



LEGAL STUDIES RESEARCH PAPER SERIES

**Working Paper Number 08-01
January 8, 2008**

Common Ground: The Case for Collaboration between Anti-Poverty Advocates and Public Interest Intellectual Property Advocates

Deborah Cantrell
University of Colorado Law School

This paper can be downloaded without charge from
the Social Science Research Network electronic library
at: <http://ssrn.com/abstract=1081621>

**COMMON GROUND: THE CASE FOR COLLABORATION BETWEEN
ANTI-POVERTY ADVOCATES AND PUBLIC INTEREST
INTELLECTUAL PROPERTY ADVOCATES**

DEBORAH J. CANTRELL*

ABSTRACT

This article examines the previously unarticulated common ground between scholars and advocates who work to eliminate poverty, and scholars and advocates who work on intellectual property issues in the public interest. The article first illustrates how scholars and advocates working on poverty and on public interest intellectual property have relied on rights talk to frame their social movements. That framing has accentuated difference between the movements, when, in fact, the movements share core principles. Relying on Martha Nussbaum's theory of capabilities, the paper suggests a reframing of the goals of both social movements which brings common ground to the fore. Using the reframing, the article then demonstrates the benefits of collaboration between the two social movements and offers three examples of potential co-movement work.

INTRODUCTION

What does the Medicaid program have to do with how a private university licenses one of its patents? What does an international treaty considering the scope of copyright have to do with whether children have school buildings that are physically sound? On first reflection, the answer to both questions is "nothing." Medicaid and adequate educational facilities for poor children relate to issues stemming from poverty, while licensing patents and the international scope of copyright relate to intellectual property law. There is no immediately discernable substantive overlap, nor overlap between the scholars, policymakers and advocates who are working on each set of questions. In this article, I argue that

* Associate Professor of Law & Director of Clinical Programs, University of Colorado Law School. I am grateful to Brad Bernthal, Nestor Davidson, Clare Huntington, and Phil Weiser for working through the ideas in this paper with me.

with deeper probing, the apparent disconnect resolves into full-bodied harmony and common ground.

This project is designed to stimulate writing, legislating, policymaking, organizing, arguing, and acting in ways that will increase people's access to, and use of, knowledge, with the goal of challenging some of the conditions that support poverty. But, it intentionally takes a modest starting point: to identify efforts now underway by the anti-poverty movement and the public interest intellectual property (IP) movement¹ which might provide opportunities to collaborate in unexpected, yet significant ways. The starting point acknowledges an important feature of social change work – that effective strategies and ideas can often be generated best by bringing interested people together without forming a detailed agenda in advance and beginning simply by sharing information and brainstorming.

One might wonder why this social movement collaboration is of interest to a legal audience, and whether sociologists might not be a more engaged audience for my inquiry. A legal audience should be interested in anti-poverty work and public interest IP work because both are inextricably tied to questions of law and legal process. Both social movements generally engage in advocacy work that is law-bound in some way – by particular statutes, by notions of rights, or by law-based decisionmaking entities. Further, both social movements have many of its scholars and advocates who are lawyers, and who think about social change work as including legal change.

When one crafts a theory demonstrating that two social movements share first principles, one should also consider the ways in which the two movements are currently disconnected. In order for a theory of common ground to be relevant, it must be robust enough to cause actors in each movement to consider the other movement. For example, if two movements have been actively hostile to each other, that contentious history may impede movement actors or scholars from considering the

¹ “Public Interest IP” is my own label, and not one that is in wide use, or that has been adopted by advocates. As I describe in the next section, there are several advocacy strands, each with its own moniker, that I believe are related and that fit under the umbrella label of public interest IP. Others have suggested different labels for the social movement, such as “Access to Knowledge.” See Amy Kapczynski, *The Emerging Access to Knowledge Movement and the New Politics of Intellectual Property Law*, 117 *Yale L. J.* ___, ___ (2007)(hereinafter “Emerging A2K Movement”).

possibility that the movements share first principles, and a theory of common ground will need to be compelling enough to push past the hostility. Or, if the culture of each social movement is dramatically different, then a theory of common ground will need to bridge differences in the ways in which social movement actors choose to pursue advocacy. Consider a movement committed to direct action campaigns (i.e., civil disobedience) which may dismiss the work of a movement focused on legislative change. The theory of common ground would need to accommodate those differences in advocacy methods.

In the case of the anti-poverty and public interest IP movements, I suggest that the current disconnectedness is one of benign neglect. For the most part, neither scholars nor advocates in the movements have paid attention to their counterparts in the other movement. Thus, a theory of common ground does not need to bridge antagonism – just disinterest. Further, both social movements have embraced a fairly wide-ranging advocacy methodology including organizing, litigating, and legislating, making each movement’s processes accessible to the other.

It is in that loamy context that I build out a theory of common ground between the anti-poverty and public interest IP movements. I suggest that the two movements have been disinterested in each other because both have articulated their first principles using rights talk. Because rights talk requires movement actors to articulate goals with particularity, it often obscures commonality. For example, rights talk about property in anti-poverty work has spurred arguments that welfare benefits are a property right,² whereas property rights talk in public interest IP work has worked from the standard repertoire of intellectual property – patents, copyrights, and the like.

Facially, a patent has nothing to do with a monthly welfare check. Therefore, I suggest a way to reframe the conversation using Martha Nussbaum’s “capabilities approach.”³ Under Nussbaum’s capabilities approach, the central question is what core capabilities must each person have in order to live a flourishing life. I more thoroughly describe and apply the capabilities approach in Section II.C, but one can see that IP property rights and anti-poverty property rights both address issues related to human

² See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³ See Section II.C, *infra*.

flourishing. IP rights consider the ways in which creativity helps a person to flourish, and anti-poverty property rights consider a person's basic needs for food and shelter in order to flourish.

In building my theory, I have structured my paper as follows. I first more carefully define the two social movements in which I am interested: the anti-poverty movement, and the public interest intellectual property (IP) movement. I then consider how anti-poverty advocates and public interest IP advocates currently define their advocacy agendas using rights talk. I suggest how one might re-frame those movement goals under a capabilities approach so that the shared first principles between the movements are highlighted. By bringing forward those shared principles, I offer common ground between the movements. I conclude by providing three examples of issues on which advocates could collaborate to produce important gains for each movement.

I. THE TWO SOCIAL MOVEMENTS

As a starting point, it will be helpful to have some shared conception of the two social movements that are the focus of this discussion. My definitions may not be accepted by all, and I will highlight areas that may be in dispute and detail why I contour my definitions in a particular way. Nonetheless, I contend that my definitions are descriptively sound and factually robust.

A. *The Contemporary US Anti-Poverty Movement:*

There is some artifice in defining a starting point for the domestically-based anti-poverty movement as one can identify instances of help and service to the poor in most periods of American history. For example, in the late 1800's, Louisa Lee Schuyler founded the State Charities Aid Association in New York which advocated for better conditions in poorhouses.⁴ Similarly, in many ways the efforts of President Roosevelt in the New Deal, were anti-poverty measures. Nonetheless, I mark the contemporary anti-poverty movement as coming into its own along side of President Johnson's War on Poverty.⁵

Johnson's War on Poverty was not a response to a general economic collapse as was Roosevelt's New Deal, but instead was a focused effort to improve the lives of those Americans whose incomes were insufficient to meet their basic necessities. Johnson articulated his anti-poverty strategy as follows: "Our chief weapons in a more pinpointed attack will be better schools, and better health, and better homes, and better training, and better job opportunities to help more Americans, especially young Americans, escape from squalor and misery and unemployment rolls where other citizens help to carry them."⁶ Johnson's speech captures the primary substantive areas of anti-poverty scholarship and advocacy.

⁴ See Lori D. Ginzberg. "Schuyler, Louisa Lee"; <http://www.anb.org/articles/15/15-00606.html>; American National Biography Online Feb. 2000; see also The Greenwood Encyclopedia of American Institutions, Social Service Organizations at 672-77 (Peter Romanofsky ed., 1978).

⁵ See Deborah Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 Loy. J. Pub. Int. L. 11 (2004)(noting as well the precursors of the War on Poverty from President Kennedy's administration) (hereinafter "Cantrell, Short History").

⁶ Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, 1 Pub. Papers 112 (Jan. 8, 1964).

First, basic shelter, which includes issues such as government-sponsored housing programs like Section 8, tenants' rights such as the warranty of habitability, or the development of affordable housing through government funding programs like HOME, or through statutory mechanisms such as inclusionary zoning ordinances. Next, basic subsistence, which includes issues about benefits such as food stamps and WIC (the special federal supplemental nutrition program for women, infants, and children). Third, basic health, including issues related to Medicaid and subsidiary programs like EPSDT (the child-focused early periodic screening, diagnosis and treatment program), challenges to pharmacy restrictions, and "healthy home" issues such as lead paint remediation and testing. Traditionally, anti-poverty scholarship and advocacy have also included a large effort related to work often intertwined with the federal welfare program and its requirements of work activity and provisions for job training and education. Finally, anti-poverty work has tackled education, most recently by considering the ways in which communities differentially fund school districts to the disadvantage of poor children.

A unique contribution of Johnson's War on Poverty was that it created a nationwide corps of funded anti-poverty advocates through the Office of Economic Opportunity's Legal Services Program.⁷ The federally-funded anti-poverty advocates joined grassroots organizations like the National Welfare Rights Organization, which had local chapters in communities throughout the country.⁸ One result of federal funding for anti-poverty lawyers was that a coordinated advocacy infrastructure was created across urban and rural areas for the first time. Instead of having pockets of anti-poverty advocacy here and there, every state had a federally-funded anti-poverty advocacy organization, and those field programs were supported by a nationwide system of support centers.⁹ The new anti-poverty infrastructure now had the

⁷ *Id.* at 17. In addition to federal funding for legal services, Johnson's War on Poverty funded anti-poverty advocates through programs such as VISTA.

⁸ See Jacqueline Pope, *Biting the Hand that Feeds Them: Organizing Women on Welfare at the Grassroots Level* at 1-4 (Praeger Publishers, 1989) (detailing the work of NWRO's local chapter in Brooklyn). The National Welfare Rights Organization disbanded in 1975, but was reconstituted in 1987 as the National Welfare Rights Union. See <http://www.nationalwru.org/about.htm>.

⁹ Cantrell, *Short History*, *supra* note ___ at 17-18.

potential to generate and support social movement work across the country.¹⁰

During the War on Poverty, anti-poverty scholars and advocates asserted that the government had an obligation to provide some support for the poor. Scholars crafted expanded notions of property designed to obligate the government to provide constitutional due process.¹¹ Scholars and advocates also argued that the 5th and 14th amendments included a substantive due process “right to live.”¹² Finally, advocates pressed the government to fully perform its obligations based on its legislative commitments under Aid to Families with Dependent Children (AFDC).¹³

The initial substantive rights focus by scholars and advocates evolved, however, as legislative efforts to reduce or eliminate government benefits were successful (such as the 1996 Personal Responsibility and Work Opportunity Reconciliation Act). Anti-poverty work has shifted its focus away from entitlement arguments to procedural due process arguments.¹⁴ While advocacy work may now sound more in procedural due process, contemporary anti-poverty scholars and advocates continue to identify their goal as eliminating poverty – some explicitly such as the Sargent Shriver National Center on Poverty Law¹⁵ or the Western Center on Law and

¹⁰ *Id.*

¹¹ Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964)(arguing that government’s expansive involvement in providing entitlements such as welfare benefits, licenses, contracts and the like created new property interests which could not be taken away without due process.)

¹² Cantrell, Short History, supra note ___ at 19.

¹³ In 1996, AFDC was replaced by TANF (temporary assistance to needy families) under the Personal Responsibility and Work Opportunity Reconciliation Act. 42 USC § 601 et seq (2007).

¹⁴ See, e.g., *Soskin v. Reinertston*, 353 F.3d 1242 (10th Cir. 2004)(in which anti-poverty advocates argued that Colorado’s procedures for terminating certain Medicaid benefits violated the Due Process Clause), *but see* David Super, *Blown Away: Hurricane Katrina and the Collapse of the Procedural Model of Anti-poverty Law*, forthcoming 2008.

¹⁵ <http://www.povertylaw.org/>. The Shriver Center was one of the original support centers created by OEO’s Legal Services Program. The backup centers were charged with pursuing systemic reform work to combat poverty. Sargent Shriver was the first head of the Office of Economic Opportunity. See Cantrell, Short History, supra note ___ at 17.

Poverty¹⁶ -- others through particular projects such as the Economic Justice Project of the Brennan Center for Justice.¹⁷

Just as it is somewhat artificial to define the contemporary anti-poverty movement as starting with Johnson's War on Poverty, it is challenging to identify who is in the movement and who is out. For example, some current labor movement work is closely aligned with anti-poverty work on increasing wages.¹⁸ And anti-poverty advocates have embraced private business models as possible community-based solutions to poverty, including developing community banks designed to increase capital and financial resources to low-income communities.¹⁹ However, the areas of overlap indicate shared commitments between movements rather than movement integration. Labor continues to see its primary purpose as workers' rights, and poverty advocates' use of private market tools comes in large part as a response to executive and legislative branches hostile to government benefits, not because poverty advocates have abandoned their position that government is obligated to provide minimum support to its citizenry. Thus, it is fair to say that the anti-poverty movement is bounded mainly by advocates' primary commitment – put colloquially, if you say your goal is to end poverty, you are within the anti-poverty movement, if you choose another primary goal, then you may support the anti-poverty movement, but you are not in it.

B. *The Public Interest Intellectual Property Movement:*

The public interest intellectual property (IP) movement is a more nascent social movement having roots in several different arenas related to the development and use of technology. One of the early progenitors of the movement was Richard Stallman who pushed against the use of copyright to create proprietary software programs.²⁰ Stallman insisted that proprietary software violated a core moral principle of sharing creative efforts to enrich all of society. As Stallman

¹⁶ <http://wclp.org/>. Western Center on Law & Poverty was also one of the original backup centers funded by OEO.

¹⁷ http://www.brennancenter.org/subpage.asp?key=40&proj_key=13 (highlighting the importance of living wages, workplace rights, and workforce development.)

¹⁸ An example is SEIU's advocacy to raise the minimum wage. See http://www.seiu.org/issues/good_jobs/7_06_story.cfm.

¹⁹ See, e.g., <http://www.cdfi.org/whatare.asp>.

²⁰ See http://en.wikipedia.org/wiki/Richard_stallman.

argued in his 1985 manifesto announcing his project to collaboratively create a free computer operating system: “If anything deserves a reward, it is social contribution. Creativity can be a social contribution, but only in so far as society is free to use the results.”²¹ In October 1985, Stallman founded the Free Software Foundation (FSF) which supported efforts to increase the development of free software.²² FSF continues to focus on issues related to the development of computer software, but it is important to note that it justifies its work in moral and ethical terms. As free software movement actors often explain: “Free software is a matter of liberty, not price. To understand the concept, you should think of ‘free’ as in free speech, not as in free beer.”²³ For Free Software advocates, the primary focus is on the liberty interests of individuals to create, appropriate, and recreate.

In addition to computer programmers, the public interest IP movement includes advocates who are committed to a broader notion of technology in service of individual creativity and in service of collaboration as methods for increasing individual participation in the making and shaping of societies and culture. As the grassroots organization, Free Culture, has declared exuberantly in its manifesto: “The mission of the Free Culture movement is to build a bottom-up, participatory structure to society and culture, rather than a top-down, closed, proprietary structure. Through the democratizing power of digital technology and the Internet, we can place the tools of creation and distribution, communication and collaboration, teaching and learning into the hands of the common person -- and with a truly active, connected, informed citizenry, injustice and oppression will slowly but surely vanish from the earth.”²⁴ Free Culture advocates share Free Software advocates’ interest in individual creativity, but look to individual creativity as a means for redistributing societal power.

Yet other public interest IP advocates focus more particularly on the potential of technology to increase democratically-based economic production. As Yochai Benkler has argued, technology, especially the internet, provides individuals with a method to collectively produce goods in a

²¹ Richard Stallman, The GNU Manifesto, available at <http://www.gnu.org/gnu/manifesto.html>.

²² See <http://www.fsf.org/>.

²³ <http://www.gnu.org/philosophy/free-sw.html>

²⁴ <http://freeculture.org/manifesto.php>.

way that is not dominated by a managerial hierarchy.²⁵ Benkler notes examples ranging from Wikipedia to craigslist.²⁶ For this strain of public interest IP advocate, the focus is on demonstrating that a commons-based approach to technology (as compared to an individual rights-holder approach) allows for more dynamic economic development.

A final group of public interest IP advocates have focused on the ways in which technology is used to promote or impede developing countries. As part of international efforts related to trade, the World Trade Organization has crafted an agreement related to intellectual property called the “Agreement on Trade-Related Aspects of Intellectual Property Rights” or TRIPS.²⁷ Similarly, the United Nations has a specialized agency related to intellectual property, the World Intellectual Property Organization, or WIPO.²⁸ Public interest IP advocates consider TRIPS and WIPO to favor developed countries’ interests over developing countries, and have actively engaged in efforts to protect developing countries.²⁹

While the groups described above have varied foci, they do have a common commitment to advocate that technology be regulated in a way that promotes individual creativity and encourages equitable development. The public interest IP movement operationalizes its work almost exclusively through the lens of intellectual property laws.³⁰ Given its focus on intellectual property law, the public interest IP movement generally has not formed alliances with those social movements more explicitly focused on alleviating poverty.

As the above descriptions make clear, the anti-poverty movement and the public interest IP movement are not hostile to each other – neither takes a position that is contrary to a core principle of the other’s movement. Instead, other than moments when the public interest IP movement considers the

²⁵ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale Univ. Press 2006)(hereinafter “Wealth of Networks”) at chapters 3-4.

²⁶ See <http://www.openbusiness.cc/2006/04/24/the-wealth-of-networks>.

²⁷ See http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

²⁸ See http://www.wipo.int/about-wipo/en/what_is_wipo.html.

²⁹ See Peter K. Yu, *The International Enclosure Movement*, 82 *Ind. L. J.* 827, 855-72 (2007)(describing ways in which TRIPS and WIPO preclude developing countries from protecting their policy interests); see also Amy Kapczynski, *Emerging A2K Movement*, *supra* note ___ at ___.

³⁰ Amy Kapczynski, *Emerging A2K Movement*, *supra* note ___ at ___. Kapczynski argues that one of the ways in which the public interest IP movement became a social movement was through its engagement with intellectual property law.

role of technology in promoting development, or the anti-poverty movement considers the “digital divide,”³¹ the movements are not in conversation with each other. That lack of conversation means that the movements are missing opportunities to collaborate in ways that would benefit the goals of each social movement and, importantly, benefit less-resourced community members. I turn now to a proposal to start cross-movement conversations.

II. STARTING CONVERSATION ACROSS MOVEMENTS

A. CURRENT FRAMING: THE DOMINANCE OF RIGHTS TALK

Common to both social movements is that each most often articulates its goals using rights talk. That is unsurprising in the domestic anti-poverty movement given the ubiquity of rights talk in the United States, including among scholars, professional advocates such as poverty lawyers, and lay advocates. Furthermore, domestic rights talk is generally framed in the context of constitutional rights (either federal or state).³² Thus, anti-poverty advocates have looked to domestic constitutional texts as the sources of framing for rights claims.³³ The anti-poverty movement has adapted its rights framing as government support for anti-poverty measures has waxed and waned. As noted earlier, the movement has framed its rights along a spectrum from an outright entitlement (“right to live,” “right to welfare”) to a demand for process (“right” not to have government benefits terminated without fair process).

By using textually-based rights talk, the anti-poverty movement defines its goals in relation to government actions that are particular to those in poverty, rather than to a broader group. For example, when anti-poverty advocates use due process rights to challenge whether a state appropriately terminated food stamps, the due process framing ties the issue to food stamp recipients rather than to a broader group. Thus, when anti-poverty advocates use rights talk, they offer up a

³¹ The “digital divide” refers to the fact that the poor more often lack access to computers and gaining internet-based knowledge. See Leonard M. Baynes, *The “Mercedes Divide?:” American Segregation Shapes the Color of Electronic Commerce*, 29 *Western N.E. L. Rev.* 165 (2006).

³² As compared to using an international source of rights such as the United Nations Universal Declaration of Human Rights.

³³ Buttressed, of course, by related federal and state statutes that create entitlements, such as the former federal welfare program, Aid to Families with Dependent Children (AFDC).

conversation that appears to be limited to gaining/preserving an entitlement for the poor.

Similarly, the public interest IP movement has often adopted rights language, although it has looked to a wider range of sources for its rights. As an initial and obvious matter, since property law and property “rights” are the basis for the concept of intellectual property, that form of rights talk is ubiquitous. Public interest IP advocates have also framed their arguments in terms of constitutional rights such as the right to privacy³⁴ and the right to free speech.³⁵ Finally, advocates have looked to international human rights treaties as supporting their work.³⁶ Public interest IP rights talk describes its rights in relation to kinds of intellectual property, or to the consequences of a private rights regime, as compared to a commons-based regime.³⁷ Just as anti-poverty advocates’ talk appears to be specific to entitlements for the poor, public interest IP advocates rights talk appears to be limited to questions about the scope of particular kinds of IP law – such as limits on copyright or patents.

As a consequence of using rights talk to frame movement goals, the specificity that is needed to define a right can discourage movements from seeing common ground. What does a right to food stamps have to do with a right to use the image of Mickey Mouse? For busy movement advocates, initial framing choices can act as blinders and can eliminate an advocate’s peripheral vision. The advocate working on a right to Medicaid is caught up in the intricacies of Medicaid, and has little time for the advocate next door who is working on free speech rights of bloggers. The two advocates are not adverse to each other’s actions, but they see themselves as unconnected and as engaged in entirely different kinds of public interest work. As a result, there is no cross-movement work.

B. *WHY CHANGE THE FRAME?: THE BENEFITS OF CROSS-MOVEMENT WORK*

³⁴ For an example of privacy rights work, see the Electronic Frontier Foundation’s advocacy listed at <http://www.eff.org/Privacy/>.

³⁵ For an example of free speech advocacy, see the Electronic Frontier Foundation’s agenda at <http://www.eff.org/Censorship/>.

³⁶ See Lawrence R. Helfer, Towards a Human Rights Framework for Intellectual Property, 40 U.C. Davis L. Rev. 971 (2007).

³⁷ See, e.g., Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (Vintage Books 2001)(hereinafter “The Future of Ideas.”)

Rights talk is very powerful. For the average person in the US, it is easy to think in terms of “my right to” or “you’re violating my rights.”³⁸ Similarly, for advocates, framing a problem in terms of rights talk allows for a fairly straightforward advocacy strategy: identify the source of the right, demand that the right be honored, and if it is not, go to court and ask that it be honored. If the right is recognized by the court, use the court’s enforcement powers to ensure that the rights holder is protected. Thus, one of the strongest benefits of rights talk is that it is easy – easy to be understood, and easy to craft an advocacy strategy. But easy does not necessarily mean effective or successful.

Advocates and scholars have fully criticized (and supported) the use of rights as the primary way of framing problems.³⁹ My point here is not to repeat that debate, nor to enter into it. Instead, I mean only to describe and highlight two facts of rights talk: that it is well-known and comfortable to advocates and the general public, and that to operationalize it requires an advocate to be particularly focused, often narrowly focused. Once an advocate’s focus is narrowed, it becomes harder to envision change happening in other ways, and harder to see opportunities to collaborate with those working outside the advocate’s particularized focus.

Looking to one of the core ideas of the public interest IP movement helps to illustrate why unexpected collaborations are important and to be encouraged. For public interest IP advocates, culture is developed in large part by individuals taking existing content (ideas, images, sounds) and reworking the content to create something new.⁴⁰ That new content is then used and reworked by another to create yet more new content.⁴¹ Groups of individuals come together to collaborate, contribute, and create.⁴² The ways in which people come

³⁸ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* at chapter 1 (Free Press, 1991).

³⁹ For critiques, see Glendon, *supra* note __; and Clare Huntington, *Rights Myopia in Child Welfare*, 53 *UCLA L. Rev.* 637 (2006). For support, see Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 *Brooklyn L. Rev.* 805 (1990) (in which Law describes why advocates chose “rights” language in framing the claims in *Goldberg v. Kelly*); and Nestor Davidson, *Rights as a Functional Guide for Service Provision in Homeless Advocacy*, 26 *St. Louis Univ. Pub. L. Rev.* 45 (2007).

⁴⁰ See, e.g., Lawrence Lessig, *the future of ideas*, *supra* note __ at chapters 7-8.

⁴¹ *Id.*

⁴² See, e.g., Yochai Benkler, *Wealth of Networks*, *supra* note __ at chapter 3.

together are not preordained or prescribed, thereby stimulating unexpected (and expected) content. The benefits of unexpected collaborations are not limited to creating culture such as new works of art or new computer software, but should extend to creating culture as happens within the context of social change work.⁴³

C. *HOW TO CHANGE THE FRAME: MOVING TO A THEORY OF HUMAN CAPABILITIES*

In order for anti-poverty advocates and public interest IP advocates to see possibilities for collaboration, the advocates must have a common ground for conversation. As seen above, rights talk does not provide that. I propose shifting the frame to that of human capabilities as developed by Martha Nussbaum. As I will detail below, I believe Nussbaum's human capabilities approach provides common ground for anti-poverty and public interest IP advocates.

Nussbaum's theory of human capabilities⁴⁴ posits that all humans should be enabled to lead flourishing lives, and her "capabilities" framework asks the question of what a person is "able to do and to be?"⁴⁵ Nussbaum contrasts her approach with traditional economic assessments of the good life such as whether a person is satisfied with her life or whether a person is able to command resources.⁴⁶ Furthermore, in contrast to rights talk, under Nussbaum's framework, the primary focus is not on creating a set of potential individualized choices, each of which may stand alone or be traded off one another. Instead, Nussbaum insists on a comprehensive notion of human flourishing, which includes ten core dimensions, all of which

⁴³ Ironically, while the public interest IP movement pushes unexpected collaborations, its own movement advocates have generally worked in expected collaborations, focused on technology, and laws related to technology. See Amy Kapczynski, *Emerging A2K Movement*, *supra* note ____ at ____.

⁴⁴ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge Univ. Press, 2000)(hereinafter "WHD"). Nussbaum has developed her theory over the course of several works, but I believe it to be most robustly set out in *Women and Development*. Thus, I rely on that work in this article. In WHD, Nussbaum distinguishes her capabilities approach from similar work done by Amartya Sen, with whom she has also collaborated. See WHD at 11-15

⁴⁵ *Id.* at 71.

⁴⁶ *Id.*

must be enabled, and none of which may be traded off one another.⁴⁷

Nussbaum is not hostile to the notion of rights, but finds rights talk ambiguous on the critical issue of actual capacity. For example, a country's constitution may give its citizens the "right" to vote, but that says nothing about whether or not its citizens are able to exercise that right.⁴⁸ For Nussbaum, the relevant inquiry is looking at the ways in which people actually are able to live their lives. In using a measure of capacity, one looks to each person and must concretely assess what resources are needed by that person in order for the person to be able to do certain activities. Nussbaum describes the relationship between capabilities and rights in this way: "[T]hinking in terms of capability gives us a benchmark as we think about what it is to secure a right to someone."⁴⁹

In addition to providing a new vantage point from which to consider what constitutes a baseline for a good or flourishing life, the shift to a capabilities approach provides a new language that is unbounded by a long history of claiming and dispute. In contrast, rights talk cannot be used without, in some way, engaging in its contentious history. For example, domestically one might think of obvious successes such as the Civil Rights movement, and disputes such as what is constituted within a right to privacy.⁵⁰ Internationally, one may point to successes such as international human rights treaties like the United Nations Universal Declaration of Human Rights, and disputes over whether international human rights treaties actually change country behavior.⁵¹

In the case of anti-poverty advocates and public interest IP advocates, when what one is encouraging is a starting point of conversation and rights talk does not provide common ground, a new language is needed. Let me now hypothesize

⁴⁷ Id. at 78-81. Nussbaum is careful to distinguish between "capability" and "function," understanding the first to be that state in which a person has access to whatever basic resources are needed in order to achieve a particular capability (i.e., access to sufficient health care to have the capability of bodily health), and the second to be the arena in which individuals may choose how to develop a capability (i.e., having sufficient food for bodily health, but choosing to fast). Id. at 86-87.

⁴⁸ Id. at 96-98.

⁴⁹ Id. at 98.

⁵⁰ Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) with *Lawrence v. Texas*, 539 U.S. 558 (2003) (Supreme Court's changing position on scope of privacy right related to consensual gay sex).

⁵¹ See Oona Hathaway, *Do Human Rights Treaties Make a Difference*, 111 Yale L. J. 1935 (2002).

why the vantage point of capabilities should be agreeable to anti-poverty advocates as well as public interest IP advocates, and then test that hypothesis using a sample of Nussbaum's ten capabilities.

Both anti-poverty advocates and public interest IP advocates are concerned with people's ability to do things – to eat sufficiently so as not worry about malnutrition, to live a life free from easily-avoided illnesses, to learn about one's world in a sufficient way so as to be able to participate in economic activities, to create art, and so forth. Further, as a broad descriptive, the work of both sets of scholars and advocates is designed to enable people to live flourishing lives, with each individual encouraged to make personal choices about what constitutes a flourishing life. The outcomes sought by movement advocates are synchronized with Nussbaum's capabilities approach. If one shifts the focus from movement process (i.e., establishing the "right to") to outcomes, we see that the movements' benchmarks are Nussbaum's benchmarks.

As noted earlier, Nussbaum proposes ten capabilities that set up a baseline for a flourishing life. Let me examine three in detail as a way of demonstrating how the language of capabilities captures the common ground between particular efforts of anti-poverty advocates and those of public interest IP advocates.⁵²

Nussbaum's second capability is "bodily health" which she defines as being able to have good health, adequate nutrition and shelter.⁵³ The particular efforts of anti-poverty advocates to enable this capability are fairly obvious, including work to ensure coverage under Medicaid and other government-sponsored health care, advocacy to protect food stamps, and to build low-income housing. The work of public interest IP advocates includes efforts to ensure the availability of generic AIDS-related medicines in developing countries, work to prevent private property rights from attaching to indigenous medicines,⁵⁴ and information sharing related to

⁵² Any of the seven capabilities that I do not examine could also be used as one of my examples. I have picked the three that I believe are particularly fruitful sources for creating common ground.

⁵³ Nussbaum, WHD *supra* note ___ at 78.

⁵⁴ I acknowledge that public interest IP advocates are not of one mind on how indigenous knowledge should be treated – whether it is better to encourage a regime of private property rights that solidifies private rights to indigenous peoples or whether it is better to encourage a commons approach to indigenous knowledge. *See, e.g.*, Maggie Kohls, *Blackbeard or Albert Schweitzer: Reconciling Biopiracy*, 6 *Chi.-Kent J. Intell. Prop.* 108

genetically-modified foods. By using the vantage of enabling the capability of bodily health, one can see each of the particular advocacy campaigns noted above as specific ways of achieving the same benchmark of bodily health.

Another of Nussbaum's capabilities is "senses, imagination and thought" which includes the ability to use senses, to imagine, think and reason, which is cultivated by adequate education.⁵⁵ Here, the particular efforts of public interest IP advocates are fairly obvious and include efforts to limit the scope and duration of copyright protection, and work to limit digital rights management. But, also included under this capability are efforts of anti-poverty advocates in litigating education funding and educational adequacy cases. If one were to ask what common ground is shared by the legal claims in a lawsuit contesting whether the copyright on Mickey Mouse should be extended⁵⁶ and a lawsuit asserting that a state is violating its constitution in the way that it funds public education,⁵⁷ one would be hard pressed to find common ground. In contrast, it is easy to find common ground if one asks whether both lawsuits are ways in which to preserve an individual's capability to use senses, imagination, and thought.

One last example – the capability of affiliation – which includes being able to live with others and develop communities, having the social bases of self-respect and non-humiliation, and being free from inappropriate discrimination.⁵⁸ Current anti-poverty movement work that fits into this capability includes efforts to challenge restrictions on who can live together in publicly-subsidized housing⁵⁹ and the preservation of low-income housing.⁶⁰ Public interest IP

(2007) (describing various approaches to protecting indigenous knowledge); Gregory K. Schlais, *The Patenting of Sacred Biological Resources, The Taro Patent Controversy in Hawai'i: A Soft Law Proposal*, 29 U. Haw. L. Rev. 581 (2007)(criticizing traditional IP rights as applied to indigenous knowledge).

⁵⁵ Nussbaum, WHD supra note ___ at 78.

⁵⁶ See, e.g., *Eldred et al v. Ashcroft*, 537 U.S. 186 (2003).

⁵⁷ See, e.g., *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307 (1995).

⁵⁸ Nussbaum, WHD, supra note ___ at 79-80.

⁵⁹ For example, in Connecticut, the City of Norwalk proposed to evict a public housing resident if the resident's child was truant from school. Margaret Farley Steele, *Norwalk Proposes Eviction for Truancy*, NY Times, July 9, 2006.

⁶⁰ For some examples of low-income housing preservation work, see the website of the National Housing Law Project, <http://www.nhlp.org/html/pres/index.cfm>.

work includes efforts to prevent web browsers from collecting or sharing private data, and efforts to preserve data-sharing technology. Again, if one were to ask how the right to live with one's family members is similar to the right to send video over the internet, there is no immediate nor obvious answer. But, if one asks whether the ability to live with one's family members and the ability to share information with one's creative partners are both ways of fostering the capability of affiliation, the immediate and obvious answer is yes.

As the above illustrates, if one articulates anti-poverty and public interest IP movement goals in terms of efforts designed to ensure that every individual has core capabilities needed to live a flourishing life, then the movements share much in common. The question then becomes: does that matter?

III. THE RESULTS OF CHANGING THE FRAME: COLLABORATIVE POSSIBILITIES

For reframing to be relevant on the ground to movement advocates, it needs to produce some tangible benefits to the anti-poverty movement and the public interest IP movement. Movement advocates need to be convinced that some good change will come about for their constituencies before they will reallocate time, energy and resources to new work.

It is important to note that my goal is to show movement advocates the potentials of collaboration, but not to prescribe the methods of collaboration. I have argued that a capabilities reframing creates a common language that can be used between social movements, but the reframing need not dictate the ways in which collaboration will be turned into advocacy agendas. For example, I have argued that rights talk has impeded social movements from seeing common ground, but once the movements are in conversation, they might still decide that effective change could happen by crafting a coordinated advocacy campaign utilizing rights. They will have set aside rights talk in order to find a way to harmonize their principles, but they then must make strategic choices about how they translate common ground into common action. It may very well be that a capabilities frame also proves useful in action, but my structure does not limit advocates to using only it.

I turn now to a set of examples to demonstrate how a capabilities approach brings common ground to the fore and offers potential for collaborative action.

A. *An Example from Fortuity*

The first example I describe is one from fortuity – the switch in the federal Food Stamps program from booklets of paper coupons to an electronic debit card, called an “EBT card.”⁶¹ It was neither anti-poverty advocates nor public interest IP advocates who pushed for the change. Instead, the federal government mandated the change in an effort to reduce the administrative costs of the food stamps program.⁶² Under welfare reform in 1996 (the Personal Responsibility and Work Opportunity Reconciliation Act), states were obligated to implement a food stamp EBT program by October 2002.⁶³ While states embraced the move on cost-savings and anti-fraud grounds, an ancillary benefit developed for food stamp recipients: they no longer felt judged and stigmatized when they went to the store to purchase groceries. Instead of having the uncomfortable experience of having everyone in the grocery line watch them pull out their food stamp coupon booklet, recipients now were able to swipe a card that looked just like the credit or debit cards used by everyone else. As one newspaper article noted about the launch of EBT cards in Virginia, “Latisha McRae said she is looking forward to shopping with dignity . . . [as the EBT card] ‘will be better than standing there and tearing all of the coupons out of the book’”⁶⁴

Ms. McRae’s quote makes clear how profound a small technological change can be. In the case of EBT cards, the capability of affiliation, which includes self-respect and non-humiliation, was well-served. Without conversation between anti-poverty and public interest IP advocates, the move to EBT likely did not register as more than another government effort to reduce bureaucracy. Nothing about EBT cards caused anti-poverty advocates to worry about due process rights or rights to benefits. Similarly, nothing about EBT cards caused public

⁶¹ See http://www.fns.usda.gov/fsp/ebt/ebt_regulations.htm for a brief overview of the regulations related to the food stamp EBT program.

⁶² See M. Stegman, J. Lobenhofer & J. Quintero, *The State of Electronic Benefit Transfer*, December 2003, 5-7, available at http://www.ccc.unc.edu/documents/cc_ebt.pdf.

⁶³ *Id.* at 5-6.

⁶⁴ Stacy Hawkins Adams, *Food Stamp Users to Get Debit Cards*, *Richmond Times Dispatch*, April 22, 2002. See also Andrew A. Zekeri, *Opinions of EBT Recipients and Food Retailers in the Rural South*, Report from the Southern Rural Development Center, No. 6, July 2003, 3-5 (study of food stamp recipients in Macon County, Alabama inquiring about reasons for preferring EBT system in which 62% of surveyed recipients noted that EBT reduced stigma or embarrassment.)

interest IP advocates to worry about rights violations.⁶⁵ Had movement advocates considered the EBT from a capabilities approach, however, they might have recognized the easy opportunity presented to connect technology and poverty.

The fortuity of the EBT example reminds advocates that there may be opportunities available to them that they miss because of the way in which their agendas are framed. If anti-poverty advocates and public interest IP advocates were in regular conversation with each other, there would be other EBT-like moments on which to capitalize. A strong benefit of regular conversation is that advocates share more kinds of information with each other, and what may seem mundane to one, may trigger an exciting development for another. EBT technology was mundane, but it made a significant difference to Latisha McRae and others.

Further, regularized conversation encourages advocates to try many different ideas together, and not see their collaboration as a one-time event that must be saved only for a big project. Moments of fortuity often may permit advocates to reallocate time and resources in modest ways, and if successful, provide their social movements with a supply of vignettes which may be used to build momentum and support.

B. An Example from the International Arena

In the international arena, there has been much attention paid to the challenges faced by developing countries in accessing affordable medicines needed to combat health crises such as AIDS/HIV.⁶⁶ The focus of the access to medicines campaign has been primarily in regard to developing countries, with the assumption being (correctly) that it is more likely that an American has access to medicines than does a counterpart in a developing country.⁶⁷ Plainly, the access to medicines campaign can be captured under the capability of

⁶⁵ Compare the EBT card with the newer technology of radio frequency identification (RFID), which permits users to collect and transmit much personal information and public interest IP advocates have raised concerns about privacy rights. See, e.g., Electronic Frontier Foundation's website information on RFID available at <http://www EFF.org/issues/rfid>.

⁶⁶ See Peter K. Yu, *The International Enclosure Movement*, supra note ____; see also Daryl Lindsay, *Amy and Goliath*, Salon.com May 1, 2002, available at <http://archive.salon.com/news/feature/2001/05/01/aids/> (detailing advocacy work that led to Yale University and Bristol-Meyers Squibb pledging not to enforce a patent on the drug d4T).

⁶⁷ See A. Kapczynski, S. Chaifetz, Z. Katz, Y. Benkler, *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 Berkeley Tech. L. J. 1031, 1032 (2005).

bodily health. Nonetheless, the public interest IP movement has generally articulated access to medicines using international law rights talk – either as part of international development agreements or as part of international human rights law.

For example, advocates have concentrated on development-related agreements such as TRIPS (the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights),⁶⁸ which sets out an international infrastructure for intellectual property law, and which has been roundly criticized for jeopardizing developing countries' ability to provide or develop needed medicines for their people. And, advocates point to the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights as sources of a right to health.⁶⁹ Advocates further note that the United Nations Commission on Human Rights has stated that access to medicines is a human right.⁷⁰

In addition to rights talk, public interest IP advocates have focused on international business forces understanding that multinational corporations, through patent protection and market domination, have an enormous amount of control over who gets medicines and at what price. Thus, advocates have pressured large pharmaceutical companies and research institutions to forego patent protections on medications in primary need by developing countries so that generic versions can be produced at lower prices.⁷¹

International access to medicines work has required public interest IP advocates to think and strategize about the interplay between government regulation and the interests of big business in the context of governments with differing amounts of resources. Working in the international arena has allowed advocates some flexibility. For example, the overarching structure of international intellectual property law has been in contest, with tensions between developed countries interested in a regime supportive of private rights and

⁶⁸ See http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS, for an online version of the TRIPS Agreement.

⁶⁹ See Noah Novogrodsky, *The Duty of Treatment: Human Rights and the HIV/AIDS Pandemic*, forthcoming 2008 (laying out international human rights law sources for a right to health, and arguing that the law also supports a positive right to treatment.)

⁷⁰ Peter K. Yu, *The International Enclosure Movement*, *supra* note ___ at 865.

⁷¹ Daryl Lindsay, Amy and Goliath, *supra* note ____.

developing countries interested in a regime that permits more information to flow more quickly into the commons.⁷² Public interest IP advocates have allies in the developing countries, which has allowed advocates to partner with a group centrally involved in developing the international IP infrastructure. As such, public interest IP advocates are comfortable viewing governments as potential collaborators not always adversaries.

Relatedly, the international business arena has provided public interest IP advocates with an ability to apply pressure. Large corporations and research institutions concerned with their reputations have less of an ability to control “the message” in the international arena compared to a domestic arena such as the US in which there is easy access to lobbying and marketing. With successes like the one in South Africa where Bristol-Meyers Squibb and Yale University agreed not to enforce a patent on an important AIDS/HIV medication thereby permitting the South African government to purchase a lower-priced generic version, public interest IP advocates have the experience of winning against big business.

Turning to the domestic arena, issues related to access to medicines have come into play differently than in the international arena. First, anti-poverty advocates have long considered access to health care to be a core area on which they focus.⁷³ But, domestic work relates to access to government-sponsored health services such as Medicaid, and so disputes are framed in terms of rights to Medicaid as a government entitlement,⁷⁴ or due process rights not to have benefits restricted.⁷⁵ Just as access to medicines clearly fit with in the capability of bodily health, so does domestic work related to Medicaid. However, rights framing presses public interest IP advocates in one direction (towards international human rights

⁷² Peter K. Yu, *The International Enclosure Movement*, supra note ___ at 855-62.

⁷³ For example, the National Health Law Program is a nationwide public interest advocacy organization that focuses on health care issues of the poor. See <http://www.healthlaw.org/about.cfm>. Furthermore, most systemic reform “poverty law” programs include health care projects. Examples include the Sargent Shriver Center National Center on Poverty Law (<http://www.povertylaw.org/advocacy/health>), the Western Center on Law and Poverty (<http://www.wclp.org/health/index.php>), and the Colorado Center on Law and Policy (<http://www.cclponline.org/ccs/healthcare.html>).

⁷⁴ See, e.g., Brian J. Dunne, *Enforcement of the Medicaid Act Under 42 USC § 1983 After Gonzaga University v. Doe: The “Dispassionate Lens” Examined*, 74 *Univ. Chic. L. Rev.* 991 (2007)(considering Medicaid as a government entitlement and limits on Section 1983 lawsuits.)

⁷⁵ See *Soskin v. Reinertston*, 353 F.3d 1242 (10th Cir. 2004, supra note ___.

law), and anti-poverty advocates in another (towards US constitutional law).

If one looks for a domestic corollary to international access to medicine issues, one could consider disputes as to whether a particular medication should be on a list of Medicaid-covered medicines. The starting point is the question of whether a medication is on or off the list of approved drugs (often referred to as the drug “formulary”), not whether pharmaceutical companies should be differently obligated to provide drugs to Medicaid providers (i.e., companies must allow generic medications to be made for Medicaid providers).

Given that Medicaid is a program funded partly by federal funds, but also by equal or greater state funds,⁷⁶ advocates interact intensively with state health agencies and state legislatures on access issues. However, those relationships are generally contentious and adversarial.⁷⁷ For example, advocates may dispute the way in which a state department of health services implements its Medicaid formulary.⁷⁸

However, as state governments have faced pressures on their Medicaid budgets because of increased medication costs, they have considered strategies to reduce those costs.⁷⁹ The primary tactic has been to require drug companies to offer rebates, as opposed to reducing patent protection. The approach was set up in 1990 when Congress passed legislation requiring drug companies to offer rebates to states for a portion of the costs incurred by states who paid for medication with Medicaid dollars.⁸⁰ Once a drug company negotiated a rebate,

⁷⁶ See Centers for Medicare & Medicaid Services (part of the U.S. Department of Health & Human Services), at http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp#TopOfPage.

⁷⁷ See, e.g., CITE

⁷⁸ Of course, not every interaction is adversarial. States do pass pro-health benefits legislation and state departments of health can implement services in a pro-access manner. Nonetheless, anti-poverty advocates most often finds themselves on the other side.

⁷⁹ See State Strategies to Contain Medicaid Drug Costs, Report of the Office of Inspector General, Department of Health & Human Services, October 2003 (Rpt. No. OEI-05-02-00680), available at <http://oig.hhs.gov/oei/reports/oei-05-02-00680.pdf>; see also Leighton Ku & Matthew Broaddus, Why are States' Medicaid Expenditures Rising?, Report from the Center on Budget & Policy Priorities, January 13, 2003, available at <http://www.cbpp.org/1-13-03health.htm> (noting that one pressure on Medicaid budgets was increased drug costs).

⁸⁰ See 42 USC 1396r-8.

then a state would include the company's medications on its Medicaid formulary. If a company failed to negotiate a rebate, the company's drugs would not be pre-approved, and patients could not obtain the medication at Medicaid prices unless the patients' doctors got prior approval from the state agency.⁸¹ That "prior authorization" provision effectively meant that a drug company who did not agree to a rebate program would be at risk for not having its medications dispensed to Medicaid patients.

Some states followed the federal legislation with their own supplemental legislation. An example was Maine's legislation, Maine Rx, which included a state rebate program with "prior authorization" as a penalty for failing to negotiate a rebate. Drug companies, via their trade group PhRMA⁸², quickly sued asserting that the legislation was preempted by the federal Medicaid statute and violated the Commerce Clause.⁸³ After the case traveled to the US Supreme Court and resulted in a fractured opinion, the Maine legislature revised the rebate scheme (renamed to Maine Rx Plus), which was again challenged by PhRMA, but whose lawsuit was dismissed.⁸⁴

Despite Big Pharma's challenges to state rebate programs, some of the programs have been successful, and have provided states with some leverage over drug companies. Maine now participates in a state drug purchasing consortium with three other states.⁸⁵ The consortium has been able to negotiate with Big Pharma for notable price rebates, and in some cases has even negotiated a price on a brand medication that is no more than the cost of the generic.⁸⁶ The consortium's

⁸¹ See Timothy Stoltzfus Jost, *Pharmaceutical Research and Manufacturers of America v. Walsh: The Supreme Court Allows the States to Proceed with Expanding Access to Drugs*, 4 *Yale J. Health Pol'y, Law & ethics* 69, 76-77 (2004).

⁸² *Pharmaceutical Research and Manufacturers of America*.

⁸³ See *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 653-60 (2003)(detailing the procedural posture of the litigation.).

⁸⁴ *Pharmaceutical Research & Manufacturers of America v. Nicholas*, 2005 WL 4677368 (USDC, Dist. ME 2005)(the primary legal issue decided by the court was that PhMRA's preemption claim was not ripe for review. The court did not address the merits of PhMRA's challenge.)

⁸⁵ Telephone interview with Jude Walsh, Special Assistant, Maine Governor's Office of Health Policy and Finance (September 10, 2007).

⁸⁶ *Id.*

success, however, has not translated into a nationwide reduction in states' Medicaid drug costs.⁸⁷

For purposes of this discussion, what is particularly salient about the disputes between states and big drug companies is that the states' interest are more closely aligned with anti-poverty advocates' interests than with the interests of drug companies. While it is true that anti-poverty advocates and states remain in tension on the question of how expansive coverage should be under Medicaid, both would agree that keeping down medication costs would be beneficial. Thus, there is some opportunity for state governments and anti-poverty advocates to work in harmony against Big Pharma, just as public interest IP advocates have worked internationally with developing states against Big Pharma.

Currently the domestic fight with drug companies focuses on rebates and whether drugs are on or off a formulary. The domestic stakeholders have not developed an agenda that considers an IP focus. It is here that public interest IP advocates might usefully intercede and build on their international access to medicines work. Substituting for developing country governments would be state governments. And, anti-poverty advocates already have substantial relationships with the relevant state government personnel so that a conduit for communication is already in place. Public interest IP advocates could take advantage of being the most recent members to the discussion to present a strategy that is new to the group, yet with a record of success elsewhere.

I expect that some anti-poverty advocates and public interest IP advocates may be skeptical about the proposed collaboration, expressing a sentiment along the lines of "Why use our limited resources fighting Big Pharma in its own backyard where it is most powerful, and where it has enormous resources in which to buy influence." The sentiment is valid, but should not be dispositive. Oddsmakers would not likely have predicted the international successes of public interest IP advocates, but those successes now offer experiences that can be used in crafting a domestic campaign. Further, state governments have powerful economic incentives to work against Big Pharma, while Big Pharma has some incentive to

⁸⁷ I note that the new federal seniors' prescription drug program, Medicare Part D, adds another dimension to what kind of pressure states may place on drug companies, but I do not take up that issue further. The purpose of my discussion is to provide an example of a possible area of collaboration between anti-poverty advocates and public interest IP advocates.

continue to participate in Medicaid if it hopes to preserve market share. If a state's only way to contain costs is to drop drugs from its Medicaid formulary, then Big Pharma is faced with losing all of its Medicaid-related market share for the drug. Given that some of the most common medical conditions of the poor may be treated with Big Pharma's top-selling medications, Big Pharma benefits from participating in Medicaid drug plans.⁸⁸

In the end, my example is not offered as the right or only course of advocacy for anti-poverty advocates and public interest IP advocates working on issues in support of a capability of bodily health. It may be that as advocates start their work with states, an agenda that focuses on reducing certain patent protections might morph into one of increasing the number of state drug purchasing consortiums, or it might morph into one of advocating for entirely new ways of financing drug research and development,⁸⁹ or morph into a strategy yet to even be crafted. My example is offered as a starting possibility, not a guarantee for success. I hope that it illustrates the potential of cross-movement conversations to produce important collaborations. Let me turn to one more example.

⁸⁸ For example, high blood pressure is a common condition among those living in poverty, and the fourth best selling drug in the world is Pfizer's blood pressure medication, Norvasc. See Centers for Disease Control and prevention, Facts and Statistics: High blood Pressure Facts, available at <http://www.cdc.gov/bloodpressure/facts.htm> (listing that 66% of people with hypertension are poor or near poor), and Matthew Herper, The World's Best-Selling Drugs, Forbes.com, March 16, 2004 (showing Norvasc as fourth best-selling drug).

⁸⁹ Long time public interest IP advocate Jamie Love has suggested that drug development not be left to private companies' research and development divisions, but instead be fostered by a government-sponsored "Medical Innovation Prize Fund." Under Love's approach, a company would receive a patent for a new drug, but the patent would not prevent other companies from creating the same drug. Instead, the originating company would receive an annual monetary prize for ten years in an amount tied to the actual medical benefit created by the new drug. See James Love and Tim Hubbard, The Big Idea: Prizes to Stimulate R&D for New Medicines, Knowledge Ecology International Research Paper 2007:1, available at <http://www.keionline.org/misc-docs/bigidea-prizes.pdf>. In 2005, federal legislation was introduced in the House to create such a prize fund, and the bill was favorably reported out of subcommittee, but no further legislative action was taken. See <http://olpa.od.nih.gov/legislation/109/pendinglegislation/medicalinnovation.asp>.

C. *An Example from Parallel Work*

Anti-poverty advocates have long been concerned with the role education can play in ameliorating poverty. Those efforts have included litigation to establish a constitutional right to education,⁹⁰ challenges to state educational financing structures,⁹¹ and more recently, challenges of educational adequacy based on provisions within state constitutions.⁹² Those efforts are stimulated by the idea that access to knowledge and learning is a powerful tool for poor children to use to push away from the negative consequences of poverty. Using the capabilities frame, education-related work comes within the capability of senses, imagination and thought.

In the current round of educational adequacy cases, advocates have had to make tangible what are the necessary conditions for learning. For example, in the California litigation, *Williams v. California*, advocates worked with their student clients and discerned certain prerequisites to learning, including having current textbooks in good condition, classrooms that were structurally safe places for students to congregate, and teachers who were qualified.⁹³ What *Williams* helps make clear is that the intersection of poverty and learning creates pressing issues related to physical space and physical sources of knowledge. One cannot make progress on learning without grappling with other related issues. Thus, education-related litigation like *Williams* has built out a right to education that looks not only at the need for knowledge, but also at the conditions that make knowledge accessible.

Public interest IP advocates are also working issues related to knowledge, but with a different starting point. As part of international advocacy work to ensure that developing countries' IP interests were protected, a group of public interest IP advocates proposed that there be an "Access to Knowledge" treaty (referred to as the "A2K Treaty").⁹⁴ In February 2005, advocates convened in Geneva and shared

⁹⁰ Ultimately unsuccessfully argued to the United States Supreme Court in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

⁹¹ An example of which is *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996).

⁹² An example of which is *Williams et al v. California et al*, Case No. 312236, Superior Court of the State of California, County of San Francisco.

⁹³ See Brooks Allen, *The Williams v. California Settlement: The First Year of Implementation*, A Report by Counsel for the *Williams* Plaintiffs, at 9, available at http://www.aclu-sc.org/attach/w/williams_first_year_report.pdf.

⁹⁴ For a detailed web-based bibliography related to the A2K Treaty, see CP Tech's website at <http://www.cptech.org/a2k/a2k-debate.html>.

numerous ideas on what an A2K Treaty might address and what content it might include.⁹⁵ The proposals focused on intellectual property law and the ways in which IP legal structures impinge on the free flow and use of information.⁹⁶ For example, one proposal considered the ways in which copyright law should be limited⁹⁷ and another considered the ways in which libraries should be exempt from IP restrictions.⁹⁸ As a draft treaty took shape, its content continued to focus on IP law-related concerns, but its preamble acknowledged a less technology-defined set of purposes, including “seeking to enhance participation in cultural, civic and educational affairs” and “recognizing the importance of protecting and supporting the interests of creative individuals and communities.”⁹⁹ Under a capabilities approach, like the domestic education work, access to knowledge work comes under the capability of senses, imagination, and thought.

As work on A2K has developed, some have encouraged advocates and scholars to understand A2K as more than a set of questions about IP law. For example, in April 2006, the Information Society Project (ISP) at Yale Law School sponsored an A2K conference. ISP Director Jack Balkin opened the conference with remarks titled “What is Access to Knowledge” in which he noted:

Much of the focus of access to knowledge, and much of what we are going to be talking about here, has been on intellectual property. There are good reasons for this. As you'll see in our discussions here, the international IP and trade regime has increasingly adopted policies that prevent the efficient and equitable flow of knowledge, information, and knowledge goods. However, if our goal is the promotion of human flourishing, economic development, and human freedom, Access to Knowledge must look beyond international trade and IP policy.¹⁰⁰

⁹⁵ For a list of the proposals circulated at the Geneva meeting, see <http://www.cptech.org/a2k/a2k-debate.html#Feb>.

⁹⁶ *Id.*

⁹⁷ *Id.* at “Proposal for Limitations and Exceptions to Copyright Law.”

⁹⁸ *Id.* at “Proposal on Library-Related Principles.”

⁹⁹ See May 9, 2005 Draft of Treaty on Access to Knowledge, at Part I, Preamble, available at http://www.cptech.org/a2k/a2k_treaty_may9.pdf.

¹⁰⁰ Jack Balkin, “What is Access to Knowledge,” available at <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html>.

Professor Balkin's remarks highlight the possibility for cross-movement collaboration between public interest IP advocates and anti-poverty advocates, and suggest the capabilities frame as a bridge builder.

Anti-poverty advocates come to the discussion with experience in dealing with tangible A2K problems like physical space and books, but with little experience negotiating IP issues related to those tangible problems (such as digital rights management issues faced by public libraries). Public interest IP advocates come to the discussion skilled in setting up a public-minded IP regime, but with little experience addressing non-technology access issues (such as providing laptops for school children without addressing whether there is physical space for school). I am not suggesting that either set of advocates has purposefully ignored a set of issues, but again that framing choices have suggested disconnectedness rather than connectedness.

By linking issues of physical access with technology-related issues of access, movement advocates have an opportunity to stimulate a community's capability for senses, imagination, and thought and for stimulating the capability of affiliation. Working to build a community's shared physical space of knowledge, by building a public library, a public school, or a community center, expands opportunities for community members to come together face-to-face, to learn, to organize, and to create. Ensuring that the community's physical space of knowledge has robust and open technology expands opportunities for community members to learn, create, and affiliate with others despite physical distance and despite other impediments to face-to-face gatherings. Thus, a community's ability to learn, organize, and create moves beyond the community's physical boundaries.

IV. THE CHALLENGES

While I believe that using a capabilities frame provides common ground for anti-poverty and public interest IP advocates, and that the examples above demonstrate the benefits of collaboration, I am mindful that cross-movement collaboration is challenging. Here, there are two primary challenges: a challenge of resources, and a challenge of movement culture.

Neither the anti-poverty movement nor the public interest IP movement has an abundance of resources. Advocates in both movements cobble together funding from multiple sources, including individual donors and foundations, with no source providing a guaranteed longterm funding stream. As a result, advocacy organizations are leanly staffed and advocates are asked to carry a very full load of work. In order for advocates to take on a new project, it is likely that they will have to discontinue working, or to scale back work, on a current project. Unless it is clear to an advocate that some current work is unfruitful, it is a hard choice to give up on current work to start a new and untested project. The momentum (and inertia) is with the current work, and not with launching a new project.

In the cross-movement collaboration that I've proposed, what countervails the inertia of staying with existing work is the possibility of the unexpected. Because anti-poverty and public interest IP advocates have not worked together, they have not developed bad habits or limits to their expectations. Thus, I hope that advocates might approach their collaboration with an open and full sense of possibilities that will lead to innovative work. My examples of possible collaboration offer some sense of what such innovative work might look like, but the collective imagination of a cross-movement group of advocates could surely envision an agenda well beyond three examples. I am counting on that collective imagination to create sufficient momentum so that individual advocates will be convinced to take on new work, and so that funders will be convinced to give new money.

The challenge from culture posits that anti-poverty advocates and public interest IP advocates are too different from one another to be able to find common ground. One might look at the underpinnings of public interest IP advocacy and assess that the movement is deeply grounded in notions of individual creativity free from government involvement. In contrast, one might look at the underpinnings of anti-poverty advocacy as stemming from a notion of fundamental governmental obligation and support. Those assessments are not entirely off the mark, but I think they come from the fact that both social movements have often described their agendas in rights talk. If advocates in both social movements are willing to consider a new framing, such as my proposal to use Nussbaum's capabilities approach, then the cultures of the two movements can be seen as consistent and harmonious.

CONCLUSION

Medicaid and university patents, international treaties about knowledge and school buildings, all come together as avenues along which advocates seek to promote human flourishing. Understanding the work of anti-poverty and public interest IP movements as having a common goal of ensuring that every individual has core capacities to lead a flourishing life, allows advocates in both social movements to see common ground between the movements. Seeing common ground thereby stimulates collaboration between movement advocates, which should allow both movements to increase chances for social change.