

Abstract: *The thesis defended in this essay is that ethical deliberation on balancing between different individual claims for opportunity is not only a question of resource distribution and barrier deconstruction, but a question of how we construct opportunity design through the validation of activity itself. This article focuses on the relation between capability, fair opportunity, and normative views of activity in Nussbaum's, Daniels' and Ricoeur's ethics. Drawing out main theses and comparing them, I show how different notions of just distribution of activity meet, overlap and interfere so that it is possible to extend discourse on the relation between opportunity and vulnerable citizenship; citizenship being thought of in analogy to how disability occurs through person's lifespan. Ricoeur presents a view which integrates accounts of fair opportunity and capability into an expanded framework of justice.*

Keywords: *Capability, disability, ethical obligation, human action, justice, opportunity*

Opportunity Design, Human action, and Justice: towards a more coherent view of vulnerable Citizenship

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A legitimate question in ethical deliberation is how we shall balance between different claims to activity which persons with disability arise to the community and what I call "opportunity design", how institutions arrange and distribute a spectre of opportunity through handling barriers of access to activities through means and resources and second: Consider a persons claim to opportunity reported in the Norwegian newspaper, Dagbladet, Sept 15, 2007:

Stine, single and mother of a two- year-old- child, is born with a progediating muscle-disease. To manage the care of her child, get sustenance or daily care, and work-occupation, she is granted user-controlled personal assistance which the municipal administrators now will reduce, by granting her child a full-time day in a nursery school so "she can have more time to leisure". Without the assistance Stine will not have the opportunity to attain her work. To Stine, this change does not seem reasonable: What pleasure will get from leisure when she cannot go to work, train or visit others, but is left to others beneficence?

What lacks in this case is a coherent account of the relations between the particularity of a person's claims for meaningful action and the opportunity design which the institutional distribution of resources opens for. "Opportunity design", here means: a geographical-material, socially adequate construction of the space of occupation, done by institutions. In many cases that resemble the example above, there is unbalance between opportunity to work, leisure and activities, in general. Though local field directors/coordinators begin with the

establishment of a planned structure to elicit and co-ordinate broad citizen support for rehabilitation and work- enabling, there is little pressure to elicit a more *coherent* accommodation to a broad range of activities. This is a problem not accorded for in many health systems, for example in the U.S.'s ADA law, under title I concerning employment, where only impediments that are directly job-related require remedy (Ingram 2006,213). Impediments that are *indirectly* related to job-performance such as transportation, personal domestic aid, are not included. Through a formalism of rights, it is the bureaucracy that reconstructs the claims, so that claims is modified and filtered through how the law constructs citizens rights according to "normalcy" (Oliver 1990,88).

This is due to a felt admonition in postmodern ethics, that the law with its distribution paradigm, may appear as a "cognitive monster", obscuring issues of domination and oppression (Caputo 1993,13;Lyotard 1995,123;Young 1990,8). In disability discourse it is a contested and debated issue: there will seldom occur an account of *opportunity* accommodate to how disability is imposed upon persons by disabling barriers, and created of a world designed for non-disabled living (Swain 1993,2, 215). A clean and cut formal-egalitarian approach cannot distinguish unreasonable discriminatory societal handicaps from those that are reasonable. Unless there are broad social rights accorded to a diagnosis, how the law distributes the right of citizens will always trump a coherent account of the person's claim for a reasonable opportunity *specter*. "Opportunity balance", meaning: "adequacy of opportunity design in relation to persons claim for a meaningful developing activity specter", is not the case of a formal egalitarianism, but is left to the *beneficence* of family and strangers.

This is an unsatisfactory deal. In my opinion, how institutions distribute the specter of opportunity a) through handling barriers to opportunity through means and resources, or b) reconstructing the space of opportunity in relation to persons claims for opportunity, is an important question of justice and public health. Then emerges our core questions: When is the range of opportunity offered to persons in the spectre of work, play, self-care, rest, with its subsets of actions, deliberation, choice, development, just? When is opportunity design just, coherent with strategy for preventive health, on a broad scale, - opportunity design being a probing operation that never take the just to be fixed within the system of law?

Vulnerable citizenship - appeal for a tender justice

A first reply could be: If beneficence is not the thing, it is impossible to distribute opportunity so that everybody is occupied with wishful activities. It demands a level of public co-operation beyond the reasonable. Such an answer is unsatisfactory because of 1) the humiliation effected by the socio-spatial reproduction of disability by institutional constraint, and 2) how the tradition of public health would consider mediation and co-operation with a wide range of pooled resources, so that people could achieve control over their activities and improve their health, as necessary (Bracht 1999,222; Gleeson 1999,127; Imrie 1996,11). The only argument that could defend the beneficence argument is that disability is a special, so that one should give priority to cases which rehabilitate persons to normal function. To me however, the difference of an argument, which considers disability opportunity as an abnormal or normal obligation, accounts *to how we value activity in relation to a lifespan view of vulnerable citizenship*. Consider the following three arguments:

First, a theory of just opportunity must not develop outside disability. Rather it must interpret access to activity from inside disability, how we are vulnerable throughout the lifespan. To approach disability we should think of it behind a very thin veil of ignorance of how *different* lifespans develop, being cognizant that traits typical of human life *do* occur, by luck or disaster. Consider how many of us are disabled in phases of childhood, disease or age, or may experience reduced ability for action through a disaster (natural/social), that interrupts our life- planning. Reasoning of disability unto the lifespan view is to interpret reduced ability *inside* our membership of society, so that vulnerable citizenship will interfere and meet with how our actual citizenship differs. *Citizenship* here, not being a juridic-political *vertical* term, when law reconstructs claims, but a socio-political *horizontal* term suggesting that the relation between our range of ability and our actual resources are vulnerable to societal membership in multiple ways (Isin & Wood 1999; Stortz 1994,411; Young 1990, cp.V). In consequence, a medical-individual model of disability, often applied to in formal egalitarianism, is not the right point of departure for measuring the just. This model is critically to be adjusted to the political model, how society's representations are the very basis for our policies for administering disablement (Barnes 1996; 1999; 2003; Oliver 1990). One cannot narrate a practice of citizenship without examining policy regarding disability (Imrie 1996; Young

1990,61-62). Accordingly, I find it useful to discern between *dis/ablement* and *disability*, between the possibility inside vulnerable citizenship, and the constructed imposed disability

Second, if access to a specter of activities is not special questions of beneficence, what we owe people with disabilities is not a question of “us and them”, but a human question which summons us all to deliberate action, since a life in activity is the correlate to health. A general intuition is that human life will see activity as a determinant of health, source of meaning, balance, satisfaction, simultaneously as activity is a condition for access to society. Consider Stine: The reason she wants to perform work is the possibility to *repeat* the desire and felt dignity which the work enables. This is a human desire, related to our emotional registry and affluent search for joy and meaning.

Third, what accords to this thought is not only that action resembles *repetition*. According to Hannah Arendt, a life in activity intersects with *natality*; new beginning, through birth, biography, choice and political action by doing something different, which support real change, novelty. What lies hidden in our desire for activity is that activity not only turns on *techné*, as in the Greek paradigm of action, but on possibility, commencement (Arendt 1989,7-17,175-274;Bowen-Moore 1989,42-68). To Arendt, to treat action as if it can be shaped and molded is to make praxis look like *techné*, it is the founding moment of political philosophy, *the fiction of the political*. Political philosophy represents a flight from what action is like, from its fragility, pluralism, contingency and abyss-like quality, into the security of law and order, of rules and structures (Caputo 1993,110;Stortz 1994,415). The *vita activa* is knit to human contemplation of development, friendship (horizontal citizenship) and free civic discourse of the political, included design (Herzog 2003,32).

If Arendt is right on the fiction of the political, the political monster that Lyotard tells of must be tamed and charged to responsibility for vulnerable citizenship. We need a more *tender democracy* which imposes itself to less pressure on regulating and disciplining people’s activities, simultaneously as it adapt to peoples pluralistic wish. If opportunity presupposes access to actions, we need a theory of opportunity design fair to the pluralism of abilities which persons claim. This is not only a question of barrier deconstruction, but also a question of the *construction of the opportunity specter through the validation of action itself*. I find it legitimate to consider four approaches: Sen’s, Nussbaum’s, Daniels’s and Ricoeur’s.

The capability approach, Amartya Sen and Martha Nussbaum

According to Sen, capability is the full set of attainable alternative lives that face a person, related to the *space* of functionings, effective freedom, attentive to diversity in abilities, (Baylies 2002;Gasper 2007;Sen 1993) . The idea is that capability has a selective value-guided character, relating to “the set of alternative n-tuples of functioning (capability set) persons could attain, the alternative lives open to her (Gasper 2007,341;Sen 1999 def.,31). Depending on the issue at hand, which space is relevant and has priority depend on the case. Against a distribution paradigm (Rawls) primary goods fail as index of the worth of liberty because a person with disability will have a lesser worth of liberty (capability) than a person with the same share of primary goods and no disability. Sen addresses opportunity freedom, the range of favorably valued life opportunities attainable for a person (Cohen 1995,282;Gasper 2007,347;Sen 1992,81.82).

To Nussbaum, which we apply more fully, just distribution of opportunity, demands a political liberalism compatible with Rawls, which she considers as a strong position. Yet, in her opinion, Rawls theory is not accommodate to the necessity of deep cases of dependence, family, disability (Nussbaum 2000b,4,8,69,274; 2002,135,138; 2006,109). Seeing the human being as material, mortal and needy, an end in itself, the aim of politics is to provide citizens with a basic core of capabilities, so that combined capabilities has to be distributed. The capability approach has an inner aspect, approaches disability from the *inside*, through making the person in question prepared to engage in the form of functioning in question. Capabilities are constitutive for humanness, agency, and dignity (,Nussbaum 2000b,72,75,120; 2004; 2006,70-71). In thinking of political planning we begin from basic capabilities as means for functioning which give rise to correlated political duties accorded for in a list: On the list Nussbaum mentions: being able to live to the end of life, place for emotions (compassion), play, affiliation, (self-respect), decent work, control (Nussbaum 2000b,78-86; 2006,76-78).

The strength of the approach of Sen and Nussbaum is their appeal to deliberate on opportunity design according to a lifespan view of vulnerable citizenship. Giving weights to individual choice, the theory seems to accord for a plurality of capabilities. The approach will satisfy our appeal for an extended space of action/activity, throughout the lifespan. Through emphasizing the role of emotions, action, vulnerability to body, dependency and disaster.

Nussbaum, more than Sen, comes close to a claim for developing a more compassionate society, but does not affirm it (Nussbaum 2000b).

However, Nussbaum admits that the capability approach will not deliver a full range theory of justice. (Neither the theory of Rawls would claim to be a full range theory of justice). Ethics must be flexible, fit to different problems of political design, and not communicate stereotypes, (Nussbaum 2000a,70-71,75,78). In her statement, she gives a partial perspective to Rawls' political liberalism, which combines Kant with Marxist materialism and Neo-Aristotelian view of action. Her position is unusual because it does not consider rights ethics and the discussion of the common good as belonging to different traditions of the ethical quandary (Nussbaum 2000b,73,76; 2001,26; 1990,26). Besides Nussbaum, Ricoeur performs an ethics that integrates Kant and Rawls with Aristotelian ethics, morals sentiments, vulnerability of the body and account of human action. I support these positioning and will return to it below.

An objection formulated by Taylor, Kavka and Hall, is that Nussbaum (though she delivers important insights to the role of human imagination), in her moral skepticism negates the possibility of a transcending of human possibilities (Hall 2000,183;Kavka 2003,344;Taylor 1988,810). Hall will question a tendency to make moral action into a technique of control, *techné*, against Arendt's notion of human action. Confer our adherence to Arendtian anti-totalitarian account of action, contemplation of new possibility above. There is not a clear view of how the capability approach may be integrated in a more comprehensive imagination of a tender democracy which *transcends* the set constructions of society. To imagine an other justice to come which interrupts known history, a compassionate politics, is difficult from Sen's and Nussbaum's position. Though they give accounts for a structuring of society through adjustment to capabilities, their notion accepts that justice develops only gradually, through an immanent process of humanization and pragmatism, not from a corrective idea of justice (Nussbaum 2001,xv,xxix (below),xxxiii). In a theory of justice, for example that of Rawls, justice gives a *normative theory* of how society must be arranged unto its core. It forces the imagination, summons to human contemplation. A comprehensive theory of justice may require that we handle capability and opportunity to tell us what these theories tell of the relation between vulnerable citizenship, dis/ablement and *opportunity*.

The fair equality of opportunity approach, Norman Daniels

Daniels proceeds not a rigor ethics, but a flexible one, open to revisions by process of reasonable arguments, overlapping consensus, and practical deliberation. To Daniels, the general principle of justice governing the distribution of opportunity should be extended so that it covers health-care, broader issues of population health, limit setting and moral controversy. Protecting the space of exercisable opportunities is a social obligation regarding priorities in distributive justice (Daniels 1985,11; 2008, XIV-XV,5,12-13,17,38,50,90). This concerns *the scope of justice*, accorded in Rawls' ethics, that we hold society responsible for guaranteeing individuals a fair share of basic liberties, opportunity (jobs and careers), and the all-purpose means needed for pursuing individual conceptions of the good according to a list of primary social goods (Daniels 1985,37-38;Daniels 2008,5,15,86,90). In Rawls's disposition, equality of opportunity is given lexical priority which permits inequalities in other social goods. To Daniels, however, this narrow and idealistic notion of opportunity is controversial, because it eliminates observance of talents, skills, together with features of disease and disability. To address inequalities, Rawls' ethics must be extended to include disease and disability, since impairment of normal functioning reduces the range of exercisable opportunities from which individuals may construct their plans of life (Daniels 1985,40; 1997,281.299,282-283,285,287,294,288). Equal opportunity must be supplemented with "fair equality of opportunity", with appeal to procedural justice and accountability for reasonableness, if process shall relate to broader issues of population health, limit setting, moral controversy on those worst off. His account facilitates deliberation through democratic institutions, it goes to the hearth of democracy (Daniels 2008.19 cp 4, 95-131,130).

To further formulate justice, Daniels will give criteria for distributing between competing claims. To Daniels, the normal opportunity range (which measures obligation before accountability for reasonableness) is the *array* of life plans reasonable persons in a society are likely to construct for themselves. The fair share of individuals include the full range of life-plan they would select, free to revise their life plan (Daniels 1985,33; 2008,35,53,58). Yet, within a *society*, the normal opportunity range *abstracts* from important individual differences in effective opportunity (micro level), or facts from individuals ideas of the "good" and particular ends, since enhancing wishes may hijack justice (Daniels

1985,35;Daniels 2008,53). Fair equality of opportunity, equalizes *fair share*, how society on a macro level corrects for disadvantages that have led to the misdevelopment or underdevelopment of talents and skills (Daniels 1985,35; 2008,36,49).

Though Daniels fulfils our claim for a deeper justice, there seem to be a tension here: On the one hand Daniels will accord for cases of disability and disease. On the other hand, the distribution of skills and talents unto opportunity will itself form a *normal* baseline, array, or range. In my opinion, it will, rightly, add up to opportunity design on a macro-level, since justice handles social distribution. Yet, there is a question if Daniels' theory gives enough reasons for cognizing disability *inside* vulnerable citizenship. Though Daniels gives some account to tragedy and the necessity to correct for Rawls' idealism of fully functioning persons, his aim is "to keep the account of justice as close as possible to the idealization that all function normally"(Daniels 2008,54). Suspicion remains: In Daniels' political liberalism, construction of normal baseline, array, unto a local code, seems to imply to let idealization of macro-level design by principle to overrule individuals' wish for a reasonable opportunity balance. When it comes to placing public institutions under the opportunity principle, Daniel's aim is, as he says, to keep the social system "*close as possible to the original idealization underlying Rawls, namely that we are concerned with normal fully functioning persons with a complete lifespan*"(Daniels 2008 cit,54).

A possible way to test Daniels' idealization, and compare it with our notion of action, is to question the role luck/disaster play in the deliberation on justice. To relate to this issue we must look to another argument which Daniels defends. Significant for Rawls is how he structures the principles of political liberalism through a *lexical* coherence of an opportunity principle (the narrow principle of opportunity (above)), a difference principle and a maximin principle. Inequalities are allowed to work to the advantage of those with talents (difference principle) only if the inequalities benefit those worst off (maximin principle). Since any birth *advantages and advantages from the social lottery, are not deserved*, positive steps are taken to provide fair equality of opportunity (Daniels 2008,30).

As I understand this principle, this is the argument of vulnerability to disaster (which Nussbaum confer), *put on its head*. Seen from the top of society, yet not entailing an elite constraint (which formal egalitarianism is criticized of, not Rawls), this objective advantage

argument can be seen as a complementary argument to the place vulnerability to disaster plays in Nussbaum's ethic. What Daniels, partly Sen, and Nussbaum confer, is to approach luck and disaster from different angles, from top and below. Because Daniels approaches the problem from the top, it will abstract, as he says, from *special effects* that derive from an individual's conceptions or wishes. The account of the opportunity range is not accorded to the wish of persons for a local coherent design of opportunity, but coherence according to the distribution of skills and talents onto a societal macro-level, a successively tested code (array). Nussbaum approaches the problem from below and will, in case of her discussion of capabilities open to persons, see the question of distribution of resources as a partial approach to her own.

This structure of a hidden structure insidious to the notions, is only partly commented. In discourses of justice combatants will often make their notion overrule complementarity. Critique accords to Daniels; to Daniels, the capability approach of Sen and Nussbaum and his own notion of fair equality of opportunity may converge and overlap (Daniels 2008,62). Capability can be thought of "as an accessible or exerciseable opportunity or option" (Daniels 2008,58). The opportunity space is the capability space described within a different terminology (Daniels 2008,57-58). While Sen proposes to rank capabilities and Nussbaum offers a list, Daniels' claim is that the only thing we need to assure us is that an individual capability set is *not distinctively worse than others*. Capability is deliberated through focus on normal functioning, resistance to preference hijacking and accountance for adequacy and sufficiency (Daniels 2008,61-62). Nussbaum has not explained how we resolve competing claims on resources needed to assure various claimants of adequacy of development of their basic functionings. Her list overlaps onto protections assured by the principles of justice, but Rawls will offer a comprehensiveness that is lacking in Sen and Nussbaum (Daniels 2008,62).

Taken into account how Daniels overrules and dissolves complementarity, his claim is not fair to how Nussbaum sees Rawls's theory as complementary to her own "partial theory". Daniels' theory extends Rawls, and uses Nussbaum and Sen to extend it, but gives less accord for what is a good coherence of opportunity for persons, only reasons to assume what lies far below the level of a coherence view of opportunity. It is not adequate to the experience of people with disabilities. For people with disabilities, after therapy and remedies has expanded skills and talents, the possibility to make a reasonable choice between different acceptable sets

of capabilities, is often not an option. Stine can adopt the offer from the public, which they may regard right in relation to accountance for social distribution, but for Stine it will make things worse. According to the Arendtian criteria of human action, which is to contemplate new options, possibility of autobiography, choice and influence in public space, it will not fill justice. When opportunity fulfils the criteria of being administered adequately as a set from top level, administrators can *interpret* her claim of reasonable coherence as private preference. Daniels' claim that one should take account of skills and talents, *may* contribute to coherence, adjust the administrators' design, but not meet the claim for sustenance in homework. While Nussbaum is opportune to recognize skills and talents in caring, and incorporate them into the capability set, Daniels is silent of caring competencies and skills. Like Rawls, Daniels gives no account of vulnerable citizenship implicit to childhood care and uprising in family.

In the course of this essay we have handled the different notions of opportunity according to what is inside vulnerable citizenship and accountance for *human* action. In the discourse of ethics of justice, this touches a related problem. In discussion of the ethics of rights, a held notion is that justice must be impartial by making a distance between persons. In the debate on neo- Kantian-liberal ethics or contractarian-procedural account of justice, which describes opportunity justice, a notion which discuss justice from inside disability would be seen as a non-impartial ethics, considering other debates on gender, racism, minority discrimination, which make claims to be debated from inside. An approach which demands to approach disability from the inside could be seen as contradictory to the demand for impartiality. Though Daniels sustains Rawls only partly, his rationale seems to hierarch ethics of justice over models which reason over accountability to compassion and proximity.

Paul Ricoeur's approach: appeal for generous justice.

Yet, there are developed accounts of justice which try to rehabilitate ethics of justice to give account for differences and plurality (Sandel 1998,133;Walzer 2007;Young 1990). Nussbaum's and Sen's ethics may be considered as ethics which try to give significance to the particularity of human ends. In my opinion, these insights are necessary issues in a development of ethics of justice, which takes measure to be counter to the fiction of the political (Arendt). From the quandary of these alternative model of justice, emerges the question if we can imagine an other justice, with resistance to how politics of disablement

evade respect for differences and human particularity of claim for meaningful action. This would be a justice beyond known justice, which meet the fiction of the political with an *other* fiction, appeal to our human imagination of possibilities of a more tender compassionate justice, respondent to vulnerable citizenship.

One of the most significant attempts is that of Paul Ricoeur. According to Ricoeur Rawls' attempt is to let "contractualist theory substitute a procedural approach for every attempt to ground justice on some prior convictions concerning the good for all, the common good of the *politeia*." (Ricoeur 2000 cit,37). Rawls's extraordinary construction borrows its *underlying dynamic* from the very principle it claims to engender by its purely contractual procedure. The major slant of the book is to substitute a procedural solution for foundational solution of the question of the just, which he does not succeed in, because the "principles of justice are largely defined and interpreted before the proof is given that these are the principles that would be chosen in the original situation" (Ricoeur 2000 cit,37).

Yet, Ricoeur does not refute Rawls's ethics. It is significant how Rawls designs the lexicographical order of the principles, making the maximin principle to the "turning point". Rawls' internal structure, the structure of principles which fair justice builds on, resembles the structure inherent in the tradition of the principle of neighbour love: "Do unto each other...". Rawls' theory of justice can be interpreted to equate the truth of a fiction of the political which support human imagination, the foundation of deontology in the desire to live well and for others in just institutions (Ricoeur 1994,228,-229,239-230). In Ricoeur's deliberation, the principle of neighbor love overlap to a quandary of the role the economy of gifts should play in ethics, to imagine the place generosity should play in an ethics of justice. But Ricoeur will also place the claim for the just into its relation to "what tragedy teaches us", invoking Nussbaum on tragedy/capability (Ricoeur 1994,243; Ricoeur 2002,288). If one sustains Ricoeur's position and claim the possibility of a sort of overlap between the paradigm of *the gift* and the merely distributive paradigm, Rawls' and Daniels' use of the objective advantage argument can be interpreted according to the obligations following from a gift perspective: to be generous because we have been given. The point is how it changes institutions to imagine and perform a more compassionate justice, a tender justice. From Rawls position it would be possible to place Daniels' objective advantage argument, and vulnerability to disaster in a

comprehensive structure of human efforts to imagine capability for action.

In a short essay it would be too expansive to develop this model further. My aim is to point to a possibility, congruent to Arendt's thesis of how the political lives of imagining possibility through an "anarchic" approach, to the fixed and set fiction of the political (Stortz 1994). Significant is how Ricoeur takes the issues of Arendt further through relating Arendt's philosophy of action to how metaphor and narrative gives food to thought, give the imagination of possibilities, a poetics of capability (Ricoeur 2002,279,282,285;Wall 2002,3,4,7). The meaning of word justice is not a given, but something that must be established through interpretation. To treat significance is a dialectic between distance and belonging (Ricoeur 1986, introduction; 1991 ,313). It means that work-places, child-care centers, residential communities, be considered as arenas of deliberation from representation of users, where those engaged in a collective undertaking participate to determine the design and operation of local justice. A conception which requires a sharp distinction between civil society and the state will be unable to imagine the interpublic coordination, and accountability for reasonableness that are essential to a tender democracy.

In my opinion Ricoeur's ethics meet the criteria to see our thrownness to luck and disaster, from top and below. The strength of Ricoeur's philosophy of the just is the accord for vulnerable citizenship, the significance of action, the requirement of recognition of particular ends, Institutional formal justice is to be corrected by a more tender justice. From Ricoeur's adjustment of Rawls to a teleological scheme it would be possible to build a double allegiance into ethics, to the perspective of top and below, exported in Nussbaum, Sen and Daniels ethics, regarding them as complementary approaches which fits in to a wider justice, a justice which accord to the moral potential of human beings to imagine another world, and renew justice through human action. The practice of law is not a matter of trump by legal formalism, on behalf of the majority's account of the normal, but a matter of adjusting normal law to the inside experience of dis/ablement. This accord for a vulnerable democracy, where law at *first* is not a matter of founding, of securing the status of the state, but of being respondent to vulnerable citizenship, giving a more coherent response to human vulnerability and people's claim for meaningful action, and create a democracy which is no longer an insult to people with disability diagnoses, but a society which appears as a friend.

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