliberately avoided exhaustively reproducing the indicators of the lesser deal that students with disabilities have received in education as observed in recent Australian inquiries, reviews and reports. As the *Held Back* report from the Victorian Equal Opportunities and Human Rights Commission (2012) concluded schooling is a lottery for students with disabilities. This is underlined by the

observation from the report on Programmes for Students with Disabilities (PSD) in Victorian government schools by the Office of Victorian Auditor-General (2012: viii):

DEECD has developed policies and guidance to help schools support students with special learning needs. It also provides funding to support students with the highest levels of need through the PSD. However, it does not monitor how schools use the funds nor does it adequately oversee the educational outcomes of students with special learning needs. Schools are not implementing DEECD's policies consistently or effectively. As a result, the quality and type of support provided to students with special learning needs is not equitable.

In that same year the second review of the implementation of the Disability Standards for Education (Department of Education, Employment & Workforce Training (DEEWT), 2012) compiled a list of blockages to the Disability Standards for Education. Most telling was the observation that the context of contemporary education policy undermined aspirations towards social inclusion (DEEWT, 2012: 66). We turn again to Nancy Fraser's observation that if the social structure is unjust, that should define the focus for reform. So too for education – when the structures, policies, protocols, programmes and culture of schooling are unjust or ableist, the focus for reform is clear. The marketing of schools through students' performance in *NAPLAN* reinstates ableist imperatives:

As schools have been expected to become competitive with each other and to market themselves, we have seen a reluctance to take on children with a whole range of special needs or disabilities, except where that child has very clear resources that accompany them and where there is an expectation that the child will not reduce the school's *NAPLAN* test scores. The narrowing of the way in which schools are valued and measures of efficiency and accountability have had the consequent impact on discouraging schools from taking on students who are seen to be problematic in a range of ways. – School sector submission (DEEWT, 2012: 67)

It seems obvious to many of us that the focus for reform needs to shift from diagnostic categories and calibrations of students therein to a determination of how systems are rendered capable of recognizing basic principles of rights and fairness as the point of commencement for reform of structures, processes and cultures of schooling.

6.2.10 A Return to Recognition, Representation & Redistribution

For us, the so-called 1984 *Collins Report* in the Australian state of Victoria, or more precisely *Integration in Victorian Education: Report of the Ministerial Review of Educational Services for the Disabled* (Victorian Ministry of Education, 1984) was a far bolder and unique manifesto for an inclusive education. Like reports that have pre-dated and post-dated it, the ministerial review of services for the disabled was struck in response to disquiet about the structures, quality and the outcomes of

education for students with disabilities. Growing concern about educational segregation, together with poor outcomes for students with disabilities prompted an inquiry. What makes it so distinctive?

The main writer of the report for the ministerial review panel was Gillian Fulcher, a sociologist. Well versed in the sociology of special education (Tomlinson, 1982; Ford et al., 1982), social theory, the emerging field of disability studies and the social model of disability (Oliver, 1990), Fulcher cast education, as had the United Nations, as a right for all children. Accordingly, the focus of the report shifted from the diagnosed deficits of individual children to ensuring all schools were accessible thereby enabling students with disabilities to access, participate and succeed in the educational programme and social life of their regular neighbourhood schools.

Integration referred to a two-fold process. First:

A process of increasing the participation of children with impairments and disabilities in the education programs and social life of regular schools in which their peers without disabilities participate. (Victorian Ministry of Education, 1984: 6)

And second:

A process of maintaining the participation of all children in the educational programs and social life of regular schools. (Victorian Ministry of Education, 1984: 6)

This remains a unique and salient proposition. Obviously, the Collins Report predated the rise in influence and pervasive reach of *The Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association). Following the release of the report there was a growth in the discovery of disabled children already in regular schools and classrooms (Slee, 1987) in order to attract additional “integration” funds. However, it was nothing like the surveillance, categorisation and regulation of students under the shadow of the most recent version of the DSM (Harwood & Allan, 2014; Slee, 2018a, b).

The guiding principles for the Collins Report are instructive:

1. *Every child has a right to be educated in a regular school.*
2. *Non-categorisation.*
3. *Resources and services, should, to the greatest extent possible, be school-based.*
4. *Collaborative decision-making processes.*
5. *All children can learn and be taught.*

We now know that rather than prompting a movement of children and educational resources from the segregated special school sector to ordinary classrooms, the integration funding was largely allotted to children “*with impairments, disabilities and problems in schooling*” in regular schools. Ironically, this growing body of children came to be known as integration students and their tenure and activity in schools was highly regulated. Meanwhile the special education sector continued to grow. The reforms that may have been envisaged by the reviewers fell short of providing a fair and just education for students with disabilities in Victoria. However, two points emerge as useful guidance:

First, establishing education in the regular school as a **right** allows us to return to first principles of what is just and fair for vulnerable populations before facing the technical question of how we achieve this right. *Second*, the process of increasing and maintaining the participation of children with disabilities in regular schools captures the social model of disability and disablement wherein the concentration moves to the adjustments and accommodations required to achieve and sustain enabling and inclusive education for all students.

Given that the ethical frameworks chronicled in this text don't resolve the challenges and debates about the education of students with disabilities, we have suggested that consideration of the nature and practice of social justice will take us further, and more importantly potentially direct us towards better educational and social experiences for students with disabilities. The evidence of recent education enquiries illustrates the less than just deal currently available for students with disabilities. We contend that the first step is to confront the presence of ableism in the structures, protocols, policies, programmes and culture of twenty-first century schooling. Where ableism exists, justice is compromised. These have been, and continue to be, hard lessons with racism and sexism in education. Identifying, acknowledging and dismantling racism is fundamental to an inclusive education in poly-ethnic societies. So too for ableism and education. The basic questions about fairness and social justice for students with disabilities apply.

Not forgetting Professor Ball's warning about the gravitational pull of neat resolution, let us simply suggest prompts for an agenda for reforming education to guarantee a better deal for students with disabilities. Of course, this is not prescriptive – it is simply a prompt for progressing the discussion of disability, social justice and equity in schooling. If we were to attempt diagrammatic representation, the result might resemble the work of Jackson Pollock. Domains such as: curriculum, pedagogy, assessment, organisation, policies, practices, workforce structure and knowledge, values, relationships, community collide, overlap and reach across, and merge into one another. We will spare you by listing essential propositions that counter ableism in schooling and pursue a just educational deal for students with disabilities. Here we are guided by Nancy Fraser's observation that we are seeking changes to the deep structures of schooling and its ontological foundations through representation and redistribution.

First, we suggest that *inclusive education is everybody's business*. All education workers must become leaders in identifying and dismantling ableism in schooling. School operating systems must build in accountability for ableism and exclusion and apply incentives for inclusion. Achieving inclusive schools for all students assumes the provision of opportunities for community access, representation and participation in reimaging and rebuilding educational experiences. More specifically, voices of people with disability rather than those who have assumed authority on disability: special educators, should be at the forefront of change. The education of children with disabilities must not be seen as the work of a separate workforce. All teachers must be charged with the responsibility of building an inclusive classroom.

Second, *inclusive education is not business as usual*. The numerous reports of investigations into the experience and outcomes of schooling for students with

disabilities attest to the deep structure of ableism in education. The established tradition of bifurcated schooling – special and regular – and the growth of diagnostic category-based education has not proven successful for students with disabilities. Still, education jurisdictions are attempting to change educational outcomes by supporting failed traditions, practices and cultures. Segregation is the incubator of ignorance, social fragmentation and injustice. Segregated education, even if co-located, is anti-educational. Strong, just and inclusive communities must be expressed in and through the structures, cultures and practices of all schools where all students are represented in the classroom curriculum and activities. Resources must be redistributed to build the capacity of schools to educate all students.

The global pandemic, COVID-19, magnifies the deep chasm between privilege and disadvantage; locally and globally. Longstanding beliefs, conventions and practices have been set aside as the world attempts to stem infection and discover new institutional frameworks for getting on with work, school, religious observance, play, and social connection. Amidst the appalling and continuing devastation there has been a sense of new discovery. The determination to find and apply effective vaccines has forged new alliances between government, capital and community. The need to continue to work and play within changing stages of isolation and distancing has resulted in the development of new protocols and practices. Education has experienced radical transformations, though not without difficulty and varied results. Put simply COVID 19 has awoken us to the possibility of change of a type and on a scale that some short months ago seemed unimaginable. This being the case, why not use it as a fillip for dismantling the tradition of failing students with disabilities, for expunging ableism in education?

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Index

A

Allan, J., 7, 8, 11, 16, 162
 Anscombe, G., 60, 61, 64
Anti-Discrimination Act 1991 (Qld), 25
 Antiquity, 56–57, 60, 65
 Aquinas
 Thomism, 118
 Aristotle
 flourishing, 56
 Augustine, 116
 Autism spectrum disorder (ASD), 33, 36, 37,
 42, 55
 Azoulay, A., 3

B

Ball, S.J., 149, 163
 Bauman, Z., 6, 151
 Benevolence, 59, 68, 72, 73, 87, 97
 Bentham, J., 24, 27–30, 32–36, 60, 89, 96, 97,
 99
 Bourdieu, P., 11
 Brantlinger, E.A., 12
 Brookings Institute, 9
Brown vs Board of Education of Topeka, 10,
 139
 Buber, M., 63

C

Capability theory, 136
 Care ethics
 criticisms of care ethics, 77
 Characters, 15, 54–57, 59–69, 79, 87, 128

Civil rights, 9, 10, 84, 104–108, 110,
 138–140
 Collins Report, *see* Fulcher, G.
 Consequentialism, 15, 21–25, 33, 48, 49, 79
*Convention on the Rights of Persons with
 Disabilities*, 84, 88, 92, 101, 107,
 109, 152
 Core social entitlements, 136
 Council Of Australian Governments (COAG),
 151
 COVID-19, 3, 4, 164
 Critical legal studies, 96

D

Danforth, S., 10, 11
 Deloitte Access Economics, 156–159
 Deontological ethics
 categorical imperatives, 44, 48
 criticisms of, 47
 duties, 39, 68, 80, 87
 practical imperative, 86
 Descartes, 45
 Diagnostic and statistical manual of mental
 disorders (DSM-5), 7, 162
 Disabilities, 1–5, 7–16, 22, 23, 25, 29, 32–34,
 36, 39, 54–56, 66, 72, 74, 76, 78,
 83–111, 116, 119–132, 134–138,
 140–142, 149–164
 Disability Discrimination Act (1992), 29, 85,
 98, 101, 102, 108, 156, 158
 Divine command theory, 39–41
 Dorling, D., 5, 6
 Dworkin, R., 90, 105, 127

E

Education for All, 10, 155, 163
 Egalitarianism, 126, 127
 Enlightenment, 26, 92
 Ethical egoism, 23, 57, 93
 Exclusion
 permanent and fixed term, 9

F

Foucault, M., 26, 56, 117
 Fraser, N.
 cultural recognition, 140
 economic redistribution, 140
 political representation, 140
 Fulcher, G., 7, 162

G

Gillborn, D., 8
 Gilligan, C., 73, 74
 God, 31, 39, 40, 58, 69, 91, 116
 Gonski, D., 26, 27
 Goodness, 55, 56, 59, 128

H

Hart, H., 89
 Held, V., 73, 75, 157, 160
 Hobbes, T., 23, 92–95, 117, 136
 Hohfeld, W.
 active rights, 101, 103
 claim rights, 101, 103
 1st order rights, 101–103
 immunity rights, 101, 103
 liberty rights, 101, 103
 negative rights, 101, 103
 passive rights, 101, 103
 positive rights, 101, 103
 power rights, 101, 103
 2nd order rights, 101–103
 Human rights
 criticisms of, 109
 1st generation, 103, 106, 107
 2nd generation, 103, 106, 107, 109
 3rd generation, 107, 109
 Hume, D., 59–61, 74, 118

I

Indigenous Australians, 108
 Integrity, 31–33, 38, 67, 136
 Isolation rooms, 86
 Is/ought, 58, 95
 Ivison, D., 91, 92, 105, 109

J

Jim Crow, 10, 139
 Justice
 distributive, 117, 120, 125–127, 129–132,
 137, 140, 142, 144
 procedural, 120, 123–125
 restorative, 120, 122, 123
 retributive
 Desert theory, 121
 Penalty theory, 121
 punishment, 121, 144

K

Kant, I., 22, 39, 40, 42–45, 48, 54, 60, 61, 87,
 117, 119, 121
 Kirk, S., 11
 Kittay, E., 72, 73
 Knausgaard, K.O., 8

L

Leavis, F.R., 35
 Legal positivism, 96
 Legal rights, 96–105, 108, 110
 Libertarianism, 129, 131, 135, 142
 Locke, J., 62, 92–95, 117, 127, 128, 136
L v Minister for Education, 24, 25, 32, 99
Lydian Ring, 150

M

Machiavelli, N., 26
 Marcus Aurelius, 69, 70
 Mill, J.S., 28, 30, 33–37, 48, 60, 61, 117
 Minow, M., 151
 Moore, G., 22, 58
 Moral intuitions, 21, 22, 31, 38–40, 44, 45, 48,
 60
 Moral rights, 97–101, 105, 108, 110, 115, 128
 Muscular Christianity, 62, 63

N

National Assessment Program – Literacy and
 Numeracy (NAPLAN), 30, 46, 47,
 100, 159, 161
 National Disability Insurance Scheme (NDIS),
 151–154
 Naturalist fallacy, 95
 Natural justice, 123
 Natural law, 58–59, 91–93, 95
 Natural rights, 58, 90–101, 105, 109, 110, 117
 Nature, 16, 23, 24, 58, 60, 61, 66, 73, 75,
 90–96, 101, 106, 128, 149, 151, 163

Nietzsche, F., 77
 Noddings, N., 73–75
 Nozick, R.
 criticisms of, 132
 Nussbaum, M., 117, 135–137, 144

O
 OECD, 5, 124, 125
 Oliver, M., 12, 78, 120, 151, 162
 Osborne, G., 149

P
 Participatory parity, 140–142, 144, 153
 Plato, 7, 40, 56, 63, 65, 66, 68, 116–118, 142, 150
 Pollock, J., 163
 Postmodern jurisprudence, 96
 Prima facie duties, 48
 Productivity Commission, 151

R
 Rawls, J.
 criticisms of, 135
 equal liberty, 132, 133
 fair opportunity, 132, 133
 veil of ignorance, 134, 135, 139, 144
 Raz, J., 89, 90
 Rights
 definitions, 87, 88
 interest theory, 89, 90
 will theory, 89, 90
 Ross, W.D., 48
 Rousseau, J.-J., 92–95, 136
 Royal Commission into Violence, Abuse, Neglect & Exploitation of People with Disability (2019), 151, 156

S
 Sachs, J., 3, 6
Salamanca Statement, 10, 155
 Sandel, M., 5, 30, 35, 118, 119, 131, 150

Sennett, R., 6
 Shakespeare, T., 1, 34, 35
 Slee, R., 2, 6–8, 10, 85, 141, 154, 156, 159, 162
 Social contract, 23, 92–94, 96, 136
 Social justice, 16, 104–109, 137–144, 163
 Socrates, 34, 65, 150
 Special Educational Needs, 2, 10, 11, 155, 156, 159
 Smart, J., 38

T
 Tait, G., 6, 7, 139, 154
 Tomlinson, S., 7, 8, 11, 13, 162
 Tronto, J., 73, 75, 76

U
 UNESCO, 3, 4, 10, 155
 Union of the Physically Impaired Against Segregation (UPIAS), 12
 United Nations, 1, 3, 4, 10, 84, 88, 91, 92, 101, 106–110, 137, 138, 142, 162
 Universal Declaration of Human Rights (UDHR), 3, 88, 91, 105, 106, 109
 Utilitarianism
 act utilitarianism, 33, 37, 38, 86
 the greater good, 32, 37, 38, 70
 rule utilitarianism, 33, 36–38, 86
 utility calculus, 32, 36
 utility principle, 27

V
 Victorian Equal Opportunities and Human Rights Commission, 159, 160
 Virtue
 cardinal virtues, 54, 55, 65, 68, 69, 86, 87
 Virtue ethics
 criticisms of virtue ethics, 70

W
 Williams, B., 30, 31, 118
 Wittgenstein, L., 119