

Recognising Capabilities: The Importance of Recognition for Human Flourishing

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This article aims to enrich critical sociolegal scholarship and methodological approaches within the field of capability theory by introducing ‘recognising capabilities analysis’. The recognising capabilities analysis embeds Nancy Fraser’s theory of recognition (particularly her concept of parity of participation), into the capability paradigm. It examines the particular role of law and legal regulation in determining the relationships of (mis)recognition operating between the state and disadvantaged groups. Systemic misrecognition tends to entrench disparities in participation. It sets up cycles of disadvantage which prevent marginalised individuals from realising greater capabilities and securing equal access to the basic goods, services, and social spaces essential for a liveable human life. The recognising capabilities analysis provides a useful normative and analytical device for identifying and challenging diverse forms of structural disadvantage and injustice.

INTRODUCTION

Structural injustice, according to Iris Marion Young, exists: ‘when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop their capacities ... Structural injustice occurs as a consequence of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms.’¹

Virginia Mantouvalou and Jonathan Wolff recently invited scholars to reflect on the role of law in both creating and mitigating structural injustice.² This article takes up that invitation and contributes to the growing field of sociolegal scholarship exploring the specific role of law and legal regulation in causing, entrenching, and attempting to tackle, structural injustice and disadvantage. This article introduces the ‘recognising capabilities analysis’ as a novel way of

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1 Iris Marion Young, *Responsibility for Justice* (Oxford: OUP, 2011) 52.

2 Virginia Mantouvalou and Jonathan Wolff, ‘Introduction’ in Virginia Mantouvalou and Jonathan Wolff (eds), *Structural Injustice and the Law* (London: UCL Press, 2024) xi–4.

identifying, understanding, and challenging the impact of multiple sources of law and legal regulation upon the wellbeing of disadvantaged groups.³

The capability approach has long provided a compelling framework for analysing a person's wellbeing based upon her relative advantages and disadvantages in achieving the life she values.⁴ It outlines that, as a matter of justice, the state is under a moral obligation to tackle exclusion by fostering measures of legal, policy and social regulation which enable all people to achieve basic levels of human flourishing.

The recognising capabilities analysis develops capability-based assessments of wellbeing in a more overtly relational direction. By expressly embedding considerations of recognition within capabilities-based thinking, sociolegal researchers can obtain a deeper analytical framework through which to explore the particular role of law in setting up relationships of recognition (or misrecognition), between the state and disadvantaged individuals. This relationality profoundly influences the practical opportunities of disadvantaged people to realise secure functionings and equal capabilities enjoyment.

Capabilities are a person's 'real freedoms or opportunities to achieve functionings.'⁵ Functionings are the 'doings and beings' that make up the parts of a human life. Systems of law are often the primary frameworks which determine both direct resource provision for disadvantaged individuals and provide (or perhaps fail to provide), recognition of their equal personhood. A lack of recognition by the state directly informs how disadvantaged groups are treated by social actors and gatekeepers in society when they try to access and maintain the basic goods, services and social capital necessary for a liveable human life. In other words, recognition profoundly affects a person's ability to obtain sufficient resources and to convert those resources into secure functionings. The role of legal regulation in determining this recognition-based element of wellbeing is not sufficiently foregrounded in assessments of opportunities for flourishing. In the recognising capabilities analysis, by contrast, it is front and centre.

Through legal and policy regulation the state is continuously making implicit choices about who is worthy of social inclusion. The recognising capabilities analysis embeds Nancy Fraser's theory of recognition,⁶ particularly her concept of parity of participation, within capability-based assessments of wellbeing. This emphasises the particular role of legal regulation in creating, perpetuating, and potentially challenging, relationships of (mis)recognition and structural constraints, which inform how disadvantaged groups are treated in reality, and which can result in significant disparities in their levels of social participation and their enjoyment of capabilities.

3 The capability approach is highly prone to misunderstandings, particularly as different commentators use the terminology in different ways. Ingrid Robeyns has provided a helpful clarification of the linguistic landscape. I adopt her approach to terminology in this article, except when referring to, or quoting directly from, the work of other scholars using the language in specific ways: Ingrid Robeyns, *Wellbeing, Freedom and Social Justice: The Capability Approach Re-Examined* (Cambridge: Open Book Publishers, 2017) 19, 89–112.

4 Amartya Sen, *Development as Freedom* (Oxford: OUP, 1999) 74–86.

5 Robeyns, n 3 above, 39.

6 Nancy Fraser, 'Recognition without Ethics?' (2001) 18 *Theory, Culture & Society* 21.

A recognising capabilities analysis focuses on the precarity facing disadvantaged people because of recognition failures which are rooted in the operation of law, policy and regulatory systems. Recognition failures can flow from the operation of one specific statutory or policy framework. However, very often such failures are rooted in a complex tangle of multiple overlapping regimes. A recognising capabilities analysis encourages sociolegal researchers to interrogate and understand experiences of disadvantage from this polycentric vantage point. It offers significant benefits for sociolegal scholars wanting to identify and challenge systemic and structural forms of injustice. As Mantouvalou and Wolff observe, 'law, alongside other social forces, can be complicit in the creation and persistence of structural injustice' and while, law 'has a potential to remove at least some aspects of particular structural injustices ... this potential has not fully been grasped by law-makers.'⁷

In referring to 'disadvantaged' individuals or groups, this article focuses upon people who experience barriers to full social participation. These barriers might be associated with (inter alia), poverty, disability, age, gender, relationship status, pregnancy, race, nationality, religion, belief and sexual orientation. This is a non-exhaustive list, and the approach developed here has utility across many vectors of disadvantage.

'Disadvantage' can be understood as a lack of genuine opportunities to access and maintain the basic resources necessary for a flourishing human life. The most disadvantaged groups in society are those for whom several types of disadvantage cluster together and have a compounding or reinforcing impact.⁸ Disability⁹ and poverty are classic examples and are used throughout this article to demonstrate the utility of a recognising capabilities analysis. Across jurisdictional contexts¹⁰ disabled people and their families consistently face an increased risk of poverty caused by higher disability-related living costs, lower levels of employment, and reliance upon benefit systems as a source of income.¹¹ In the UK, disabled people are around twice as likely to live in poverty than other working-age adults.¹² 'Poverty and disability are mutually reinforcing'.¹³ They have a cumulative impact upon wellbeing. If a person experiences disability, this profoundly increases their risk of poverty, and the conditions of poverty, in turn, result in worsening health outcomes which further increase the risk of impairment. Disadvantaged people often live their lives at the intersection of several overlapping systems of law which may all individually result in misrecognition, and which can cause compounding layers of disadvantage in lived reality.

7 Mantouvalou and Wolff, 'Introduction', n 2 above, 4.

8 Jonathan Wolff and Avner de-Shalit, *Disadvantage* (Oxford: OUP, 2013) 10.

9 I adopt an engaged and critical perspective to disability law scholarship. See Colette Cann and Eric DeMeulenaere, *The Activist Academic: Engaged Scholarship for Resistance, Hope and Social Change* (Gorham, ME: Myers Education Press, 2020).

10 World Bank Group, 'Disability Inclusion' (3 April 2023) at <https://www.worldbank.org/en/topic/disability> [<https://perma.cc/X5FP-6C22>].

11 Joseph Rowntree Foundation, 'UK Poverty 2024: The Essential Guide to Understanding Poverty in the UK' (23 January 2024) 66 at <https://www.jrf.org.uk/uk-poverty-2024-the-essential-guide-to-understanding-poverty-in-the-uk> [<https://perma.cc/SW5N-QQLV>].

12 *ibid.*, 67.

13 Luke Clements, *Clustered Injustice and the Level Green* (London: Legal Action Group, 2020) 129.

The recognising capabilities analysis can be operationalised in sociolegal research to better understand and tackle the role of law in creating, entrenching and challenging structural disadvantage. It also offers a helpful ontological and epistemological perspective for sociolegal researchers hoping to undertake engaged and activist research projects¹⁴ by encouraging us to consider how research agendas can be more impactful for disadvantaged communities through the research process itself.¹⁵

Until now, the capability approach and the theory of recognition have been considered distinct and competing theoretical approaches.¹⁶ Both frameworks are well established and highly respected.¹⁷ The objective here is not to detract from the importance or utility of either paradigm. Instead, by expressly drawing together the strengths of both discourses, the recognising capabilities analysis can move capability theory in more overtly relational directions. It provides a more complete analytical tool with which to explore law's role in setting up structural constraints and power inequalities which profoundly affect capabilities enjoyment for disadvantaged people. This offers significant benefits for sociolegal researchers who wish to better understand the role of law in perpetuating structural disadvantage and who wish to develop new and innovative responses. This article contributes to ongoing discussions about how critical sociolegal researchers can utilise novel theoretical insights which help us to better harness the potential of law to challenge structural injustice.

In 2011, although electing not to take on the challenge himself, Gideon Calder suggested that 'factoring in capability ... might "round out" Fraser's own approach [to recognition] and make good its promise ... I hope to have shown here that such further work is worth considering, and would enhance our understanding.'¹⁸ This article takes up that mantle.

The article is divided into three sections. The first section provides an overview of the development of the capability approach primarily in the work of Amartya Sen and Martha Nussbaum. It addresses some of the praise and criticism levelled at capability-based scholarship from relational and disability rights discourses, and considers the contributions made by Jonathan Wolff and Avner de-Shalit to the paradigm.¹⁹ The second section outlines the key elements of Nancy Fraser's theory of recognition, particularly, her normative understanding of parity of participation. It highlights the importance of relationships of recognition between the state and disadvantaged groups. The third section makes the case for embedding recognition within capability theory, and for placing a particular analytical focus upon how legal regulation is affecting parity of participation, capabilities enjoyment, and the realisation of functionings for disadvantaged groups. It highlights the role of law in either entrenching or challenging structural disadvantage. The conclusion offers some initial reflections on the

14 Cann and DeMeulenaere, n 9 above, 13, 71–74.

15 Margaret Ledwith and Jane Springett, *Participatory Practice: Community-based Action for Transformative Change* (Bristol: Policy Press, 2nd ed, 2022) 135, 195, 208–209.

16 Gauthier de Beco, 'The Right to "Inclusive" Education' (2022) 85 MLR 1329, 1341–1344.

17 In relation to capability theory, see Robeyns, n 3 above. In relation to recognition, see Simon Thompson and Majid Yar (eds), *The Politics of Misrecognition* (Abingdon: Routledge, 2016).

18 Gideon Calder, 'Disability and Misrecognition' in Thompson and Yar (eds), *ibid*, 121.

19 Wolff and de-Shalit, n 8 above.

contribution of the recognising capabilities analysis to ongoing debates about the role of law and sociolegal research in better understanding and challenging structural injustice.

THE DEVELOPMENT OF CAPABILITY THEORY

The capability approach was originally devised by Amartya Sen²⁰ and has been further developed by various scholars including Martha Nussbaum,²¹ Ingrid Robeyns,²² Jonathan Wolff and Avner de-Shalit.²³ Capability theory provides a framework by which to assess a person's wellbeing or quality of life in terms of her relative advantage and disadvantage. The 'capability of a person corresponds to the freedom that a person has to lead one kind of life or another.'²⁴ A person's advantage 'is judged to be lower than that of another [person] if she has less capability – less real opportunity – to achieve those things that she has reason to value.'²⁵

Capability theory focuses upon a person's 'actual ability to achieve various valuable functionings as a part of living', where 'functionings represent parts of the state of a person ... the various things that he or she manages to do or be in leading a life'.²⁶ A person's capability freedom is determined by the choices and opportunities practically available to her, to achieve valuable functionings; thus the 'doings' and 'beings' of life. The distinction between 'functionings' and 'capabilities' is between realised achievements on the one hand, and the opportunities from which to choose, on the other.²⁷ Sen notes that the functionings needed for wellbeing vary from elementary things, like being adequately nourished and avoiding mortality, to more complex things such as achieving self-respect, involvement in community life and appearing in public without shame.²⁸

In contrast to neoliberal capitalist understandings of the independent, able-bodied human labouring towards his rational conception of the good life,²⁹ a deep acknowledgement of human diversity is one of the key theoretical characteristics of the capability approach.³⁰ All capability theorists recognise that a person's ability to convert available resources into secure functionings and/or capabilities is determined both by the internal characteristics of a person

20 Sen, n 4 above, 74–86.

21 See Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Belknap Press, 2011). See also Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2007). See also Martha Nussbaum and Amartya Sen, 'Introduction' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Oxford: OUP, 1993).

22 Robeyns, n 3 above.

23 Wolff and de-Shalit, n 8 above.

24 Nussbaum and Sen, 'Introduction' in Nussbaum and Sen (eds), n 21 above, 3.

25 Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2010) 231.

26 Amartya Sen, 'Capability and Well-Being' in Nussbaum and Sen (eds), n 21 above, 30–31.

27 Robeyns, n 3 above, 39.

28 Sen, n 26 above, 36–37.

29 David Harvey, *A Brief History of Neoliberalism* (Oxford: OUP, 2007) 64–66.

30 Robeyns, n 3 above, 63.

(personality traits, intellectual, emotional and educational capacities, health, etc) and what Nussbaum called ‘combined capabilities’ or the suitable external conditions and circumstances which make it possible for people to function.³¹ The impact of a particular characteristic (for example an individual mind or bodily trait), is only a contingent limitation upon a person’s functioning. The extent of the restriction upon her capabilities or opportunities to achieve flourishing, is determined by the social, legal and cultural responses to that characteristic. Practically, this means that the availability of public services, the dominant social norms and legal institutions, the valorisation of productivity in capitalist societies,³² and the distribution of wealth and social goods all influence our opportunities for flourishing.³³

The external conditions or ‘structural constraints’ operating in our lives play a very important role in shaping people’s capability sets, so an account of structural constraints is essential for all capabilities-based theorising. However, as Robeyns acknowledges, ‘sometimes this account will be very implicit’.³⁴ This article makes the often ‘implicit’, explicit. The importance of legal regulation as a structural constraint in determining the recognition afforded to disadvantaged groups and therefore, whether or not we ever actually have the suitable external conditions and circumstances necessary to function, is not always sufficiently brought to the fore. Relational recognition is heavily determined by how legal regulation operates in our lives. Legal systems inform the structural constraints operating in the lives of disadvantaged groups; both through direct resource provision and by influencing how we are treated at the point of access to basic goods, services and social resources essential for the enjoyment of functionings. Only by giving due analytical weight to this reality, can we properly understand a person’s real opportunities for flourishing and explore the impact of law within experiences of structural disadvantage.

Martha Nussbaum developed capability theory by suggesting a list of 10 central human capabilities which she argues are essential for a life worthy of human dignity.³⁵ For Nussbaum, any state failing to provide minimum threshold levels of each relevant good for everyone, falls short of being a just society.³⁶ Nussbaum offers a partial theory of justice based upon providing social minimums or capability adequacy to all humans. Nevertheless, Nussbaum recognises that some key capabilities can only be ‘adequately secured if they are equally secured’, because inequality in the enjoyment of these elements of life would cause ‘a deficit in dignity and self-respect’.³⁷ Equality in the enjoyment of particular key capabilities is closely related to the idea of non-discrimination for disadvantaged groups, because the equal dignity of all human beings ‘demands recognition’.³⁸

31 Nussbaum, *Creating Capabilities* n 21 above, 20–21.

32 Harvey, n 29 above, 64–70.

33 Emma Wynne Bannister and Sridhar Venkatapuram, ‘Grounding the Right to Live in the Community (CRPD Article 19) in the Capabilities Approach to Social Justice’ (2020) 69 *International Journal of Law and Psychiatry* 101551, 2.

34 Robeyns, n 3 above, 66.

35 Nussbaum, *Frontiers of Justice* n 21 above, 76–78.

36 *ibid.*, 75.

37 Martha Nussbaum, ‘The Capabilities of People with Cognitive Disabilities’ (2009) 40 *Metaphilosophy* 331, 335–336.

38 *ibid.*, 335.

Capability failures which result from discrimination or marginalisation ‘ascribes an urgent task to government and public policy³⁹ to correct these issues as a matter of justice.

Nussbaum’s 10 capabilities include things like: ‘life’, ‘bodily health’ and ‘having control over one’s environment’.⁴⁰ She places particular importance upon two capabilities,⁴¹ namely: ‘Practical Reason’ (‘being able to form a conception of the good and to engage in critical reflection about the planning of one’s life’), and ‘Affiliation’ (‘being able to live with and towards others, to recognise and show concern for other human beings, to engage ... in social interaction ... [And] having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others’).⁴²

The 10 central human capabilities were expressly developed with disabled people in mind.⁴³ Therefore our entitlement ‘lies not in rationality ... but rather in the bare fact of being a living human being: being born from human parents and having a minimum level of agency or capacity for activity.’⁴⁴

Nussbaum’s theory, however, has encountered some criticism from the disability rights and ethic of care perspectives.⁴⁵ At different points, Nussbaum has argued that people with profound cognitive impairments both have⁴⁶ and might lack⁴⁷ an entitlement to the central human capabilities. She notes that where a disabled person cannot be elevated to the requisite threshold level for any given capability through the provision of support and care, this ‘extremely unfortunate’ and ‘unhappy state of affairs’ means that ‘society ought to give her the capabilities through a suitable arrangement of guardianship.’⁴⁸ Nussbaum further outlines that should treatments or pre-natal genetic engineering options become available which could ‘cure’ impairment, that is what a properly just society would do. Such arguments are treated with extreme caution by disability rights scholars for valorising an unrealistic species norm which devalues disabled people and quickly leads to the risk of coercive treatment.⁴⁹

Nussbaum’s emphasis on the importance of ‘practical reason’, the need for a ‘minimum level of human agency’ and her acceptance of guardianship, has led disability rights commentators to argue that her conception of capability theory is overly individualistic and too focused upon the rationality and contribution of the individual. This risks stigmatising disabled people who cannot, for whatever reason, meet the threshold level of any of the central human capabilities.⁵⁰ ‘It’s as though the standards of personhood that are set up for critique, return by

39 Nussbaum, *Creating Capabilities* n 21 above, 19.

40 Nussbaum, *Frontiers of Justice* n 21 above, 76–78.

41 Nussbaum, *Creating Capabilities* n 21 above, 39.

42 Nussbaum, *Frontiers of Justice* n 21 above, 77.

43 *ibid.*, 155–223.

44 Martha Nussbaum ‘Capabilities, Entitlements, Rights: Supplementation and Critique’ in Diane Elson, Sakiko Fukuda-Parr and Polly Vizard (eds), *Human Rights and the Capabilities Approach: An Interdisciplinary Dialogue* (Abingdon: Routledge, 2012) 25.

45 Daniel Engster, *Justice, Care, and the Welfare State* (Oxford: OUP, 2015) 176–179.

46 Nussbaum, n 44 above, 25.

47 Nussbaum, *Frontiers of Justice* n 21 above, 187–193.

48 *ibid.*, 192–193. Also see Nussbaum, *Creating Capabilities* n 21 above, 24.

49 Anita Silvers and Leslie Pickering Francis, ‘Justice through Trust: Disability and the “Outlier Problem” in Social Contract Theory’ (2005) 116 *Ethics* 40, 55.

50 *ibid.*, 54–55.

the back door'.⁵¹ Nussbaum's conception has been further criticised for paying insufficient attention to asymmetrical power relations,⁵² and for failing to adequately acknowledge the importance of caring relationships and relationality in realising capabilities for all humans, regardless of impairment.⁵³ Despite the 'often-heard' criticism that 'the capability approach is too individualistic', Robeyns has argued that, properly developed, the capability approach is neither methodologically nor ontologically individualistic and can be expanded in ways which meaningfully answer these criticisms.⁵⁴ Capability theory can be developed in more overtly relational ways to better highlight the impact of relational recognition and structural constraints upon the capabilities enjoyment of disadvantaged groups. Section three of this a seeks to do this. However, we must first explore the contributions made by Wolff and de-Shalit to developing the capability discourse and consider how Fraser's theory of recognition can move this debate forward.

Tackling disadvantage – Wolff and de-Shalit's contributions

Jonathan Wolff and Avner de-Shalit made a profound contribution to capability-based theory by designing a practical approach for detecting and combatting disadvantage.⁵⁵ They argue that determining a person's 'capabilities' or the freedom that a person has to choose one particular 'capability set' over another, actually requires us to assess counterfactuals.⁵⁶ Functionings are observable but capabilities are not, so determining a person's set of capabilities is extremely difficult to quantify or to implement in public policy.⁵⁷ In the interests of pragmatism and clarity,⁵⁸ Wolff and de-Shalit advocate assessing a person's genuine opportunities for secure functionings because a person's ability to achieve and sustain functionings is a vital component of their relative advantage or disadvantage in realising a life they value.⁵⁹ A focus on the ongoing 'security' of our functionings, provided new insights into capability-based analysis. To flourish, we not only require access to particular functionings at any given time, but must also have a secure prospect of maintaining that level of functioning on an ongoing basis. Risk or vulnerability to losing important functionings 'is itself a disadvantage'.⁶⁰

51 Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario, October 2010) 71 at <https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf> [<https://perma.cc/ND2A-F7RZ>].

52 Alison Jaggar, 'Reasoning About Well-Being: Nussbaum's Methods of Justifying the Capabilities' (2006) 14 *The Journal of Political Philosophy* 301, 313–318.

53 Engster, n 45 above, 176–179.

54 Robeyns, n 3 above, 183–185, 179–193.

55 Wolff and de-Shalit, n 8 above.

56 *ibid.*, 63–64.

57 Jonathan Wolff and Avner de-Shalit 'On Fertile Functionings: A Response to Martha Nussbaum' (2013) 14 *Journal of Human Development and Capabilities* 161, 163.

58 *ibid.*

59 Wolff and de-Shalit, n 8 above 37, 72.

60 *ibid.*, 9 and ch 3.

Through empirical research with disadvantaged groups and the people who support them, Wolff and de-Shalit identified six ‘high-weight functionings’ upon which there is general agreement of importance: ‘Life; Bodily health; Bodily integrity; Affiliation (more often described as “belonging”); Control over one’s environment; and Sense, imagination, and thought.’⁶¹ The task for social justice researchers is to identify groups of people for whom disadvantage clusters, because the social arrangements are such that they fail to achieve (or only achieve insecure realisation of), several of the high-weight functionings.⁶² ‘Clusters of disadvantage are often systematic rather than accidental or a coincidence’⁶³ because ‘those who are disadvantaged in one respect (or functioning) are also [often] disadvantaged in others.’⁶⁴ People who fair badly across many of the ‘high weight’ functionings are amongst the least advantaged in society.⁶⁵

Governments should work to de-cluster disadvantage by attending to what Wolff and de-Shalit term ‘corrosive disadvantages’ and ‘fertile functionings’.⁶⁶ Corrosive disadvantages occur when one disadvantage or failure to secure a particular functioning, causes disadvantages to other functionings.⁶⁷ Conversely, fertile functionings are types of functionings, (or the pre-conditions for functionings), which spread their good effects over several categories of living and which lead to the achievement of other functionings. ‘A truly fertile functioning is a “golden lever” of social policy’⁶⁸ because it leads to the realisation of other functionings in practice. As a matter of justice, the state must, therefore, provide the legal, policy and social conditions which enable disadvantaged groups and individuals to realise secure fertile functionings.

Wolff and de-Shalit reaffirm that the realisation of functionings depends upon the interplay between: our internal resources (for example talents and characteristics), the external resources (available in our immediate environment, including income, social capital and ‘less tangible matters such as family and community support’),⁶⁹ and crucially, how those internal and external resources interact with the social and material structures in society.⁷⁰ A person’s resources are what she has to play with, while the dominant social and material structures determine the rules of the game.⁷¹

This article asserts that the recognition afforded to disadvantaged groups by the state through overlapping sources of legal regulation, plays a similar, and equally important role to ‘security’ in determining our genuine opportunities to achieve secure functionings. Through my empirical research with disabled people,⁷² it has become strikingly clear that overlapping systems of legal

61 *ibid*, 106–107.

62 *ibid*.

63 *ibid*, 136.

64 *ibid*, 103.

65 *ibid*, 107.

66 *ibid*, 152, 154.

67 *ibid*, 121, 133–134.

68 *ibid*, 136.

69 *ibid*, 172.

70 *ibid*, 172–173.

71 *ibid*, 173.

72 Alex Louise Pearl, ‘Enabling Financial Flourishing in the Lives of Adults with Cognitive Impairments: Law, Policy and Practice’ (PhD thesis, University of Leeds, 2023) at <https://etheses.whiterose.ac.uk/id/eprint/32339/> [<https://perma.cc/JG5F-6N8J>].

regulation operating within people's everyday lives set the parameters of whether the state recognises particular groups of people as worthy of social inclusion and the conditions necessary for them to flourish. This, in turn, affects how people are viewed and treated by social actors when they attempt to access the basic goods, services and social spaces which form a key part of achieving secure basic functionings. Fraser's work on recognition, particularly her concept of parity of participation, provides a helpful framework for foregrounding these considerations more overtly within sociolegal capability-based assessments of wellbeing.

THE IMPORTANCE OF RECOGNITION

Nancy Fraser's paper 'Recognition without Ethics?'⁷³ sought to reconcile the previously disparate⁷⁴ philosophical concepts of recognition and redistribution. To realise flourishing, we require not just the redistributive resources and opportunities to do so, but we must also regard ourselves, and be regarded by others, as having the equal social status of relationally-situated agents who can operate in the lifeworld.⁷⁵ This crucially important status dimension of flourishing is constituted intersubjectively within social relations of recognition. Consequently, it is 'vulnerable to others' failure, or refusals, to grant us appropriate recognition in a range of different spheres.'⁷⁶ This includes within our everyday interpersonal interactions and as full persons who are both protected by, and subject to, the institutions of the state.

Fraser advocates redefining 'recognition' to mean social status. What requires recognition is not group specific identities (for example disabled versus non-disabled), but rather recognition of the status of all individuals 'as full partners in social interaction'.⁷⁷ 'Misrecognition ... means social subordination in the sense of being prevented from participating as a peer in social life'.⁷⁸

Viewing recognition as a matter of status means we can 'examine institutionalized patterns of culture value for their effects on the relative standing of social actors'.⁷⁹ Legal, policy and normative frameworks which cast disadvantaged individuals or groups as 'inferior, excluded ... or simply invisible', reflect an active political choice by the state to subject those people to status subordination rather than equality.⁸⁰ At its most severe, misrecognition may even become nonrecognition, when marginalised individuals are 'rendered invisible

73 Fraser, n 6 above, 21–22.

74 Julie Wallbank, 'Universal Norms, Individualisation and the Need for Recognition: The Failure(s) of the Self-Managed Post-Separation Family' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Abingdon: Routledge, 2014) 90–91.

75 Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability', in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford: OUP, 2014) 44.

76 *ibid.*

77 Fraser, n 6 above, 24.

78 *ibid.*

79 *ibid.*

80 *ibid.*

via the authoritative representational, communicative, and interpretive practices of one's own culture; and disrespect[ed] ... routinely maligned or disparaged in stereotypical public cultural representations and/or in everyday real life interactions.⁸¹

Claims to recognition seek to establish subordinated people as full partners in social life. For Fraser, 'justice requires social arrangements that permit all (adult) members of society to interact with one another as peers.'⁸² We must work to 'deinstitutionalize patterns of culture value that impede parity of participation and to replace them with patterns that foster it'⁸³ To achieve this, Fraser develops the deontological norm of parity of participation.⁸⁴ Participatory parity has two constitutive elements, both of which must be satisfied.

First, the objective condition which requires the distribution of material and economic resources be such as to ensure all participants' independence and voice. It precludes material inequality and/or economic dependence which impedes parity of participation. Institutionalised deprivation, exploitation and gross disparities in wealth, income and leisure time which prevent some people from interacting with others as peers, are precluded as a matter of justice.

Second, the intersubjective condition which requires that institutional patterns of culture value, or institutionalised social norms, express equal respect for all participants and ensure everyone has equal opportunities for achieving social esteem. Institutionalised patterns of culture value which deny some people the status of full partners in social interaction (either through ascribing problematic 'difference' to them, or by failing to acknowledge their distinctiveness), are precluded.⁸⁵

In summary, participatory parity prohibits material inequality and institutional norms which 'systematically depreciate some categories of people and the qualities associated with them.'⁸⁶ 'Participatory parity is the backbone of social justice'.⁸⁷ Indeed justice, equality and dignity 'are not achievable outside a recognition of the relationality between people'.⁸⁸ Herring has contended that it is relationships of care, love and dependence themselves which form the moral basis of being human⁸⁹ so understanding relationships of care as actively generating moral status represents 'personhood at its best'.⁹⁰

Incorporating these insights from the theory of recognition can develop the capability approach in a more overtly relational direction. Sociolegal researchers are encouraged to pay particular attention to the role of overlapping systems of law in creating relationships of recognition (or misrecognition) between the

81 Nancy Fraser and Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (London: Verso, 2023) 13.

82 Fraser, n 6 above, 29.

83 *ibid.*, 25.

84 *ibid.*, 29–30.

85 *ibid.*

86 *ibid.*

87 Ledwith and Springett, n 15 above, 18.

88 Amanda Gouws and Mikki van Zyl, 'Towards a Feminist Ethics of *Ubuntu*: Bridging Rights and *Ubuntu*' in Daniel Engster and Maurice Hamington (eds), *Care Ethics and Political Theory* (Oxford: OUP, 2015) 180.

89 Jonathan Herring, *Law and the Relational Self* (Cambridge: CUP, 2020) 136–138.

90 Jonathan Herring, 'Relational Personhood' (2020) 1 *Keele Law Review* 24, 40–41.

state and disadvantaged groups. These set the structural constraints which operate in disadvantaged people's lives and determine whether they are provided with the resources and social conditions necessary to achieve basic functionings. Such an approach is, therefore, particularly well placed to investigate structural forms of disadvantage and injustice. Nevertheless, it is important to illustrate why embedding considerations of recognition into capability-based assessments of wellbeing adds analytical value beyond the operation of the two theoretical frameworks independently. We turn to this task now.

THE CASE FOR THE 'RECOGNISING CAPABILITIES ANALYSIS'

The capability approach is highly pluralistic. It can be developed in various ways to achieve different objectives.⁹¹ Robeyns has drawn a helpful distinction between the open-ended and underspecified nature of the wider 'capability approach', and more developed 'capability theories', 'capability accounts', 'capability applications' or 'capability analyses' which add further normative or empirical factors into the framework and tailor it to address specific objectives.⁹²

Capability-based thinking has been used to develop partial theories of justice.⁹³ It has been profoundly influential in the fields of international development and human rights scholarship.⁹⁴ It has been used to advocate for policy changes addressing everything from energy poverty⁹⁵ to child law.⁹⁶ It has been operationalised through empirical measures to assess wellbeing, poverty and human rights outcomes.⁹⁷ It has even been used to develop new forms of welfare economics.⁹⁸

Nevertheless, as Robeyns argues, 'if the capability approach aspires to make a difference in practice', 'a critical account of social structures and power is needed' which can put flesh on the bones of the capability approach.⁹⁹ 'Necessary collaborations with other theories ... are needed. It is in those collaborations with complimentary powerful theories and frameworks that the success of the future of the capability approach lies.'¹⁰⁰

This is what the recognising capabilities analysis offers. Capability theory is about determining the real opportunities which people have to achieve a flourishing life. Fraser's theory of recognition is about the recognition of people in

91 Robeyns, n 3 above, 29–31, 60–61, 153.

92 *ibid.*, 29.

93 Notably by Nussbaum.

94 Nussbaum, *Creating Capabilities* n 21 above.

95 Lucie Middlemiss and others, 'Energy Poverty and Social Relations: A Capabilities Approach' (2019) 55 *Energy Research & Social Science* 227.

96 Michael Thomson, 'A Capabilities Approach to Best Interests Assessments' (2021) 41 *Legal Studies* 276.

97 Tania Burchardt and Polly Vizard "'Operationalizing" the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain' (2011) 12 *Journal of Human Development and Capabilities* 91.

98 Robeyns, n 3 above, 208–209.

99 *ibid.*, 215.

100 *ibid.*, 216.

their relationships. I argue that relational recognition plays a critical role in determining our genuine opportunities to secure basic functionings and realise flourishing. Accordingly, relational recognition requires an overt focus and foregrounding in assessments of wellbeing. Drawing together both discourses provides a more relationally-focused application of capability theory. It places analytical emphasis on the role of law in creating relationships of (mis)recognition which determine the structural constraints and power differentials affecting the genuine opportunities of disadvantaged people to achieve secure functionings. This section illustrates how the recognising capabilities analysis develops a new tool of sociolegal analysis which overtly incorporates the insights of relational theory within capability-based assessments of wellbeing, overcoming some of the linguistic and semantic challenges levelled at both relational scholarship and the capability discourse by disability rights commentators. The recognising capabilities analysis develops a new limb of capability-based thinking. It provides a new ontological and epistemological tool to better understand the role of law and state sanctioned misrecognition in causing and perpetuating unjust structures.

Fraser's work on recognition can round out and further develop capability theory to highlight law's role in setting up relationships of (mis)recognition between the state and disadvantaged groups. These relationships both determine the extent of direct resource provision and set institutional norms which influence how disadvantaged people are treated by social actors at the point of service delivery. This significantly influences their ability to convert resources into achieved functionings through accessing the basic goods, services and social spaces essential for a minimally flourishing human life. Embedding recognition within the capabilities paradigm means that the recognising capabilities analysis adds the normative considerations of social recognition, equality and non-discrimination overtly into capability-based assessments of wellbeing.¹⁰¹ It places emphasis on the 'structural constraints' at play in people's lives, constraints which result from overlapping modalities of legal regulation. This allows sociolegal researchers to take a more holistic approach to assessing the role of law in creating, entrenching and challenging structural disadvantage, thereby developing more transformative research and reform agendas.

Why capabilities?

As outlined above,¹⁰² capability theory has been criticised for being overly individualistic, stigmatising disabled people, and for failing to pay sufficient attention to asymmetrical power relations in realising capabilities for all humans.¹⁰³ Indeed, some disability scholars continue to question its utility.¹⁰⁴ However, much of this criticism is aimed at Nussbaum's conception of capability theory

101 *ibid* 86.

102 See section 1 on the development of capability theory.

103 Engster, *Justice, Care and the Welfare State*, n 45 above, 176–179.

104 Angharad Beckett, 'Rethinking Disability Law: Theoretical Limitations and Transformative Possibilities' (2025) 17 *Ars Vivendi* 2, 6.

and does not hold weight against the broader field of scholarship. By developing the discourse in more overtly relational directions to better attune to the impact of structural constraints and power inequalities on our genuine opportunities for flourishing, capability theory can be incredibly useful in better understanding law's role in perpetuating and challenging structural injustice for all disadvantaged groups, disabled people included.

One core reason to maintain a commitment to capabilities-based thinking is the natural coherence of capability theory with human rights discourses. The capability approach has long been considered a close relation of human rights theory.¹⁰⁵ It dispels any spurious distinction between the realisation of civil and political rights on the one hand, and socioeconomic rights on the other, by acknowledging that human rights entitlements cannot be enjoyed without adequate distribution of resources and enabling material conditions. Indeed, many commentators assert that modern human rights treaties, particularly the UN Convention on the Rights of Persons with Disabilities,¹⁰⁶ are constructed upon capabilities-based understandings of wellbeing and thus should be implemented by adopting the capabilities approach.¹⁰⁷ Human rights entitlements, despite their challenges, remain the best 'commitment gadget' we have to argue for a better life for people beyond the bonds of our kinship.¹⁰⁸ They retain a particular weight within legal scholarship, unmatched by any other discourse and remain a key weapon in the arsenal of sociolegal scholars seeking to improve lived realities for disadvantaged groups. The natural synergy between capability theory and human rights discourses should not be neglected in the fight for transformative justice.

A second reason for retaining a commitment to capability theory is that adding recognition to the paradigm offers significant scope for overcoming the historical challenges levelled at capability theory by ethic of care and relational thinkers. Any capability-based theory of wellbeing should, at its very core help us to understand whether capabilities (or achieved functionings) are truly available to us, given the choices made by other people and institutions.¹⁰⁹ Care ethicists and relational theorists have long emphasised that relationships are essential for human flourishing. We do not operate as 'isolated, individual selves, but rather "relationally", interdependently and intersubjectively with others ... and through social, economic and political conditions that make this possible.'¹¹⁰ No humans realise functionings (or exercise agency) in isolation, but rather in light of our relational contexts and structural constraints. Research is increasingly illustrating that human decision-making is driven by emotion, cir-

105 Robeyns, n 3 above, 160.

106 United Nations Convention on the Rights of Persons with Disabilities 2006 (CRPD), 2515 UNTS 3.

107 See Jill Stavert, 'Adapting or Discarding the Status Quo? Supporting the Exercise of Legal Capacity in Scottish Law and Practice' in Mary Donnelly, Rosie Harding and Ezgi Taşcıoğlu (eds), *Supporting Legal Capacity in Socio-Legal Context* (Oxford: Hart Publishing, 2022) 178. Also see Wynne Bannister and Venkatapuram, n 33 above.

108 Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty and Virginia Mantouvalou (eds), *Debating Social Rights* (Oxford: Hart Publishing, 2011) 12.

109 Robeyns, n 3 above, 41.

110 Bach and Kerzner, n 51 above, 40.

cumstance, internal bias, habit, behavioural nudges and even capriciousness.¹¹¹ All humans make decisions about their wellbeing with support from others. We all fall along a spectrum of support at different times throughout our lives.¹¹² While all capability-based theories ‘should endorse some account of agency ... the concept of “agency” can be fleshed out in many different ways ... there is no agreed-upon or standard claim about how much agency, or what particular type, should be assumed’.¹¹³ To be as inclusive as possible, the recognising capabilities analysis posits that the requisite level of agency necessary to qualify for an entitlement to basic human functionings, is simply that of being in human relations of interdependence with other people. Agency can be fleshed out in far more relational ways to better reflect how all human beings operate. Involvement in human relationships is sufficient ‘agency’ to qualify for capabilities-based entitlements. While this may be open to the criticism of speciesism, it is a necessary step to focusing upon the particular role of law in determining the capabilities enjoyment of all humans, regardless of the extent of their impairments.

An overt turn towards relationality foregrounds the role played by structural constraints in determining a person’s genuine opportunities to realise secure functionings. It can ‘expose all the varied relationships (interpersonal, social, legal, regulatory) that shape and constrain social action ... [W]here a person lives within structures of oppression, a relational view allows us to be attentive to the effects of those structures on her life. It allows us to understand the ways that broader, macro norms impact on her everyday life.’¹¹⁴

How the law treats disadvantaged groups sets the relationality between the state and the individual and this trickles down to affect how that individual is treated in their day-to-day lives. ‘Within relations we become what we are as persons ... When they work well, relations are ... conducive to human autonomy and to the flourishing of the individual ... the role of law is to regulate relations ... to ensure that they run smoothly and that they neither oppress nor harm us.’¹¹⁵

Care-based and relational discourses have historically been treated with caution, and even antagonism,¹¹⁶ by disability rights scholars because medicalised notions of ‘caring-for’ disabled people can be disempowering. The individual rights of disabled people may become obscured by the caring relationship and the historic relegation of care to the private sphere can conceal the risk of harm for both parties involved in caring relationships. The overburdening of families to undertake care work has also been used to insidiously absolve the state of

111 See Daniel Kahneman, *Thinking Fast and Slow* (London: Penguin Books, 2011). Also see Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (London: Penguin Books, 2008).

112 Herring, n 89 above, 16–23.

113 Robeyns, n 3 above, 64.

114 Rosie Harding, ‘Care and Relationality: Supported Decision Making Under the UN CRPD’ in Rosie Harding, Ruth Fletcher and Chris Beasley (eds), *ReValuing Care in Theory, Law and Policy: Cycles and Connections* (Abingdon: Routledge, 2018) 119.

115 Ngairé Naffine, ‘Review Essay: The Liberal Legal Individual Accused: The Relational Case’ (2013) 29 *Canadian Journal of Law and Society* 123, 123.

116 Beverley Clough, ‘Disability and Care: Theoretical Antagonisms Revisited’ in Beverley Clough and Jonathan Herring (eds), *Disability, Care and Family Law* (Abingdon: Routledge, 2021) 18–21.

responsibility for providing the resources and conditions needed for disabled people to flourish on an equal basis.¹¹⁷ The antagonism between care and disability discourses is increasingly being seen as ‘unhelpful and outmoded’,¹¹⁸ and a reprioritisation of care and rationality is being seen in the work of Beverley Clough,¹¹⁹ Jonathan Herring¹²⁰ and Rosie Harding.¹²¹ The recognising capabilities analysis expressly draws the insights of relational theory more clearly into focus within capability-based assessments of wellbeing by adopting the language of recognition. This helps to move beyond the linguistic and semantic criticisms levelled at both discourses.

Why recognition?

Fraser’s two-dimensional concept of parity of participation has great utility in focusing minds upon ‘structural constraints’ and particularly the role of overlapping systems of law upon the recognition afforded to disadvantaged groups. This is profoundly important in determining our actual abilities to secure basic functionings which are essential for a liveable human life. Sociolegal researchers must attune to both: the direct relationships of recognition, misrecognition or even nonrecognition between the state and disadvantaged groups which affects levels of direct resource provision; and, how that recognition, misrecognition or nonrecognition establishes institutional norms which determine how disadvantaged groups are viewed and treated in society by social actors and gatekeepers with whom we must interact to obtain access to the basic goods, services and social spaces necessary for functionings.

To really appreciate the effect of law within structural injustice, we must explore the overlapping and polycentric impact of a multitude of different legal structures which influence our parity of participation and our abilities to access and convert essential basic resources into realised secure functionings. A focus on the impact of law in setting the objective and intersubjective conditions of parity of participation across various different contexts, and how this affects our practical opportunities to realise secure functionings is the central contribution of the recognising capabilities analysis. Indeed, this highlights how systems of law can actually entrench systematic disadvantage and depoliticise structural injustice. If the equal personhood of disadvantaged groups is not recognised, there is no corresponding moral imperative for the state to better provide essential resources, improve institutional recognition for disadvantaged groups, and meaningfully enable them to achieve the secure basic functionings which are needed for a safe, civilised and liveable human life.

117 See Jonathan Herring, ‘The Disability Critique of Care’ (2014) 8 *Elder Law Review* 1. Also see Clough, n 116 above, 19–20.

118 Clough, *ibid*, 20 and 28.

119 See Beverley Clough, *The Spaces of Mental Capacity Law: Moving Beyond Binaries* (Abingdon: Routledge, 2022) 78–102. Also see Clough, *ibid*, 21, 26–27.

120 Herring, n 89 above.

121 Harding, Fletcher and Beasley (eds), n 114 above.

Why both?

The recognising capabilities analysis uses recognition to put flesh on the bones of capabilities-based assessments of wellbeing and to provide a more critical account of social structures and power inequalities, with a particular emphasis on law's role in determining these factors. It puts the focus upon systems of law as centrally important 'structural constraints' which have a profound influence on people's basic resources, their conversion factors (their ability to convert resources into achieved functionings), and their capability sets themselves, or the practical opportunities actually available to them to achieve secure functionings.¹²²

A recognising capabilities analysis can support human rights claims, redistributive claims, and claims for equal recognition, not just between the state and disadvantaged groups, but also between disadvantaged groups and the social actors who control our access to the basic goods and services essential for a minimally flourishing life. As Wolff and de-Shalit note, 'recent theories of equality have not paid sufficient attention to the relations between citizens in a society of equals. Instead ... concentrat[ing] essentially on the way governments treat their citizens, rather than the way in which those citizens treat each other'.¹²³ The recognising capabilities analysis offers a way to do both. It focuses minds upon the direct impact of law for disadvantaged groups, but also upon how modalities of legal regulation inform the relational interactions experienced by disadvantaged individuals within everyday contexts. As Engster notes, 'the nature of the relationships between street level bureaucrats and citizens' is 'a key but underappreciated dimension of justice'.¹²⁴

The recognising capabilities analysis rests upon a substantive, multidimensional understanding of equality.¹²⁵ It is intentionally constructed to support arguments which break the cycle of disadvantage associated with status or out-groups; actively promote the dignity and worth of all people to redress stigma and stereotyping; accommodate difference and achieve structural change; and facilitate full participation in society, both socially and politically.¹²⁶

Some commentators may feel that embedding recognition within capability theory is superfluous, as the capability approach and relational theory can both independently provide adequate conceptual space for these arguments. However, I have demonstrated how drawing on recognition can put flesh on the bones of the capability approach by better incorporating considerations of relationality, parity of participation, equality and non-discrimination within capability-based assessments of wellbeing. It places a more overt focus on the role of law in determining structural constraints and power inequalities operating in people's lives which can either enhance or impede their parity of participation in access to secure basic functionings. This offers particular benefits for

122 Robeyns, n 3 above, 81.

123 Wolff and de-Shalit, n 8 above, 5.

124 Daniel Engster, *A Public Ethics of Care for Policy Implementation* (2020) 64 *American Journal of Political Science* 621, 627, 632.

125 Sandra Fredman, *Discrimination Law* (Oxford: OUP, 2nd ed, 2011) 25.

126 *ibid.*

sociolegal researchers wanting to investigate the role of law in establishing, perpetuating and potentially rectifying structural injustice. This article attempts to move beyond ‘either/or’ debates.¹²⁷ There is intrinsic value in drawing together the strengths and core insights of two well-established theories and using those frameworks as pillars on which to build a more fleshed-out analysis of law’s role in creating, (and challenging), unjust structures.

To apply a recognising capabilities analysis, sociolegal researchers should aim to address five points. First, identify instances of corrosive disadvantage or exclusion from the conditions necessary to realise secure basic functionings. In other words, identify people who are experiencing inadequate access to the basic resources, goods, services and social spaces necessary for a liveable human life. Second, identify the various overlapping systems of legal regulation operating (and setting structural constraints) in the everyday lives of those individuals. Third, address how each of those systems of law affects the objective and intersubjective conditions of parity of participation. This includes the extent of direct resource provision and the relationship of recognition, misrecognition or nonrecognition set up between the state and disadvantaged groups. How do these norms trickle down through culture value to affect how disadvantaged groups are treated by other social actors and gatekeepers in society with whom we have to interact to realise secure basic functionings? Fourth, what is the cumulative and compounding impact of these different regulatory systems? This highlights the role played by law in creating or entrenching structural injustice which effectively prevents disadvantaged groups from ever having access to secure basic functionings and/or the conditions for flourishing. Fifth, how might law and policy reform be leveraged (perhaps across different legal contexts and sectors), to challenge and rectify structural injustice? Can the process of conducting sociolegal research itself play a role in addressing structural injustice at the grassroots level? In the following section, the example of disability poverty and its impact on wellbeing is used to demonstrate the utility of a recognising capabilities analysis.

Example: disability and financial wellbeing

Poverty is perhaps the single greatest corrosive disadvantage experienced by humans. As the introduction highlighted, the impact of poverty is particularly stark for disabled people. Using the recognising capabilities analysis we first identify areas of corrosive disadvantage (for example disability poverty), then we identify the overlapping systems of legal regulation having a significant effect on the financial wellbeing of disabled people based upon their lived experiences. Researchers can then analyse how each framework, individually and cumulatively, operates to create relationships of misrecognition/nonrecognition which affect parity of participation, both through direct resource provision, and through setting institutional norms which affect how disabled people are viewed and treated by social actors who control access to the basic

127 Engster, n 45 above, 163–199.

resources, goods, services and social spaces necessary to achieve secure basic functionings.

For example, a woman with learning disabilities living in England today is likely operating at the intersection of the benefits system, the care system, the Mental Capacity Act 2005 system, and the Equality Act 2010 system. If her impairment affects her ability to secure high quality employment, she may be wholly or substantially depending on benefit income to live. If this benefit provision is complex to access due to inaccessible call centres, complicated application processes, long wait times and punitive assessment criteria,¹²⁸ then, in practice, her access to essential monetary resources may be reduced. If she has everyday care needs which cannot be covered by family, then she is likely to be interacting with the care system. If state provided care is in a permanent crisis of provision,¹²⁹ then our individual may be going without essential day-to-day living support vital for helping her to manage money, go shopping, access community and leisure spaces, perhaps even undertake basic tasks such as dressing, eating and communicating with others. If her decision-making capacity is contested, she may be unable to use the bank, receive her own benefit income, use direct debits or enter contracts for basic goods and services such as utility and telecommunication provision. If the legal and social systems which govern access to basic functionings such as housing provision, banking, education etc are not made accessible through equality and non-discrimination provisions, then she may remain profoundly excluded from achieving a substantial number of basic human functionings to which she is entitled, and which could be meaningfully realised were sufficient resources, support and recognition provided. A lack of accessible service provision across society results in a 'disability premium', with disabled people paying higher costs for lower quality but 'easy to use' services such as utility meters or pay-as-you-go phones. Our woman with learning disabilities faces clusters of problems across all these systems (access to money, access to care, access to services), all of which overlap and combine in her day-to-day life to put her financial wellbeing further into precarity. No sooner has she navigated one challenge, the next is immediately apparent. It creates a life of firefighting clustered disadvantage on all fronts with little time, energy or resources left for any meaningful wellbeing achievement. Each legal system overlaps and interacts in 'polycentric, ripple-effects of clustered problems'.¹³⁰ If these overlapping legal systems (either through legislative provisions or implementation failures) fail to acknowledge or recognise the equal personhood of disabled people, this informs how societal gatekeepers view and treat disabled people at the point of access to these essential human requirements. Continued in perpetuity, these legally-determined structural constraints may be such that our woman with learning disabilities might never have real opportunities to secure basic functionings, let alone capability freedom and flourishing on her own terms. Misrecognition and a failure to acknowledge the equal personhood

128 Clements, n 13 above, 42–44, 71–83.

129 House of Commons Committee of Public Accounts, *Reforming adult social care in England* Twenty-Second Report of Session 2023–34, HC 427 (11 March 2024) 9 at <https://committees.parliament.uk/publications/43918/documents/217743/default/>.

130 Clements, n 13 above, 3.

of disabled people across a broad spectrum of legal frameworks can have the effect of depoliticising and entrenching structural injustice and removing any corresponding pressure on the government to rectify profound disadvantage and exclusion. Each system of law is taken in turn below.

Income and the Benefits System

Adequate levels of income are a pre-condition of functioning. What matters is not simply the amount in pounds and pence, but how one can use income to realise other fertile functionings. A recognising capabilities analysis involves assessing whether the state directly provides adequate resources (income) for a minimally flourishing life, alongside how institutional norms entrenched within the benefits system cause misrecognition for benefit claimants which affects their treatment in reality. Do these state sanctioned norms hamper parity of participation and the realisation of secure functionings?

Income levels differ significantly between disabled and non-disabled people with 54.2 per cent of working-age disabled people in employment compared to 82 per cent of the general population.¹³¹ Ninety-five per cent of disabled people feel that their impairment affects their ability to work.¹³² Therefore, disabled people often rely on benefits as a primary source of income. Provision is governed primarily through the Welfare Reform Act 2012 and delivered through the Department for Work and Pensions (DWP). Overwhelming evidence shows that benefit levels in the UK are insufficient to cover even basic living costs for disabled people. On average, disabled households face additional costs of £1,010 per month.¹³³ In 2023, the DWP reported that those relying solely on disability benefits ‘were often unable to meet essential day to day living costs ... such as rent, heating or food and [were] almost always unable to pay for additional health-related costs’, such as therapies and equipment.¹³⁴ Research by the Personal Finance Research Centre (PFRC) found that 27 per cent of disabled households are experiencing serious financial difficulty, with 33 per cent of disabled people struggling to pay for food and other essential expenses.¹³⁵

Systemic and continuing reductions in benefit income over the last 15 years have left disabled families in far higher levels of poverty.¹³⁶ Direct resource

131 Andrew Powell, ‘Research Briefing: Disabled People in Employment’ (House of Commons Library, Research Briefing Number 7540, 18 March 2024) 10 at <https://researchbriefings.files.parliament.uk/documents/CBP-7540/CBP-7540.pdf>.

132 Jamie Evans and others, ‘The Financial Wellbeing of Disabled People in the UK’ (Personal Finance Research Centre, University of Bristol, Research Institute for Disabled Consumers, September 2023) 37 at <https://www.bristol.ac.uk/media-library/sites/geography/pfrc/documents/The%20financial%20wellbeing%20of%20disabled%20people.pdf> [<https://perma.cc/X35V-994Q>].

133 Scope, ‘Disability Price Tag 2024’ (Scope, Campaigns, 2024) at <https://www.scope.org.uk/campaigns/disability-price-tag> [<https://perma.cc/FL9Z-6SG2>].

134 Department for Work and Pensions, ‘Uses of Health and Disability Benefits’ (DWP research report No 998, March 2023) 24–25 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1142539/uses-of-health-and-disability-benefits.pdf [<https://perma.cc/9UP4-E52R>].

135 Jamie Evans and others, n 132 above, 6–7.

136 Ledwith and Springett, n 15 above, 53–55, 63.

provision is so low that it fails the objective condition of participatory parity and places disabled people in a position of relational misrecognition by the state. This corrosive disadvantage affects each of Wolff and de-Shalit's 'high-weight' functionings, worsening outcomes related to health, bodily integrity, affiliation and having control over one's environment. Applying a recognising capabilities perspective, such inadequate provision is a failure of justice and requires the state to provide corrective measures which rectify this corrosive disadvantage.

Clements has highlighted the trauma which disabled families encounter when interacting with the social welfare system.¹³⁷ Ninety-two per cent of disabled people felt that interacting with the benefits system was 'complicated', and participants in the PFRC research described the process of accessing benefits as 'punishing and humiliating', 'degrading' and 'hostile'.¹³⁸ Indeed, Rapporteurs to the UN Committee on the Rights of Persons with Disabilities recently described the UK's policy and practice as "a pervasive framework and rhetoric that devalues Disabled people's lives" which "tells Disabled people that they're undeserving citizens" and "makes [Disabled] people feel like criminals" – particularly those who are trying to access the social security system.¹³⁹ This fails the intersubjective condition of participatory parity.

Cast as unworthy of the basic essentials necessary for a flourishing life, disabled people are denied both elements of participatory parity. These institutional norms of misrecognition entrench structural disadvantage and affect how disabled people are treated in everyday interactions when they try to access basic goods and services and realise secure functionings. For example, evidence shows that mortgage and lending systems are affected by structural discrimination which devalues income from benefits sources within lending assessments,¹⁴⁰ meaning that disabled people are disproportionately trapped within insecure rental accommodation, reducing control over one's environment, increasing stress and precarity, and worsening health outcomes.

The demonisation of disabled people as 'welfare scroungers'¹⁴¹ has enabled the state to absolve itself of responsibility for ensuring basic levels of human flourishing. The regulatory system is setting institutional norms regarding who is worthy of recognition and inclusion within society. At the time of writing, this remains a growing concern. Uncertainty continues to surround the

137 Clements, n 13 above, 42–53, 90–99.

138 Jamie Evans and others, n 132 above, 15, 43–44.

139 Inclusion London, '2024 Evidence Session: Watch live as the UK government attempts to defend its record on Disabled people's rights' (Inclusion London, 13 March 2024) at <https://www.inclusionlondon.org.uk/campaigns-and-policy/uncrdp/uncrdp-2023-24/crdp24/>.

140 See Financial Conduct Authority, 'Firms' Treatment of Customers in Vulnerable Circumstances Review: Delivering good outcomes for customers in vulnerable circumstances – good practice and areas for improvement' (FCA, 7 March 2025) <https://www.fca.org.uk/publications/good-and-poor-practice/delivering-vulnerable-customers> [<https://perma.cc/654Z-5UTP>]. Also see Laura Hemingway, 'Taking a risk? The mortgage industry and perceptions of disabled people' (2010) 25 *Disability and Society* 75, 80–85.

141 See Ledwith and Springett, n 15 above, 53, 63. Also see Frances Ryan, *Crippled: Austerity and the Demonization of Disabled People* (London: Verso 2020) 4–5.

Government's planned reforms to reduce benefit and welfare spending.¹⁴² The choice to cut benefit provision for disabled people over concerns about the fiscal 'sustainability' of current provision,¹⁴³ rather than to increase taxation in order to deal with fiscal challenges, was met with strong condemnation from disability rights charities sparking mobilisation and campaigning against the proposals.¹⁴⁴ Despite recent political concessions and a commitment from the Government that changes to Personal Independence Payment (PIP) will only occur after a review of the current system coproduced with disabled people, any future cuts to PIP are likely to exacerbate disability poverty and increase the precarity of basic functionings, further entrenching and compounding structural disadvantage.¹⁴⁵ A recognising capabilities analysis is especially well-equipped to address the role of law and the potential of legal reform in setting structural constraints and institutional norms which either worsen or address structural injustice.

The Care System

The availability and quality of local authority-funded care support is essential for safeguarding the day-to-day wellbeing of many disabled people (particularly if they lack familial support). In England, the Care Act 2014 governs social care provision, adopting a framework for 'promoting well-being'.¹⁴⁶ Local authorities bear primary responsibility for meeting social care needs and supporting people to realise community living outcomes such as: living safely, building relationships, accessing education or work, and making use of necessary facilities and services in the local community.¹⁴⁷ Heralded as legislation 'enabling people to have more control over their lives',¹⁴⁸ the Act introduced personal budgets as a way to help people gain more control over their care arrangements. However, the practical implementation of these measures has led to mixed results. Some groups have reported significant benefits, while others find managing their own care overwhelming, bureaucratic, 'onerous and stressful'.¹⁴⁹

142 Kate Whannel, 'Government's watered-down benefits bill clears Commons' *BBC News* 9 July 2025 at <https://www.bbc.co.uk/news/articles/cm2zyvypmeeo> [<https://perma.cc/ZLX3-PN6V>].

143 HM Treasury and The Rt Hon Rachel Reeves MP, 'Spring Statement 2025 speech' (Speech, London, 26 March 2025) at <https://www.gov.uk/government/speeches/spring-statement-2025-speech> [<https://perma.cc/AMF5-ECWC>].

144 Disability Rights UK, 'Take Action: Oppose the benefit cuts' (2025) at <https://www.disabilityrightsuk.org/take-action> [<https://perma.cc/6LFE-74HS>].

145 Disability Rights UK, 'Government's Universal Credit Bill Passes: DR UK Response' (News, 9 July 2025) at <https://www.disabilityrightsuk.org/news/governments-universal-credit-bill-passes-dr-uk-response> [<https://perma.cc/6S3B-B39S>].

146 The Care Act 2014, s 1.

147 The Care and Support (Eligibility Criteria) Regulations 2015, SI 2015/313, s 2.

148 Janet Snell, 'A quick guide to the Care Act' *The Guardian* 28 April 2015 at <https://www.theguardian.com/social-care-network/2015/apr/28/-care-act-2014-quick-guide> [<https://perma.cc/8CQT-8BBE>].

149 Lucy Series, *Deprivation of Liberty in the Shadows of the Institution* (Bristol: Bristol University Press, 2022) 68–69.

Systemic reductions in state funding and increased privatisation have pushed the social care sector to the ‘brink of collapse’.¹⁵⁰ Widely acknowledged to be in a permanent state of crisis, unpaid carers are covering unmet demand.¹⁵¹ Series has described a ‘landscape of domination’ in which people live in the constant shadow of institutional regulation and detention.¹⁵²

‘More and more people are not getting access to the care they need, and ... are experiencing a reduction in quality.’¹⁵³ The heavily means tested nature of care provision means that people can face ‘unpredictable and catastrophic care costs’, often obliged to use their life savings or sell their homes to pay for care. In 2022 the Levelling Up Committee reported:

a rise in unmet and undermet need ... ‘cases of local authorities justifying not providing care, or only providing care on a limited basis, because of cost’ ... the impact on disabled people left many in debt or in poverty, without care, and even in some cases having their lives cut short... sometimes ‘only very basic personal care needs [are] met’, which ‘limits, and often completely denies opportunities to participate in society, become economically active, build relationships and live a normal life, that many non-disabled people take for granted.’¹⁵⁴

Case law illustrates how such cuts can profoundly undermine a person’s secure functionings.¹⁵⁵ Far from receiving enabling support which assists one to live in the community and flourish, even very basic care needs, essential for the functionings of adequate health, food and secure housing, are not being met. A prejudicial miasma ‘lurks beneath policy in this area’ as social care continues to be understood as something ‘concerned with the management of a national and economic burden, of a group that society (and politicians) would rather forget about’.¹⁵⁶ The law is failing to deliver the conditions necessary for even very basic functionings. This entrenches a norm under which those who access care are not worthy of the direct resource provisions or relational recognition which enable them to operate as peers in social life.

The Mental Capacity Act 2005

In England and Wales the Mental Capacity Act 2005 (MCA 2005) governs how decision-making ability is assessed using a functional test, and outlines how decisions should be taken for people who cannot demonstrate the requisite level of capacity for any given decision.¹⁵⁷ For the Act to apply, decision-making inca-

150 House of Commons Levelling Up, Housing and Communities Committee, *Long-term Funding of Adult Social Care*, House of Commons, Second Report of Session 2022-23, HC 19 (4 August 2022) 15 at <https://committees.parliament.uk/publications/23319/documents/170008/default/>.

151 *ibid.*, 7-9.

152 Series, n 149 above, 211-214.

153 House of Commons Levelling Up, Housing and Communities Committee, n 150 above, 7.

154 *ibid.*, 17.

155 See *Davey, R (on the application of) v Oxfordshire County Council & Ors* [2017] EWCA Civ 1308; [2017] WLR(D) 590.

156 Series, n 149 above, 67.

157 MCA 2005, s 3.

capacity must be caused by, and flow directly from, an impairment or disturbance in the functioning of the mind or brain.¹⁵⁸ This diagnostic criteria and causative nexus between impairment and incapacity sanctifies in law the idea that people with impairments are generally less able than others to make their own decisions.¹⁵⁹ It crystallises a relationship of misrecognition which disproportionately disadvantages disabled people. This legal misrecognition affects how people are treated in reality. Many people make profoundly unwise decisions but if they are not experiencing a cognitive impairment the state generally refrains from intervening in their decision-making.¹⁶⁰

The MCA 2005 includes a presumption of capacity and requires ‘all practical steps’ be taken to help a person make her own decision before decision-making power is lost.¹⁶¹ This includes the provision of interpersonal support, adapted forms of communication and accessible information. Where a person lacks decision-making ability, another person must make that decision based upon her objective ‘best interests’¹⁶² considering a list of factors such as the circumstances of the decision, the person’s wishes over time, the views of relevant people surrounding the individual and through encouraging the person to participate as fully as she can in the decision-making process. Best interests decisions can be taken informally by a carer or doctor, or formally through a legally registered Lasting Power of Attorney,¹⁶³ or the appointment of a Deputy.¹⁶⁴ Kong and Ruck Keene have highlighted the profoundly relational nature of the interactions which determine decision-making capacity and best interests, and the role played by the capacity assessor in either bolstering, or restricting, a person’s decision-making ability.¹⁶⁵ ‘Denial of the social recognition, acceptance and belonging we all need to flourish’ is profoundly damaging, because ‘[t]he social status that is accorded to us by others – how they view and treat us in interpersonal interactions – becomes internalised ... Mis-recognition [means that] ... when we are viewed through [a] stigmatising lens, we might start to believe that we are lesser or different in a bad way, which impacts on our choices accordingly.’¹⁶⁶

A House of Lords Post-legislative Scrutiny Committee¹⁶⁷ concluded that the MCA 2005 was widely misunderstood.¹⁶⁸ Despite an empowering ethos and a

158 See *PC & NC v City of York Council* [2013] EWCA Civ 478; [2014] 2 WLR 1 at [58]–[60] per McFarlane LJ. Also see *NCC v PB & TB* [2014] EWCOP 14 at [81]–[92], [107] per Parker J.

159 *NCC v PB & TB* *ibid* at [81]–[92], [107] per Parker J.

160 While powers do exist under the inherent jurisdiction to interfere in the lives of all ‘vulnerable’ people who fall outside the scope of the MCA 2005, scholars highlight that these powers are disproportionately applied to disabled adults in practice. See Eilionóir Flynn and Anna Arstein-Kerslake, ‘State Intervention in the Lives of People with Disabilities: The Case for a Disability-neutral framework’ (2017) 13 *International Journal of Law in Context* 39, 45. Also see, *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam) at [45], [57] per Hayden J.

161 MCA 2005, s 1.

162 MCA 2005, s 4.

163 MCA 2005, ss 9–14.

164 MCA 2005, ss 15–20.

165 Camillia Kong and Alex Ruck Keene, *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues* (London: Jessica Kingsley, 2019) 51–142.

166 *ibid*, 81 and 83.

167 House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* HL 139 (2013–14).

168 *ibid* [2]–[5], [104]–[105].

focus on support, the Act has engendered a prevailing culture of risk-aversion and paternalism.¹⁶⁹ Case law repeatedly illustrates that the law seems better equipped for restricting the rights of disabled people to protect them from exploitation, than it does to bolster their capabilities and enable their positive freedom.¹⁷⁰ Harding and Taşcioğlu found that complex decisions often collapse into substituted decision-making without proper consideration of how to support the individual to decide, or be involved in the decision-making process.¹⁷¹ My own empirical research coheres with these findings.¹⁷²

Misrecognition set up in the legislative framework is colouring the operational culture of the MCA 2005. This impedes parity of participation by affecting day-to-day interpersonal interactions in ways which prohibit the realisation of secure functionings. For example, if a person requires support to access and manage her bank account, but she encounters a banking assistant with a limited understanding of the MCA 2005 who is unable, or unwilling, to provide adequate support at the point of service delivery, she may be encouraged to go away and implement a Lasting Power of Attorney so someone else can deal with money on her behalf.¹⁷³ This misrecognition causes corrosive disadvantage by actively reducing the scope for a person with cognitive impairment to access banking and secure the basic functioning of money management. Without access to a bank account, we cannot receive income. We are excluded from obtaining mortgage facilities and may remain stuck in insecure rental properties. Without access to direct debit facilities, we must pay increased costs for poorer quality services. This lack of secure functioning causes corrosive disadvantage which bleeds into other areas of life, increasing costs, exacerbating disability poverty and jeopardising other functionings.

The Equality Act, Access to Services and Public Functions

The Equality Act 2010 (EA 2010) is the key piece of legislation governing equality and non-discrimination law in England, Scotland, and Wales. It provides a framework for promoting equality and prohibiting discrimination across nine protected characteristics, including disability.¹⁷⁴ The EA 2010 adopts a

169 *ibid* [2]–[5], [104]–[107].

170 See for example: *Hinks v R* [2000] UKHL 53; [2000] 3 WLR 1590, particularly discussions of Lord Hutton and Lord Hobhouse. Also see *Southend-On-Sea Borough Council v Meyers* n 160 above at [45], [57] per Hayden J. However see also the interesting and progressive judicial discussions in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; [2014] 1 AC 591 at [45] per Lady Hale. Also see *Briggs v Briggs & Ors* [2016] EWCOP 53; [2017] 4 WLR 37 at [128]–[130] per Charles J; and *London Borough of Tower Hamlets v PB* [2020] EWCOP 34; [2020] 4 WLR 94 at [51] per Hayden J.

171 Rosie Harding and Ezgi Taşcioğlu, ‘Everyday Decisions Project Report: Supporting Legal Capacity through Care, Support and Empowerment’ (Birmingham Law School, November 2017) 20 at https://legalcapacity.org.uk/wp-content/uploads/2017/12/Everyday_Decisions_Project_Report.pdf [<https://perma.cc/WAH4-L4K3>]; and Rosie Harding and Ezgi Taşcioğlu, ‘Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity’ (2018) 8 *Societies* 25, 2, 14.

172 Alex Pearl, n 72 above.

173 This example is taken from empirical data, *ibid*.

174 Equality Act 2010, s 4.

‘transformative equality’ approach, built on a capabilities understanding of justice which places positive duties on public authorities to help dismantle systemic inequalities and eradicate poverty and disadvantage.¹⁷⁵ The Act contains a duty on public authorities to have due regard to the need to reduce inequalities resulting from socio-economic disadvantage. This provision has not yet been fully brought into force in England despite its implementation in some devolved contexts in Scotland and Wales.¹⁷⁶ Nevertheless, the Government have reaffirmed their manifesto pledge to implement it.¹⁷⁷

Disability occupies a central place in the legislation. This was lauded as a ‘victory for the political theory of recognition’ for disabled people.¹⁷⁸ Alongside prohibitions of direct discrimination, indirect discrimination, discrimination arising from disability, victimisation and harassment,¹⁷⁹ the EA 2010 imposes a positive duty to make ‘reasonable adjustments’ for disabled people.¹⁸⁰ This duty is both reactive and anticipatory across differing contexts. The anticipatory reasonable adjustment duty is ‘the principal legal tool ... for embedding disability equality and inclusion into services and public functions’.¹⁸¹ It obliges those providing public functions and services to the public to anticipate the barriers which disabled people may face in interacting with their services, and requires them to take reasonable steps to rectify this.¹⁸² Failure to do so, constitutes unlawful discrimination. Despite its promise, the anticipatory reasonable adjustment duty has not lived up to its potential.¹⁸³ A lack of awareness and understanding of the provision has resulted in limited implementation.¹⁸⁴ An overreliance on individual claimants bringing cases which enforce the duty, a lack of access to legal aid funding, insufficient specialist legal advice for disabled people, and a plethora of accessibility barriers to justice¹⁸⁵ all mean that ‘those who live with disadvantage have little or no prospect of challenging bad behaviour by public bodies’.¹⁸⁶

The EA 2010 has been hampered by enforcement challenges. Systematic reductions in funding for the Equality and Human Rights Commission (responsible for ensuring compliance with the Act), have further exacerbated

175 See the analysis on this point provided by Bob Hepple, *Equality: The Legal Framework* (Oxford: Hart Publishing, 2nd ed, 2014) 28.

176 See the discussion by Colm Ó Cinnéide, ‘“Cruel Optimism”: The Limits of Legal Liability as a Tool for Engaging with Structural Injustice’ in Mantouvalou and Wolff (eds), n 2 above, 51 and fn 79.

177 See UK Parliament, Written questions, answers and statements, ‘Public Sector: Equality, Question for Women and Equalities’ tabled by Baroness Lister and answered by Baroness Smith, UIN HL1263 (Tabled on 7 October 2024) at <https://questions-statements.parliament.uk/written-questions/detail/2024-10-07/hl1263#>. Also see The Labour Party, ‘Change: Labour Party Manifesto 2024’ (The Labour Party, 2024) <https://labour.org.uk/change/> [<https://perma.cc/LR9T-VAW5>].

178 Calder, n 18 above, 105.

179 Equality Act 2010, ss 13–27.

180 Equality Act 2010, s 20.

181 Anna Lawson and Maria Orchard, ‘The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?’ (2021) 80 *Cambridge Law Journal* 308, 335.

182 Equality Act 2010 ss 20–22, s 29(7), Schedules 2 and 3.

183 Lawson and Orchard, n 181 above, 337.

184 *ibid*, 310, 316–318.

185 *ibid*, 326–335.

186 Clements, n 13 above, 28.

the issues.¹⁸⁷ Accessibility provisions can be breached with relative impunity. This reinforces the message to organisations providing services to the public, that accessible provision and the practical inclusion of disabled people is not a priority. Fifteen years on from the advent of the EA, and 30 years on from the Disability Discrimination Act 1995, accessibility across basic goods and services remains a profound challenge for disabled people. Inaccessible banking and payment facilities,¹⁸⁸ inaccessible housing,¹⁸⁹ inaccessible public spaces¹⁹⁰ and inaccessible transport systems¹⁹¹ all continue to prevent disabled people realising secure basic functionings which other people take for granted. Implementation failures, the overreliance on individual enforcement models and the watering down of positive equality duties have largely hollowed out the transformative potential of the EA. This has led Ó'Cinnéide to express a degree of pessimism about law's transformative power to tackle structural injustice.¹⁹² However, it is not a failure of the legislation itself to improve parity of participation, but rather a systemic failure to recognise the equal personhood and rights of disabled people which has allowed piecemeal implementation and enforcement failures. Indeed, advocates of disability justice are now questioning whether a new UK Accessibility Act (backed by adequate monitoring and enforcement mechanisms), is needed to combat systemic injustice in access to basic goods and services.¹⁹³

The Compounding Impact

Each of these systems of legal regulation can be interrogated for its practical effect on parity of participation, both through direct resource provision and through the relationality created between the state and disadvantaged individuals which informs how disadvantaged groups are treated at the point of access to the basic goods, services and social spaces necessary to obtain and sustain secure functionings. A core contribution of the recognising capabilities analysis is that it encourages sociolegal researchers to explore how misrecognition or nonrecognition across differing legal systems compounds to depoliticise injustice. Polycentric layers of exclusion create cycles of disadvantage which keep people in spirals of poverty, ill-health, exclusion from services, and social iso-

187 Lawson and Orchard, n 181 above, 334–335.

188 Project Nemo, 'Safe Spending for Adults with a Learning Disability: A Call to Action for Financial Services' (Project Nemo, Nationwide and Firefish, June 2025) at <https://projectnemo.co.uk/learning-disabilities-report/> [https://perma.cc/D6J6-AWRM].

189 House of Commons Levelling Up, Housing and Communities Committee, *Disabled People in the Housing Sector*, Seventh Report of Session 2023–24, HC 63 (20 May 2024) 3–4.

190 Anna Lawson and others, 'Enhancing the Accessibility of Pedestrian Environments: Critical Reflections on the Role of the Public Sector Equality Duty' (2024) 13 *Laws* 43.

191 House of Commons Transport Committee, *Access Denied: Rights Versus Reality in Disabled People's Access to Transport*, First Report on Session 2024–25, HC 770 (20 March 2025) 8–20 at <https://committees.parliament.uk/publications/47122/documents/244036/default/>.

192 Ó'Cinnéide, n 176 above, 32–58.

193 Anna Lawson, 'Accessibility and the Limits of UK Equality Law: Time for a UK Accessibility Act?' (UCL Current Legal Problems Lecture, 6 February 2025) at <https://www.ucl.ac.uk/laws/events/2025/feb/hybrid-accessibility-and-limits-uk-equality-law-time-uk-accessibility-act> [https://perma.cc/7DFV-W26F].

lation. Systemic misrecognition can entirely remove the moral imperative on the state to rectify this. Researchers cannot properly understand the real opportunities a person has to obtain secure functionings without acknowledging how misrecognition across compounding systems of law interact to entrench structural injustice in ways which can prevent those basic functionings from ever becoming realisable. To suggest systemic reform across all these fronts may provoke initial scepticism, for being unrealistically radical and utopian. But the question of how we might start this process using the law as our sword, is addressed below.

IMPROVING ACCESS TO FUNCTIONINGS: A POLYCENTRIC APPROACH

Our practical ability to access the basic resources, goods, services and social spaces in society is what really determines our ability to achieve secure fertile functionings and realise the life we value. We have seen the fundamental role played by laws in creating the structural constraints and the relationships of recognition which determine whether we can enjoy parity of participation. Perhaps a place to start advocating for legal reform which can achieve cross-cutting change to counter structural injustice, is to argue for a polycentric trifactor approach using the legislative introduction of some form of universal basic income, alongside new legislative accessibility and support provision measures, backed by, and delivered through, a meaningful regeneration of the welfare state.

At present, we seem to be at a point of flux in the global political climate. The rising tide of far-right, nationalist governance is raising profound questions about the sustainability of neoliberal capitalist societies and their ability to protect democratic values, basic human rights entitlements, and wellbeing for everyone.¹⁹⁴ Recent years reflect a notable rise in division, inequality, and other symptoms of unwell and unequal societies.¹⁹⁵ As Kittay notes: ‘what we require is a theory of just social arrangements that will allow us to flourish ... Such a theory asks: “what institutions do we require to support each other and to enable each one to flourish ... What are the governing principles for establishing and maintaining such institutions?”’¹⁹⁶

There is a growing clamour of voices arguing for the adoption of a ‘universal basic income’ provision which applies equally for all citizens and therefore alleviates the stigma and status subordination surrounding benefit income.¹⁹⁷

194 See Nancy Fraser, *Cannibal Capitalism* (London: Verso, 2022). Also see Andrew Vitek, ‘Blind Spots and Backdoors: The Growth of the Global Far-right and the Paralysis of Liberal Democracies’ (2024) 26 *International Studies Review* [Online] at <https://doi.org/10.1093/isr/viae027>.

195 Ledwith and Springett, n 15 above, 38, also see 53 and 223.

196 Eva Feder Kittay, ‘A Theory of Justice as Fair Terms of Social Life Given Our Inevitable Dependency and Our Inextricable Interdependency’ in Daniel Engster and Maurice Hamington (eds), *Care Ethics and Political Theory* (Oxford: OUP, 2015) 59.

197 Ledwith and Springett, n 15 above, 231–232. Also see The Foundational Economy Collective, *Foundational Economy: New Edition* (Manchester: Manchester University Press, 2022) 121–128. Also see Rutger Bregman, *Utopia for Realists: And How We Can Get There* (London: Bloomsbury, 2017) 33–34, 44–46.

Such a provision would inevitably require sufficient levels of income to enable all people to convert those resources into achieved functionings. Fundamental to the realisation of secure basic functionings for all people, is the meaningful implementation of new legislative accessibility provisions which embed equality and support provision in access to public goods, services and social spaces. This requires universal and accessible design to be mainstreamed within all goods, public functions, and private organisations providing services to the public. Disadvantaged groups will require more structural support in converting resources into achieved functionings, but better support and care provisions could be achieved through a meaningful investment in, and regeneration of, the welfare state.

The Foundational Economy Collective argue that the establishment of the welfare state in the mid-to-late 20th century, represented a practical working out of the basic set of goods and services necessary for a relatively flourishing human existence. They refer to this as ‘the foundational economy’ which provides ‘the broad social infrastructure of safe and civilised life’.¹⁹⁸

While the welfare state has never been a perfectly functioning organism, the objective is one of a state which provides and regulates adequate levels of income; free healthcare and education; employment; sufficient and quality housing provision; clean water; power and utility services; refuse removal; accessible infrastructure and public transport systems; adequate access to goods and services such as banking, postal services, internet provision; robust community support provision (both for recipients and providers of care); and meaningful access to social and leisure facilities, all of which reflect the practical working out of the basic requirements necessary for flourishing human lives.

The ‘primary role of public policy should ... be to secure the supply of basic services for all citizens. If the aim is citizen well-being and flourishing for the many not the few, then ... politics ... needs to be refocused on foundational consumption and securing universal minimum access and quality.’¹⁹⁹

In providing (theoretically) universal access to basic social goods and community services for everyone, we can see ‘a kind of practical working out of the theory of human needs and human capabilities, because foundational provision amounts to a kind of immanent (implicit) moral theory of citizenship’.²⁰⁰ If the idea of a functional welfare state is taken as a practical working out of the baseline requirements for a safe and civilised human life, then any clusters of disadvantage or failure to achieve the functionings provided by these key provisions can be understood as a failure of substantive equality in human flourishing and thus must be rectified as a matter of justice. Scholars wishing to apply the recognising capabilities analysis should identify where disadvantaged groups experience clusters of disadvantage in obtaining access to these basic goods and services, and how the relevant systems of law and policy are influencing parity of participation.

198 Foundational Economy Collective, *ibid*, 32, 40–41, 95.

199 *ibid*, 1.

200 *ibid*, 92.

The Foundational Economy Collective advocate for ‘systems-based redistribution which expands universal entitlement to services’²⁰¹ and reinvigorates the foundational economy through policy-setting in direct consultation with citizens; a new constitutional framework which brings private service-providers within the umbrella of state regulation for all activities in which they provide services to the public; an overhaul of taxation policies to provide funding to reinvigorate the foundational economy; and building upon foundational alliances with third sector bodies as a check and balance for the foundational economy ‘because government is not always benign or competent’.²⁰²

To this list we should add the importance of using legislative reform to establish new institutional norms which enhance recognition and parity of participation for disadvantaged groups, thereby increasing their real opportunities to secure basic functionings in practice. Justice requires ‘a responsive ethical relationality with the other, and ... reworking our relationships with each other’.²⁰³ This reworking can and should begin with law in our efforts to tackle structural injustice. More and more voices are suggesting that it might indeed be time for new, seemingly utopian approaches to social regulation.²⁰⁴

While such changes would represent a radical departure from the established order of social regulation, these concrete suggestions provide a helpful reminder that the status quo regarding how we treat disadvantaged communities represents an active and continuing choice by the state, in determining who is worthy of recognition and inclusion.

CONCLUSION

Capability theory should not be seen ‘as an intellectual project that has become an end in itself for academics’,²⁰⁵ but rather as a tool to help us analyse instances of injustice that need our attention. The new analytical tool introduced here is designed to do just that. Until now, scholars have considered capability theory and the theory of recognition to be distinct and competing ideas.²⁰⁶ The recognising capabilities analysis has embedded the insights of Fraser’s work on recognition into capability-based assessments of wellbeing. It draws the insights of relational theory more overtly into focus within capabilities-based analysis and uses the language of recognition to ‘round-out’ capability theory by adding normative considerations of parity of participation, equality, and non-discrimination into capability-based assessments of wellbeing. By doing this, greater analytical focus can be placed on the role of law in setting the structural constraints operating in the lives of disadvantaged people which profoundly affect their opportunities to achieve secure basic functionings. There is a real

201 *ibid*, 130.

202 *ibid*, 130–147.

203 Ledwith and Springett, n 15 above, 19.

204 See Cinzia Arruzza, Tithi Bhattacharya and Nancy Fraser, *Feminism for the 99%: A Manifesto* (London: Verso, 2019). Also see Ledwith and Springett, n 15 above, and Bregman, n 197 above.

205 Robeyns, n 3 above, 194.

206 de Beco, n 16 above, 1341–1342.

benefit to highlighting expressly the determinative role which relationality plays in determining our practical ability to achieve secure functionings and to realise the life we value. Implicit choices about who we should respect, value and include are inherent within the measures of legal regulation set by the state. These state frameworks overlap and compound to inform how disadvantaged groups are treated in practice.

The recognising capabilities analysis provides a method through which sociolegal researchers can explore the overlapping impact of various different systems of legal regulation upon the lived realities of disadvantaged people. It holistically explores direct resource provision, the impact of relationships of recognition between the state and different groups, and importantly, how this affects the way people are treated at the point of access to basic goods, services and social resources necessary for a flourishing existence. As a result, this approach to sociolegal capabilities-based analysis is particularly well attuned to assessing the role of law in causing, compounding and challenging experiences of structural injustice. It prompts the question of how we can better use law to tackle structural injustice.

As Jonathan Herring observes, ‘the understanding of what a person is, what is important to people and how people flourish will powerfully influence what we consider to be good law.’²⁰⁷ While it is ‘as easy to give the law too much credit for solving personal and social maladies, as it is to give it too much blame for causing them’,²⁰⁸ we must acknowledge that the regulatory choices and norms set by the state, provide the nucleus from which culture value can be influenced. ‘Legislation plays an important role as the vehicle of policy and driver of practice’.²⁰⁹ It governs who receives adequate resources and sufficient status equality to participate as a peer in social life. Law sets the structural constraints which determine our access to secure fertile functionings. State regulation sets the parameters for recognising our capabilities and determines who is worthy of inclusion.

Who the system acknowledges, respects, protects and supports is important. Structural misrecognition across a multitude of legal systems can depoliticise inequality and disadvantage. Long-term social change and greater flourishing for disadvantaged groups ‘depend[s] in no small part, [o]n drawing a connection between the law and deeper legacy values that *all* people can relate to’.²¹⁰ It may indeed be time for a new approach to social regulation. One which overtly highlights the importance of structural constraints and relational recognition within human flourishing, and which provides everybody with adequate material resources and fair access to the basic elements of a safe and civilised human life. Far from utopian thinking, there is a growing consensus that this

207 Herring, n 89 above, 2.

208 Piers Gooding, ‘Navigating the “Flashing Amber Lights” of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns’ (2015) 15 *Human Rights Law Review* 45, 48.

209 Stavert, n 107 above, 182.

210 Gerard Quinn, ‘Rethinking Personhood: New Directions in Legal Capacity Law & Policy’ (Presentation at the University of British Columbia, 29 April 2011) 9 at https://citizenship.sites.olt.ubc.ca/files/2014/07/Gerard_Quinn_s_Keynote_-_April_29__2011.pdf [<https://perma.cc/9PBH-M4A8>].

kind of dynamism is exactly what is required to combat profound systemic disadvantage and increase social justice for disadvantaged groups.²¹¹

As stated in the introduction, ‘the point of a temporary excursion into theory is always to return to practice and to change it.’²¹² When employed to better understand law’s role in creating structural disadvantage or to inform real-world research and reform agendas, ‘there is nothing as practical as good theory’.²¹³ We, as sociolegal researchers, should consider how our work can increase relational recognition, challenge structural constraints and contest disadvantage in the spaces, and places, of conducting research itself. A significant body of work is now highlighting how methods of coproduction, activism-based models, and participatory action research paradigms can help transform the lives of disadvantaged communities through rights-awareness raising,²¹⁴ increased agency,²¹⁵ social solidarity²¹⁶ and even helping people obtain greater access to services and entitlements through the research process itself.²¹⁷ Increasing awareness of, or access to, legal entitlements through the research process itself, can help disadvantaged people obtain greater resources and develop new routes through which to realise secure fertile functionings.

An important element of any theoretical model is a ‘commitment to being genuinely revisable and providing avenues for a theory (and theori[s]er) to be self-critical.’²¹⁸ In this article I have sketched out the initial rubric of the recognising capabilities analysis as a new, more overtly relational capabilities-based tool of sociolegal analysis.²¹⁹

It focuses upon the role of law as a structural constraint and key determiner of power relationships which profoundly impact the practical opportunities of disadvantaged groups to achieve parity of participation and an equal enjoyment of the secure basic functionings necessary for a liveable human life. The framework presented here, while in need of further refinement, offers a new approach for sociolegal researchers to address the role of law in creating, perpetuating and potentially challenging entrenched structural injustice. My aim is

211 Ledwith and Springett, n 15 above, 195–257. Also see Bregman, n 197 above, 255–264.

212 Quinn, n 210 above, 9.

213 Carol Weiss, ‘Nothing as Practical as Good Theory: Exploring Theory-Based Evaluation for Comprehensive Community Initiatives for Children and Families’ in James Connell and others (eds), *New Approaches to Evaluating Community Initiatives: Concepts, Methods and Contexts* (New York, NY: The Aspen Institute, 1995) 65–90.

214 Cann and DeMeulenaere, n 9 above, 13.

215 Ledwith and Springett, n 15 above, 29 and 208–209.

216 Faye Ginsburg and Rayna Rapp, ‘Collaborative Research on the Möbius Strip’ in Mara Mills and Rebecca Sanchez (eds), *Crip Authorship: Disability As Method* (New York, NY: New York University Press, 2023) 158–159.

217 See the body of work of Luke Clements at <https://www.lukeclements.co.uk/publications/> [<https://perma.cc/QH64-HNS5>], particularly Luke Clements and others, ‘Direct Payments for Disabled Children and Young People and their Families’ (University of Leeds and Cerebra, Legal Entitlements & Problem Solving LEaP Project, July 2018) at <https://www.lukeclements.co.uk/wp-content/uploads/2023/04/2019-Final-Report-02.pdf> [<https://perma.cc/CV53-2JPN>].

218 Chad Kleist, ‘A Discourse Ethics Defence of Nussbaum’s Capabilities Theory’ (2013) 14 *Journal of Human Development and Capabilities* 266, 283.

219 Given sufficient scope for further development, the recognising capabilities analysis could be expanded into a more complete theory of justice. That, however, is beyond the scope of this article.

to spark further debate about how best to develop and operationalise transformative theories of justice in hopes of developing ever more effective sociolegal research strategies which can tackle injustice both within and beyond the research paradigm itself.