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Severe Intellectual Disability and the Social Contract

1.1 A CHALLENGE TO THE SOCIAL CONTRACT TRADITION

Social contract theories generally predicate the authority of rules that govern society on the idea that these rules are the products of a contractual agreement struck between members of the society. These theories assume the moral, political, and strategic importance of certain contractual features (for instance, equality and reciprocity between contractors) and they assume certain characteristics are held by the parties (for instance, mutual disinterest and rationality). These theories are appealing because of the value they place on these assumed features. Social contract theories employ a normative or descriptive narrative about the origins of society, presenting parties to the social contract as endorsing certain rules and principles when they set up basic social institutions. The two main variants of social contract theory have been called "contractarianism" and "contractualism." These variants can also be described as ethical theories that apply to discrete situations, rather than as political theories that legitimize the social structures that are agreed to through this contractual process. This moral and political tradition is most famously represented by Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant and, in contemporary times, by David Gauthier, John Rawls, and Thomas Scanlon. I distinguish "contractarian" and "contractualist" theories later in the chapter (see Section 1.5). Where I refer to both theories, I use the general term "contractual."

John Rawls's *A Theory of Justice* is arguably one of the most important philosophical works of the twentieth century.[1] His text single-handedly revived political philosophy, resuscitated the social contract tradition, and connected this tradition to the values of contemporary liberalism. While this book focuses on a particularly

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[1] The three monographs by Rawls that outline his theory of justice as fairness are: *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999); *Political Liberalism*, expand. ed. (New York: Columbia University Press, 2005); *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Harvard University Press, 2001).

recent *integrationist* branch of social contract theory – rather than on Rawls – it is fitting to consider how Rawls, as the most influential contemporary representative of the social contract tradition, justified the exclusion of people with severe disabilities from the scope of his social contract. Indeed, Rawls's position on this question frames the philosophical problem that I address in this book. He presents the "fundamental question of political justice" in the following terms:

> [W]hat is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?[2]

Rawls's emphasis on social cooperation between citizens influences him (and traditional social contract theorists) to set aside a fundamental problem that severely disabled individuals face: namely, that they are unable to "cooperate" due to their disabilities. Rawls considers that this exclusion of severely disabled individuals could be remedied by the expansion of his theory, although he confesses to "lack[ing] the ingenuity to see how the extension may proceed."[3] Thus, Rawls writes that, should his theory of "justice as fairness" fail to encompass individuals with severe disabilities, it is possible that other accounts of justice or morality may deal with the "problem" of the severely disabled person's exclusion and thus effectively supplement his theory. For Rawls, measuring the damage that the exclusion of the severely disabled individual and of other groups does to his contractualist theory "must wait until the case itself can be examined."[4] This is the challenge that Rawls bestows upon the social contract tradition: can it ground a *robust moral status* for severely disabled people? If not, how deep a fault is this for the tradition, and can the tradition be effectively supplemented by alternative accounts?

I define with more precision what I mean by robust obligations or robust moral status in Section 1.3. At this point, it is only necessary to know that "robust" implies more than mere charity and connotes no less moral and political consideration than that which is owed to all nondisabled citizens.[5]

1.1.1 *Situating This Work*

This book explores whether and how one particular set of theories can provide moral and political grounds for owing robust duties to people with severe disabilities, or

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[2] Rawls, *Political Liberalism*, at 20.

[3] *Ibid.* at 21.

[4] *Ibid.*

[5] "Citizenship" is being broadly understood as membership to a political community. The frontiers of a political community can, in turn, be defined in different ways. This book will be focusing on contractual justifications for counting someone as a subject of justice or as a moral agent/patient. However, the claim that people with disabilities deserve the same moral and political status as that of other members of a moral or political community could also be used (as a hypothesis or starting premise) to reflect on noncontractual justifications for moral and political status as well.

grounds for justifying their robust moral status, which is the corollary of such duties. These theories belong to the social contract tradition. While I am interested in assessing the merits of various theoretical grounds that justify the severely disabled individual's moral status, it is particularly important to see how social contract theory fares in this discussion because of its theoretical and practical omnipresence. Whether the key ideals and premises of social contract theory are meticulously defended by theorists or unreflectively adopted by practitioners as a matter of common sense, their influence in political, economic, and legal affairs is undeniable. This influence is felt through the importance that our political culture and our laws give to individual capacities for reasoning and autonomy. As I will explain in this chapter, people with severe disabilities, especially cognitive disabilities, suffer from "contractual expectations" which, in turn, serve to justify their exclusion from various spheres of social life. For instance, they may be excluded – partially or completely – from work, education, healthcare, voting, marriage, and other participatory roles within the legal system, such as that of witness, complainant, and respondent, though the politics and the law in these areas are being reformed in various jurisdictions to gradually better accommodate cognitive differences.[6] The United Nations *Convention on the Rights of Persons with Disabilities*[7] is a symptom as much as a catalyst of this ongoing evolution in capacity recognition.[8]

While I assume that people with severe disabilities do have a robust moral status, I leave the issue of justifying this status unresolved. Various scholars justify the robust moral status of severely disabled individuals in different ways and by applying different theories, ranging from Kantian to Wittgensteinian. However, this book does not deal with the revisionist challenge presented in the last section of this chapter, or at least not directly. Instead, the question that this book addresses is whether normative contractual philosophy can justify the position that we do owe robust obligations to the severely disabled individual, and, if so, to what extent it succeeds or fails in meeting these obligations. I am not concerned with distinguishing between obligations of morality and justice in answering this question, as my focus is whether severely disabled individuals have a robust moral status. As I explain later in this chapter, this position implies that the duties of justice are owed to severely disabled individuals because having a robust moral status should normally imply that one is a subject of justice.

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[6] Consider, for instance, the recent federal law in Canada: *An Act to Ensure a Barrier-Free Canada*, RSC 2019, c 10.

[7] March 30, 2007, 2515 UNTS 3 (entered into force on May 3, 2008).

[8] See, e.g., Colin Barnes, "A Working Social Model? Disability, Work and Disability Politics in the Twenty-First Century" (2000) 20:4 Critical Soc Pol'y 441; Linda Barclay, "Cognitive Impairment and the Right to Vote: A Strategic Approach" (2013) 30:2 J Applied Phil 146; Richard D. Schneider and Hy Bloom, *Law and Mental Disorder: A Comprehensive and Practical Approach* (Toronto: Irwin Law, 2013).

To some readers, social contract theory may evoke an outdated artifact, a thought experiment used by seventeenth- and eighteenth-century philosophers. However, its contemporary versions have been enormously influential in philosophical scholarship, and its conceptual pillars have not only outlasted its early formulations, but they also animate the fundamental liberal commitments of Western societies, which still adhere to the individualist paradigm that Thomas Hobbes heralded centuries ago. In fact, one may fail to detect the ubiquitous and permanent presence of contractual thinking in our cultural background because it is so entrenched as to be invisible. The social contract tradition holds the promise, as old as philosophy itself, that reason can help human beings to organize a fair society thanks to the use of reason. The social contract operated a metaphysical restructuring of the foundations of our political order, by understanding human beings' desires and their capacity for reason and placing individual wills at the heart of the social edifice. For early modern thinker Hobbes, "the central political question becomes that of knowing how a multiplicity of individual wills can become a unique political will . . . [and] one of the central juridical questions becomes that of knowing how to found a penal law that does not conflict with ethical individualism."[9] While theories of the social contract do not make the news, their basic assumptions about sovereignty, power, individualism, reason, and personhood pervade our culture, notwithstanding critiques of modernity exposing the historically contingent construction of the modern subject (along with its reasonable nature, desires, needs, quality of life, and aspiration to autonomy). Modern subjecthood is conditional upon possessing reasoning capacities. As Foucauldian scholar Achille Mbembe wrote:

> [I]t is on the basis of a distinction between reason and unreason (passion, fantasy) that late-modern criticism has been able to articulate a certain idea of the political, the community, the subject – or, more fundamentally, of what the good life is all about, how to achieve it, and, in the process, to become a fully moral agent. Within this paradigm, reason is the truth of the subject and politics is the exercise of reason in the public sphere. The exercise of reason is tantamount to the exercise of freedom, a key element for individual autonomy. The romance of sovereignty, in this case, rests on the belief that the subject is the master and the controlling author of his or her own meaning.[10]

Far from an innocuous thought experiment, the social contract is therefore a quintessentially modern theorizing of society and, incidentally, of the conditions of exclusion of those understood as lacking certain cognitive capacities that enable reasoning and autonomy.

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[9] Yves Charles Zarka, *Hobbes and Modern Political Thought*, trans. James Griffith (Edinburgh: Edinburgh University Press, 2016), at 9. See also Yves Charles Zarka, *La décision métaphysique de Hobbes: conditions de la politique* (Paris: J Vrin, 1987).

[10] J.-A. Mbembe, "Necropolitics" (2003) 15:1 Pub Culture 11 at 13.

The kind of exclusion I am considering here may seem quite abstract to readers who would claim not doubting that even the most profoundly disabled individuals have equal rights and find threats to their moral status farfetched. Yet, these same well-meaning readers may unwittingly entertain ableist prejudices making it difficult to realize that their social arrangements marginalize, disempower, and otherwise oppress people with disabilities in ways that go undetected, as whatever harm people with disabilities endure are thought to be the necessary result of fair social arrangements, which in fact rest on problematic understandings of disability. The rights of people with disabilities are often not so much violated as they are suspended: people with disabilities are often not just mistreated as subjects, but their very subjecthood is threatened. For instance, analyzing "whether human rights law effectively facilitates the meaningful inclusion of people with disabilities in society," Canadian legal scholar Judith Mosoff found that "[t]he most striking characteristic of the adjudicated complaints was that individuals with severe disabilities were rarely the subjects of decisions."[11] Perhaps, then, disability activists and scholars should pay attention not only to the violation of abstract rights, but also to the very status of persons with disabilities as rights bearers and how this status is constructed through relations of power preceding, or supposed by, discourses of rights and discrimination.[12] Examining the social contract tradition's role in disabling certain human beings is a contribution to this general endeavor.

1.1.2 *Main Contentions*

The hypothesis that I test in this book is that social contract theory does not satisfactorily explain why we owe a serious concern or respect for persons with severe intellectual disabilities in our community (or why they have a "robust moral status"). In turn, this book explores the extent to which "integrationist" contractual theories – that is, contractual theories that try to remedy the exclusion of the severely disabled individuals – fail or succeed. This examination suggests that the social contract tradition excludes morally important dimensions of human relations from the spheres of morality or justice.

My primary goal is to reveal various contractual expectations that pervade our moral, political, and legal culture and constitute an oppressive orthodoxy. To put this another way, I want to reveal the conceptual structure of a "disabled contract."

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[11] Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's In – Who Wins – What – Why" (2000) 26:1 Queen's LJ 225 at 225.

[12] This suggestion mirrors Hannah Arendt's criticism of the Rights of Man, worth only as much as the political will to protect them. "From the beginning," Arendt writes, "the paradox involved in the declaration of inalienable human rights was that it reckoned with an 'abstract' human being who seemed to exist nowhere" (*The Origins of Totalitarianism* [New York: Meridian Books, 1958], at 291). For Foucauldian critiques of medicolegal apparatuses constructing disability, see Shelley Tremain, "On the Government of Disability" (2001) 27:4 Soc Theory & Prac 617.

This work mirrors the critical ambition of Charles Mills and Carole Pateman, who revealed the structures of violence and domination that compose a racial contract[13] and a sexual contract,[14] respectively.[15] In similar terms, the title of this monograph, *The Disabled Contract*, refers to a conceptual apparatus that is used to justify, normalize, or naturalize unfair, immoral, or oppressive social structures. More specifically, this conceptual apparatus connotes the idea that the exclusion of PWD (persons with disabilities) and PSID (persons with severe intellectual disabilities) can be justified on contractual grounds or that harmful forms of integration can constitute "contractual compensation" for delaying integration, namely by forcing a "contract" on people with different needs and capacities. In a more literal way, this title suggests that our social contract is "disabled" in the sense that it fails to enable some people and, additionally, that the disabling/enabling power it generates is arbitrary.

A Rotten Social Contract

If we took the unbridled individualism that dominates our political culture seriously and imagined how it would translate in a social contract including PWD, the results may be bleaker than what any of the revisionist or integrationist contractual theories I examine in this book would formally propose. We could imagine a "social contract" involving the PWD and the PSID in the following way: an unspoken cultural agreement, that could have organically taken place through the industrial revolution, would segregate PWD from increasingly specialized means of production. Such social isolation, even accompanied with a duty of charity toward the PWD, would be seen as more economically advantageous than the social integration of PWD and less disruptive to the meaning of labor within a capitalistic framework. This evokes Mike Oliver's historical description of disability, as "ultimately produced by the functional needs of capital for a particular kind of work force."[16] If we accept (something that contractual thought cannot easily justify) that PWD are already a part of the community and *must* fit somewhere within it, we could imagine that a separate "contract" occurred between able-bodied people and disabled, especially severely disabled, individuals. This "contract" would have been unilaterally imposed by the powerful able-bodied contractors, who simultaneously act as trustees for PWD's interests, and who are moved only to give them scraps off

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[13] Charles Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997).

[14] Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

[15] Those sexual and racial structures of oppression need to be revealed since they are made invisible within traditional understandings of the social contract. Mainstream contract doctrine both constitutes and perpetuates oppression, in part by rendering it invisible within the seemingly neutral language of rights and values it promotes and the prescriptive (but race- or sex-neutral) or descriptive accounts of society formation that it puts forward.

[16] Michael Oliver, *The Politics of Disablement* (London: Macmillan, 1990), esp. at xii, 27. See also Anita Silvers, "Formal Justice" in Anita Silvers, David Wasserman, and Mary Mahowald, *Disability, Difference, Discrimination* (Lanham, MD: Rowman & Littlefield, 1998), 13.

the political table because of PWD's already-established status as members of society. (Of course, under this model, PWD are not full citizens or full persons.)

The general terms of this hypothetical rotten social contract would have been the following: PWD would "contribute" by enduring social exclusion whenever this would be convenient for the social order. In return for letting the modes of production run as they do, and not seeking integration in the labor force (in a culture where one's status as a laborer is partly determinative of one's status as a person), PWD's basic needs would be provided for. This charitable kind of providence would be the first expense to be cut in times of economic hardship, and for many PWD – being literally voiceless, and most being powerless – the enforcement of this rotten contract would not be guaranteed. It would be left to the discretion of parties who may eventually gain from not enforcing it, namely by keeping more resources for themselves, or because cruelty toward "less than full persons" within one's community would distinguish and heighten one's own status as the "fullest" kind of person – self-serving pity and cruelty being the darker sides of the charity coin. Of course, alienation and segregation are not traded at a fair table of negotiation as a form of social contribution. Oppressed people are not considered entitled to *not* be alienated, segregated, or more easily sacrificed. However, by presenting this imposed indecent cost as traded, we can sense how poorly PWD, and especially PSID, fare under a contractual idiom. I will not attempt to flesh out the reality of this hypothetical rotten contract with historical and empirical data. Instead, I will examine whether even the most promising, integrationist versions of the social contract succeed at integrating PWD within their scope.

Although this work is primarily a critique of the social contract tradition, it also supports a more positive program of research that emerges from the examination of specific failures of this tradition. In the last part of this book, I elaborate on the moral dimensions missing from mainstream contractual thinking and point to the pitfalls that any alternative account must heed. I also suggest a theory that integrates seemingly clashing contractual and relational concerns and answers to the preliminary criticisms that are obstacles to this program of research. Thus, this book has a dual aim: to question or curtail the breadth of certain key assumptions of social contract theories and to contribute to research on the moral and political obligations that are owed to people with severe disabilities.

1.1.3 *Terminology: PSID (Persons with Severe Intellectual Disabilities)*

I will generally use the acronym "PSID" (persons with severe intellectual disabilities) to refer to the group of persons who pose the challenge to the social contract tradition that I am examining in this book.[17] I also occasionally use the term

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[17] I hope that the very use of an acronym is at least no more dehumanizing than the commonly employed "PWD." Writing "persons with severe intellectual disabilities" throughout this book

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"cognitive" or "mental" instead of "intellectual" to qualify their disability. I may also use the word "impairment" instead of "disability." I may also use person-first language, such as PWD, or disability-first language (as "the severely disabled" or "a disabled person"). Although I will generally adhere to a person-first language and to the terms "intellectual" and "disability," this book does not use a uniform terminology to better interact with a variety of scholarships and texts that use different terms to refer to identical or overlapping phenomena. (For instance, the section below uses a disability-first language, since it examines a medical text in which such language is predominant.) Readers should infer from the context whether I use those germane terms to make broader assertions (e.g., that apply not only to PSID but also to PWD or to severe physical disabilities) or to mirror a particular author's terminology. Generally speaking, disability referents in this book signify individuals who, as a result of their disabilities, lack "contractual" capacities – that is, the (generally intellectual) capacities required by different strands of the social contract tradition to be considered a full moral or political subject. Like other philosophers writing about intellectual disabilities, I do not take any of those terms to refer to "natural kinds" (i.e., "a grouping that reflects the structure of the natural world rather than the interests and actions of human beings"[18]), or to be self-evident or unproblematic.[19]

Consider a few common challenges to disability-related terminology. The terms "dysfunction," "impairment," "disability," and "handicap" are sometimes distinguished to refer to more or less socially constructed phenomena, or to draw attention to medical or social components of a situation. The same can be said of person-first language, which is sometimes preferred by those who wish to want to avoid the term "disabled person" because it seems to imply that someone's "personhood" itself is disabled or that someone is not a full person, whereas a "person with a disability" emphasizes her personhood first. The French expression *une personne en situation de handicap* (literally, a person in a *situation* of handicap/disability) not only detaches personhood from disability but also suggest that "handicap" is a "situation," thereby inviting to consider that this situation may be partially, if not totally, socially created. The traditional, reductionist, version of the social model of disability insisted that disability is *nothing but* a social phenomenon (e.g., physical barriers, such as a lack of a ramp to access the post office) added on top of some actual physiological differences in a PWD's body, referred to as "impairments."[20] However,

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seemed too distracting. Stipulating that "disability" in this book refers to "severe intellectual disability" would have been the most elegant solution but it would have been a source of confusion, as most of my comments apply to PSID, and not to PWD generally.

[18] Alexander Bird and Emma Tobin, "Natural Kinds," *The Stanford Encyclopedia of Philosophy* (February 2017), plato.stanford.edu/archives/spr2018/entries/natural-kinds/.

[19] See, e.g., Licia Carlson, *The Faces of Intellectual Disability* (Bloomington: Indiana University Press, 2010), at xv.

[20] The "social model" of disability has gained currency from the seventies onward and has effectively become an orthodoxy of its own in many fields – from sociology to civil rights

those mainstream observations are themselves problematic. Some scholars may prefer to use the term “disabled person” to draw attention to disability. This is meant to emphasize society’s responsibility in creating disability. “Disabled person” would always implicitly mean “person disabled *by* a particular social context.” Challenges to personhood are not at the forefront of those scholars’ concerns. Others may problematize the rigidity, artificiality, or oppressive features of identity politics, or the insidious reintroduction of natural kinds in disability discourses through the notion of “impairments.” Some may point out that the very act of setting apart PSID as a distinct category of persons or of using words like “different” or “exceptional” may imply a problematic commitment to certain standards of “normalcy.” While earlier waves of disability scholarship sought to identify, name, and redefine certain oppressed groups in more positive or empowering ways, later waves of disability scholarship problematized the “oppressed identity” used in these earlier emancipatory narratives. This theoretical progression is reminiscent of the “waves” of gender and race studies. It could be answered that theoretical investigations must start somewhere, and that using the category of PSID is a useful way to criticize theories that treat PSID as outliers, even if those theories themselves relied on the problematic assumption that PSID is a valid category to use to discuss who falls beyond the scope of morality. We must, in other words, take the assumptions of the people we criticize seriously – or seriously enough to get to the point of analyzing the arguments they make on the basis of those assumptions – unless we are to reject their views wholesale rather than engage with them.

I try to circumvent those debates, but I cannot avoid them entirely. If anything, my preferred person-first language (PSID) reflects this book’s assumption that human beings with exceptional (and commonly assessed as “lesser”) cognitive abilities are equally important members of our moral and political communities. The issue of how (and how much) phenomena and categories of “intellectual disability” are socially constructed and the biological and historical origins of these phenomena are left open. Although a social constructivist view tends to impute responsibility on the society that created the “problems” PWD suffer from (such as

activism. For a general introduction to disability models, see David Pfeiffer, “The Conceptualization of Disability” in Sharon N. Barnartt and Barbara M. Altman, eds., *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go (Research in Social Science and Disability, vol. 2)* (Bingley: Emerald Group Publishing, 2001), 29. For my own critical view on the debate between proponents of the “medical model” and proponents of the “social model” of disability, see Jonas-Sébastien Beaudry, “Beyond (Models of) Disability?” (2016) 41:2 J Med & Phil 210. On the debate about the construction of “impairment,” as opposed to “disability,” see my “The Vanishing Body of Disability Law: Power and the Making of the Impaired Subject” (2018) 31:1 Can J Fam L 7. In the history of disability waves, see the first part of my “Welcoming Monsters: Disability as a Liminal Legal Concept” (2018) 29:2 Yale JL & Human 291. For a more general survey of the complex enterprise of defining disability, see my “Theoretical Strategies to Define Disability” in David Wasserman and Adam Cureton, eds., *The Oxford Handbook of Philosophy and Disability* (New York: Oxford University Press, 2019).

exclusion, devaluation, and inequality), to fix said problems, this book assumes that, even if PWD *were* a natural kind, their communities would still owe them the recognition of their robust moral status.

Let me now refine certain descriptive and normative understandings of intellectual disability in order to delineate the category of PSID used in this book with more precision.

1.2 WHO ARE THE "PERSONS WITH SEVERE INTELLECTUAL DISABILITIES"?

1.2.1 *A Medical Picture*

My goal is not merely to set out a definition of PSID in order to proceed with my argument. Rather, I wish to begin my argument by examining the choices that theorists make when they define a category of people. A medical definition is helpful to begin understanding who PSID are, although I will problematize this definition in the following subsections. The fifth iteration of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), published by the American Psychiatric Association (APA), defines intellectual disability as a neurodevelopmental disorder:

> Intellectual disability (intellectual developmental disorder) is characterized by deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. The deficits result in impairments of adaptive functioning, such that the individual fails to meet standards of personal independence and social responsibility in one or more aspects of daily life, including communication, social participation, academic or occupational functioning, and personal independence at home or in community settings.[21]

Intellectual disability (the term that gradually replaced "mental retardation" in medical literatures) affects 2–3 percent of the general population.[22] Eighty-five percent of intellectually disabled people belong to the group known as "mildly" disabled people.[23] The APA classifies three other levels of severity for intellectual

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[21] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 5th ed. (Arlington, VA: APA, 2013), at 31. The American Association on Intellectual and Developmental Disabilities (AAIDD), formerly the American Association on Mental Retardation, defines intellectual disability in a similar way: "Intellectual disability is a disability characterized by significant limitations both in intellectual functioning [such as reasoning, learning, problem-solving] and in adaptive behavior, which covers a range of everyday social and practical skills. This disability originates before the age of 18" (Robert L. Schalock *et al.*, *Intellectual Disability: Definition, Classification, and Systems of Supports*, 11th ed. [Washington, DC: AAIDD, 2009], at ch. 1).

[22] See Donna K. Daily, Holly H. Ardinger, and Grace E. Holmes, "Identification and Evaluation of Mental Retardation" (2000) 61:4 American Family Physician 1059 at 1059.

[23] Paul Harrison *et al.*, *Shorter Oxford Textbook of Psychiatry* (Oxford: Oxford University Press, 2017), at 487–88.