An extension of social justice: a Rawlsian application of justice for the intellectually disabled

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An extension of social justice:
A Rawlsian application of justice for
the intellectually disabled

by

Jennifer Christina Tillman

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ABSTRACT

In this dissertation, I add to the literature in the following way. First, I review the existing criticisms of Rawls’s theory of justice, which claims that he is unable to address the question of justice for individuals with intellectual disabilities. Second, I explain how Rawls’s idea of reciprocity can accommodate some forms of disability but not the more severe cases. Third, I develop an account of a right to political identity that can provide an extension of Rawls’s theory to address the more severe cases of disability. From these steps, I will suggest that these changes will allow us to address the problem of institutionalized stigma that individuals with intellectual disabilities often experience. Segregating, creating negative stereotypes, and discouraging persons with intellectual disabilities from being a part of the political process are core violations of their right to a political identity.

The first chapter outlines Rawls’s basic project. Primarily, I focus on the role of reciprocity and the model that Rawls develops for the two principles of justice. By the end of chapter one, I raise questions regarding the extension of this model in cases that Rawls himself did not discuss. Chapter 2 identifies ways in which Rawls’s theory has been extended to non-standard cases. This chapter introduces Norman Daniels’s extension of Rawls’s principle of fair equality of opportunity. I raise two objections against Daniels’s extension: first, Daniels’s extension of the principle of fair equality of opportunity does not provide an adequate solution for individuals who are never capable of reciprocity, and, second, I object to Daniels’s conception of the person because it relies on the biomedical model of disability.
Chapter 3 focuses on cases of disability which are generally excluded from Rawls’s and Daniels’s discussion. By exclusion, I mean that Rawls and Daniels do not discuss these cases. Further, exclusion can also mean that Daniels and Rawls do not discuss these cases because these cases are outside of the scope of political justice. However, I will argue that some cases of disability are inside the scope of political justice. To show this, there are two general goals in chapter 3. First, I develop an appropriate extension of paternalism that could be compatible with Rawls’s conception of reciprocity. Second, I distinguish Rawls’s conception of reciprocity from other conceptions of reciprocity, namely G.A. Cohen and David Gauthier.

Chapter 4 focuses on cases of disability that were traditionally thought to be excluded from a Rawlsian conception of reciprocity, i.e. persons with mild forms of schizophrenia. To develop this argument, I highlight Rawls’s political conception of the person. With this political conception, I develop an extension of Rawls’s model of the person to these cases of disability.

The contribution these arguments make to the issue of disability and distributive justice is to extend Rawls’s view to be more inclusive of persons with disabilities. Supporting a Rawlsian view of distributive justice does not mean that we can treat persons with physical and mental impairments with cruelty, indifference or ignore them as recipients of justice. Persons with physical and mental impairments also have basic rights and
liberties that ought to be protected and part of my project is to show how this can be a part of a Rawlsian view.
I would like to thank my committee for their support. Bringing together my interests in Rawls and disability would never have happened without many conversations with Jon Mandle and comments from my committee members Kristen Hessler and Monika Piotrowska. I am grateful for all of your time and effort.

Thank you to other faculty members within the UAlbany Philosophy Department who supported me, especially Jason D'Cruz, Robert Howell and P.D. Magnus.

Thank you to my mom, Evelyn Tillman, whose respect and passion for education provided me with the opportunity for success.

Thank you to my sister, Laura Tillman, whose work ethic and creativity inspired me.

Thank you to my partner Joseph who provided emotional and intellectual support throughout this entire process.

And even though I cannot thank him in person, I would like to thank my father, Jacob Tillman, for his love and support. And even after his death, his memory has served as a motivating force to question the world around me, to reject the status quo, and to not be afraid of the unknown. My father's death also serves as a motivation for my work. My father died when I was 12 years old. After he died, I asked the physician on call why more steps were not taken to be placed on an organ donor list. The doctor merely replied ‘he was not an important member of the community’. From there, my quest to understand ethical components of health care began.
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Chapter 1

Although the work of John Rawls has been central to political philosophy for the last 5 decades, in recent years there have been significant challenges to his basic method. In particular, those concerned with disabilities of various kinds have argued that his contract method systematically ignores those with differing needs. I aim to join this conversation by addressing the concern of disability within Rawls’s literature. My project will begin by establishing the basic framework of the Rawlsian system of justice. I will assess whether or not criticisms of his theory of justice make his position untenable. After this assessment, I will discuss the application of Rawlsian theory to the experience of persons with disabilities.

In particular, I focus on the application of justice via social and economic institutions to those persons who have severe and persistent mental illnesses. My primary research question is “What do we (as citizens) owe, as a matter of justice, to persons with severe and persistent mental illnesses?” Developing the proposed answer to this question will involve several steps.

I intend to examine how social institutions should be designed in order to treat individuals, including individuals with disabilities, justly. Basic social institutions determine the procedures through which individuals come to be entitled to various social goods including resources, opportunities, basic rights, and duties. I will argue that Rawls provides an appropriate starting point for determining the institutional requirements of justice, and furthermore, that it can be extended in a convincing way to
consider cases of disability that he himself did not address. I will propose a reevaluation of Rawls’s theory of justice combined with a reassessment of Rawls’s concepts of reciprocity and social cooperation.

Specific concepts I will address will be the role of reciprocity, paternalism and equality in Rawls. Reciprocity, I will argue, is a crucial concept in understanding the idea of social cooperation within Rawls’s theory. Further, many of the strong critiques against Rawls and his discussion of disability focus on the issues of social cooperation, reciprocity and the difficulty of treating individuals as equals. In order to address these concerns, I will clarify Rawls’s concept of reciprocity as he may have meant to develop it. Then, I will both clarify and then extend Rawls’s position. The first clarification will be to sort out what Rawls actually argues in regard to these key concepts. The second clarification will build on these concepts as I identify those places where opponents of Rawls have critiqued him based on either misunderstandings or misreading of Rawls’s actual argument. Next, I will offer my own critique of Rawls, but it will not be dependent on any misreading of Rawls’s position concerning the ideas of reciprocity or social cooperation. Thus, my project will begin from the starting point of justice Rawls has in mind. It will then develop an extension of Rawls’s account.

In this chapter, I will outline Rawls’s basic project. In this section, I will define Rawls’s two principles of justice, the idea of reciprocity and social cooperation, and outline the role of Rawls’s hypothetical tool of the original position.

The first section identifies Rawls’s general project of developing a conception of justice,
justice as fairness. I will focus on the idealizing assumptions of a well-ordered society made to develop another important component of his conception of justice: the model of the person. In order to understand Rawls’s model of the person, I will explain the ideas of the two moral powers and full cooperation of citizens from the perspective of the parties in the original position who focus on the idealization of citizens in a well-ordered society.

Once these key concepts are developed, I will focus on the relationship between reciprocity, the two moral powers and social cooperation. The end of this chapter tests the limits of the idealized model of the person for which the principles of justice were designed, and questions whether or not the two moral powers can be extended to persons with physical and mental disabilities.

Rawls’s basic project
At the foundation of his project, Rawls claims that justice is “the first virtue of social institutions” (1999, p. 3). The scope of his theory of justice is limited to studying institutional arrangements as they jointly form the basic structure of society. The basic structure includes the institutions and procedures through which rights and duties are distributed through social institutions. Rawls includes as examples of major social institutions “the political constitution and the principal economic and social arrangements” (1999, p. 6). For example, the basic structure can include many different

1In Political Liberalism, Rawls defines the basic structure as “a society’s main political, social and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next” (p. 11). Further, “the way in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation (1999, p. 6). The basic structure is “that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies.” (Rawls, (1993), p. 12). Second, the basic structure allows “its members [to] enter it only by birth and leave it only by death” (Rawls, (1993), p. 12).
social and economic arrangements (as institutions)\(^2\) which are regulated by laws. The ways in which laws, for example, regulate particular social, political or economic arrangements is one way in which the basic structure is constituted within a particular society. The way in which social, economic or political arrangements affect individuals within society becomes the focal point of justice for Rawls. When inequalities arise within the basic structure, through various institutional arrangements, Rawls questions whether or not these social, economic or political inequalities are within an acceptable range of what justice may require. Rawls makes his argument for the fair range of social, economic and political inequalities through his two principles of justice: *justice as fairness*.

**Two principles of justice**
The first principle of justice is referred to as the *liberty principle*. The *liberty principle* states that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value (*Political Liberalism*, p. 5).

The *liberty principle* guarantees persons equal claims to basic rights and liberties.\(^3\) An example of a basic right is the right to vote. A basic liberty is freedom of thought.

However, the *liberty principle* protects more than just equal rights. Because the liberty

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\(^2\) Some examples are “the political constitution, the legally recognize forms of property, and the organization of the economy, and the nature of the family, all belong to the basic structure” (*Political Liberalism*, p. 258).

\(^3\) Rawls states that basic liberties include a “right to vote and to hold public office, and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the role of law” (*Theory* (1999), p. 53).
principle protects equal rights, it also protects equal status.

Rawls’s theory contrasts with utilitarian views of political justice as it insists on equal moral and political standing of all citizens. Contrary to classical utilitarianism which in some cases may require citizens to sacrifice their individual liberty or rights in an unreasonable way for the economic gains of society, the Rawlsian theory of justice protects citizens from these situations. The Rawlsian view protects the liberties of individuals from being violated for public economic gains or private profit. I argue this makes Rawls’s discussion of political liberties more appealing than utilitarian arguments.

The liberty principle alone is not enough, however, to take into account all types of unjust inequalities that occur within the basic structure of society. Rawls’s view also takes into account social and economic inequalities in terms of acceptable limits of justice. The second principle of justice has two parts. The first part is referred to as the principle of fair equality of opportunity and the second part is referred to as the difference principle. Together these two principles state that “social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society” (Political Liberalism, p. 6).

The two parts of the second principle regulate the range of acceptable inequalities pertaining to social and economic standing. Rawls states that positions and offices are
open to citizens under fair equality of opportunity. This means, first of all, that all citizens should be allowed to compete and apply for different jobs, political positions or other opportunities that are present within a particular society. The guarantee to compete for these positions is not a guarantee that any particular individual will actually attain them. For example, it would be an unfair restriction of a citizen’s social or economic standing to prevent them for applying for a job as a security officer. It would be wrong to bar them from this position based on irrelevant facts, such as height or race. However, if the position requires someone who can stand for 2 to 4 hours at a time, then this might prevent a person from qualifying for this position. But *fair equality of opportunity* requires more than *formal equality*. Individuals must not be disadvantaged because of their social or class background. Educational and training resources, for example, must be allocated in a way that allows individuals equally to develop their natural talents and abilities. In the ideal, individuals with equal natural talents and abilities should have an equal opportunity to occupy the various social positions, regardless of their social or class background. As for the *difference principle*, it applies to the basic structure and not directly to individuals. The *difference principle*, in conjunction with the *principle of fair equality of opportunity*, makes sure that social and economic inequalities are not unjust. Essentially, the *difference principle* allows for differences in positions, income, and wealth, but only when social and economic inequalities work to everyone’s advantage relative to equality.

**The original position as a hypothetical tool**

The *original position* is a thought experiment that is designed to help us identify the most favored conception of justice. It does not represent an actual historical event.
Within this thought experiment, the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like (Rawls (1999), p. 11). In addition to these limitations, the hypothetical parties in the original position do not know their own conception of the good or “their special psychological propensities” (Rawls (1999), p. 11). Rawls succinctly summarizes a conception of the good in *Political Liberalism* as “a conception of the ends and purposes worthy of our devoted pursuit, together with an ordering of those elements to guide us over a complete life” (p. 104). Examples of one’s own conception of the good could include goals such as becoming a doctor or becoming a mother. These are goals that we try to achieve within our lifetime which require certain “psychological capacities”\(^4\) to form these ends and create rational life plans to achieve them.

Importantly, there is a distinction between the rational actors of the original position and the theorists, such as you and me, who are thinking about the rules of justice. In fact, Rawls identifies three points of view: that of the parties in the original position, that of citizens in a well-ordered society, and finally that of ourselves—of you and me who are elaborating justice as fairness and examining it as a political conception of justice (*Political Liberalism*, p. 28).

The hypothetical parties are merely part of a “device of representation” (*Political Liberalism*, p. 27) used to model reasonable considerations that we accept as appropriate for developing a political conception of justice. The second point of view is

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\(^4\) The role of psychological capacities will be discussed in the section *Elements of Psychological Stability.*
of citizens in a well-ordered society for whom the principles are being developed. The third point of view of “you and me” (Political Liberalism, p. 28) are the actual theorists who use this device to test how well the principles of justice “articulate our more firm considered convictions of political justice” (Political Liberalism, p. 28).

The original position, as a device of representation, allows you and I to use this device as “a means of public reflection and self-clarification”, which “serves as a mediating idea by which all our considered convictions [...] can be brought to bear on one another”, “establish[ing] greater coherence among all our judgments”, and grants a “deeper self-understanding” which allows for “wider agreement among one another” (Political Liberalism, p. 26). The choices of the members in the original position are not “an account of the moral psychology, either of actual persons or of citizens in a well-ordered society” (Political Liberalism, p. 28). Rawls justifies the use of this device of representation to empower actual citizens to envision the principles of justice.

Two idealizing assumptions
In developing his conception of justice, Rawls makes several idealizing or simplifying assumptions. Rawls’s theory is idealized in two important ways. The assumption of “strict compliance” (A Theory of Justice, p. 215) attempts to work out principles of justice that “characterize a well-ordered society under favorable circumstances” in

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5 Rawls states that a concept of a well-ordered society is “a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice; and second...its basic structure—that is, its main political and social institutions and how they fit together as one system of cooperation – is publicly known, or with good reason believed to satisfy these principles. And third, its citizens have a normally effective sense of justice and so they generally comply with society’s basic institution, which they regard as just” (Political Liberalism, p. 35). It is also important to point out the idea of a well-ordered society is also “a highly idealized concept” (Political Liberalism, p. 35).
which all citizens are assumed to have a normally effective sense of justice (A Theory of Justice, p. 215). The assumption of strict compliance in a well-ordered society allows us to focus on the problem of social justice, as Rawls understands it, rather than other forms of justice such as retributive justice. Rawls suggests that by abstracting away from the particulars of actual individuals within society we could use these abstract agents to conceive of principles of justice which could fairly apply to the basic structure of society. The assumption of fully cooperating members as an ideal characterization of justice is debated amongst contemporary political philosophers. Those who reject thinking about justice in this way often describe themselves as looking at justice from a non-ideal perspective. Instead of entering this debate, I will focus primarily on a second aspect of ideal theory.

By assuming that citizens normally comply with the requirements of justice, Rawls is at the same time making more specific assumptions that they have two “moral powers.” Although the parties in the original position are behind a veil of ignorance, they do know that they are choosing principles for individuals who will be capable of full participation

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6 This model of idealization is questioned in terms of disability by Martha Nussbaum (2006) in Frontiers of Justice: Disability, Nationality, and Species Membership, Eva Kittay (2011) in The Ethics of Care, Dependency, and Disability, and by Anita Silvers and Leslie Pickering Francis in “Justice through Trust: Disability and the “Outlier Problem” in Social Contract Theory” 116 Ethics 40: 58-58, 2005. Other contemporary theorists think that there are ways to include disability in social contract type theories and models of distributive justice such as in the case of Lawrence C. Becker’s “Reciprocity, Justice, and Disability” 116 Ethics 9–39, 2005. Becker states that “mutual advantage theories, at least, have a good deal to say about justice for the disabled”. In Henry S. Richardson’s paper “Rawlsian Social Contract theory for the Severely Disabled” Journal of Ethics (2006) 10:419-462, where he defends Rawls against Nussbaum’s critiques concerning disability. Richardson’s position is distinct because he rejects the idea that the original position depends on a concept of reciprocity (p. 426-429).

7 Other contemporary theorists focus on a particular group of individuals from the aspect of non-ideal theory. Some of these individuals are Charles Mills with “The Racial Contract” and Carole Patemen with “The Sexual Contract”. While these non-ideal approaches may be able to directly address race or gender, they are much narrower in scope than ideal-type approaches.
in society’s system of cooperation. To address Rawls’s conception of the person, I must specify what criteria these persons have in order to be full cooperating members of society. For Rawls, these are the two moral powers: the capacity for a conception of the good and a conception of justice.

**Citizens, Two Moral Powers and Social Cooperation**

Rawls’s project develops a conception of justice from the assumption of a well-ordered society for fully cooperating members. A well-ordered society, as mentioned in the discussion of the original position, assumes that in this society each member knows, accepts, and understands that everyone else in this society accepts a particular conception of justice. Citizens in a well-ordered society know how social and political institutions are structured and citizens know that the institutions satisfy the publicly known and accepted conception of justice. Further, since we are assuming full compliance, citizens in a well-ordered society will have a sense of justice that leads them to follow the rules of society (*Political Liberalism*, p. 35). Rawls’s conception of the person and the abilities that these persons can have are developed from this assumption of a well-ordered society.

Rawls’s model of the person is a normative and political conception,\(^8\) and not based on

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\(^8\) Rawls states that “a conception of the person, as I understand it here, is a normative conception, whether legal, political, or moral, or indeed also philosophical or religious, depending on the overall view to which it belongs. In the present case the conception of the person is a moral conception, one that begins from our everyday conception of persons as the basic units of thoughts, deliberations and responsibility, and adapted to a political conception of justice and not to a comprehensive doctrine. It is in effect a political conception of the person, and given the aims of justice as fairness, a conception suitable for the basis of democratic citizenship” (fn. 20, *Political Liberalism*, p. 18).
“psychology originating from the science of human nature” (*Political Liberalism*, p. 86). Use of the term *conception* is important in Rawls’s terminology because a “conception of the person” is distinct from Rawls’s use of an idea or a concept. As such, Rawls states that persons and citizens have the ability to “play a role in, social life” (*Political Liberalism*, p. 18). Being a person is not merely about biological membership, but pertains to the active role of cooperation within many parts of society. On the other hand, the political role of persons as citizens is fulfilled by their capacity to participate fully in society’s system of cooperation, and this, in turn, requires that they possess the two moral powers to an adequate degree.

A citizen is a person who is “a normal and fully cooperating member of society over a complete life” (*Political Liberalism*, p. 18). Citizens are normal and fully cooperating members of society when they have the two moral powers and their own “determinate conception of the good” (*Political Liberalism*, p. 19). Citizens require both the capacity to develop the two moral powers and to actually have their own conception of the good.

One of the two moral powers is a capacity for a conception of the good. This moral power is “the capacity to form, to revise, and rationally to pursue a conception of one’s rational advantage or good” (*Political Liberalism*, p. 19). The other moral power is a

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9 Rawls discusses this distinction in *Political Liberalism*, footnote 15, p. 14. Ideas are inclusive of both concepts and conceptions. Rawls contrasts the difference between his discussion of the concept of the person (*Political Liberalism*, Chapter 3.3) and the conception of the person which is the idea of a person as “a democratic citizen” (fn. 15, p. 14).

10 It is important to note that being a ‘citizen’ is a technical term for Rawls. Rawls’s concept of being a ‘citizen’ is another part of his idealization, and as such it should not be confused with the more colloquial understanding of ‘citizenship’, i.e. having a particular national identity.
capacity for a sense of justice which is “the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation” (Political Liberalism, p. 19). Citizens must also have a determinate conception of the good that is formed over time using their first moral power, under constraints from the second. A determinate conception of the good includes

a conception of what is valuable to human life [...] more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations (Political Liberalism, p. 19).

Further, determinate conceptions of the good “are not fixed but form and develop as they mature, and may change more or less radically over the course of life” (Political Liberalism, p. 20).

For example, a citizen in a well-ordered society may have a determinate conception of the good which includes a desire to be a doctor. Being a doctor fits into a part of her “scheme for determinate ends” (Political Liberalism, p. 19). Further, as this person develops her own conception of the good, this also leads to deeper connections with other persons and associations. As for the development of her own conception of the good, the source of it may either arise from her own interests to care for others, or as an idea that she was guided towards by others. Regardless, in our case the doctor has both the capacity for the two moral powers and a determinate conception of the good.

Further, the woman can revise and rationally pursue her goals once her conception of the good has formed. In this case, her interest in helping others could lead her down a path of being a medical doctor; it will then be specified and developed in light of her more specific interests, abilities, and circumstances.
If, however, she decides to rationally pursue her own good as a doctor, she must rely on a form of instrumental rationality. In order to use her two moral powers, she must also have “intellectual powers of judgment, thought, and inference” (*Political Liberalism*, p. 81). She understands that to practice medicine she must acquire certain credentials such as a 4-year medical degree which would help her achieve “more or less determinate scheme of final ends” (*Political Liberalism*, p. 19) and she must also have the ability and desire to develop these skills. However, being rational, and developing rational ends is not enough to be a fully and normal cooperating citizen.

As for the second moral power, in a well-ordered society citizens also have the capacity for and develop the capacity for a sense of justice. In this case, citizens can understand, apply and act from a conception of justice. For example, if the citizens were to accept justice as fairness as their conception of justice, then they will understand and be motivated by the two principles of justice. They will understand how the two principles of justice impact the basic structure. Even though most of the time, most individuals will not apply the principles of justice directly to basic institutions, they can support their application by constraining their own conception of the good in a reasonable way. Doing this will depend on developing and acting from a sense of justice.

Importantly, Rawls clarifies the difference between developing a capacity for a conception of the good and a capacity for a sense of justice as the capacity to either be rational or reasonable. To take a simple, non-political example, consider a rational agreement in which Cathy asks Daisy to help supply her farm with proper irrigation.
Cathy needs Daisy to help her dig a 4-foot trench to help water her crops. Daisy agrees to dig as long as Cathy will assist her in the future. Later that month, Daisy asks Cathy to help bring her herd of cattle home. However, this task takes one month to complete in which time all of Cathy’s crops will have died. If Daisy claims the Cathy is not holding up her end of the agreement, Cathy can claim that Daisy is being unreasonable. Her request goes far beyond what a fair interpretation of their agreement would require.

Thus, voluntarily entering into agreements with each other is a rational act. We are assisting other individuals to meet their own conception of the good. However, when we have conflicting ends, as in the case of Cathy and Daisy, the issue of reasonability arises. The conflicting ends are that Cathy would like for her crops to continue to grow. Daisy would like to bring her cattle home but this can only be done with assistance. It would be unreasonable for Daisy’s conception of the good to override Cathy’s conception of the good for two reasons.

First, it would be unreasonable for Daisy’s conception of the good to override Cathy’s merely because *Daisy desires it*. However, more importantly, Daisy views her request for assistance as getting what she is owed in terms of their rational agreement. And even though Rawls states that it is sometimes reasonable to uphold these agreements at the expense of our own interests, Daisy is asking too much of Cathy. Daisy’s request undermines the achievement of Cathy’s conception of the good, i.e. to grow her crops.
If Cathy and Daisy were to be ‘reasonable’, they would both be

(1) ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation, [and] (2) reasonable persons also understand that they are to honor these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them (Justice as Fairness: A Restatement, p. 7).

In other words, a reasonable agreement may be that Cathy does not leave her farm for an entire month, but instead leaves for a few days at a time. Daisy’s acceptance of this offer would be an acknowledgement that Cathy upholds her end of their agreement without unfairly restricting Cathy’s conception of the good, i.e. keeping her crops alive.

Further, Daisy could also claim that Cathy is unreasonable if Cathy is not open to reasonable proposals from Daisy. Rawls states that an unreasonable person is not ready to propose such principles, or not to honor fair terms of cooperation that others may reasonably be expected to accept; it is worse than unreasonable if one merely seems, or pretends, to propose or honor them but is ready to violate them to one’s advantage as the occasion permits (Justice as Fairness: A Restatement, p. 7).

In the second part of this quote, if Cathy purposively deceives Daisy, this is something worse than being unreasonable, even if it is rational from the point of view of her own conception of the good.

Another component of the conception of a citizen beyond developing the two moral powers and attaining a determinate conception of the good is that citizens also have “two corresponding higher-order interests in developing and exercising these moral powers. To say that these interests are “higher-order” interests means that, as the
fundamental idea of the person is specified, these interests are viewed as basic and hence as normally regulative and effective” (*Political Liberalism*, p. 74). Further, there is a higher-order interest associated with a determinate conception of the good as well (p. 74). These higher-order interests as a component of the assumption of the person as a citizen in a well-ordered society helps motivate citizens to develop their two moral powers as well as their determinate conception of the good.

So far, I have shown that Rawls’s conception of the person and of a citizen is developed from the assumption of a well-ordered society. Citizens who are a part of a well-ordered society are full and normal cooperating citizens because they have the two moral powers and a determinate conception of the good. Persons become citizens when they have a determinate conception of the good, and can develop, revise and rationally pursue their conception of the good, understand, apply, and act from a public conception of justice and are motivated to do so by corresponding higher-order interests. Further, citizens with these capabilities are not only rational but reasonable.

Another component of the capacity for a conception of justice is also that the public conception of justice identifies the fair terms of social cooperation. Rawls further specifies how social cooperation is possible through three requirements:

(1) Social cooperation is “guided by publicly recognized rules and procedures that those cooperating accept and regard as regulating their conduct” (*Political Liberalism*, p. 16)

(2) Social cooperation “involves the idea of fair terms of cooperation” (*Political Liberalism*, p. 16). By “fair terms of cooperation” Rawls specifically identifies *reciprocity* as being a necessary part of this aspect of cooperation. Individuals who are cooperative members are active participants in supporting different “rules and procedures” and thus will “benefit in an appropriate way as assessed
by a suitable benchmark of comparison” (*Political Liberalism*, p. 16)

(3) Social cooperation “requires an idea of each participant’s rational advantage, or good. The idea of good specifies what those who are engaged in cooperation, whether individuals, families, or associations, or even the governments of peoples, are trying to achieve, when the scheme is viewed from their own standpoint” (*Political Liberalism*, p. 16).

As members of a well-ordered society, citizens are capable of meeting the first requirement of cooperation. In the first case, cooperation is “distinct from merely social coordinated activity, for example, from activity coordinated by orders issued by some central authority” (*Political Liberalism*, p. 16). So, to return to the case of Cathy and Daisy, their agreement to help each other *could* be an example of Rawlsian cooperation if they were guided by publicly accepted rules and procedures that adequately respected the interests of both.

The second requirement of social cooperation identifies the role of reciprocity. Since this is a complex idea I would like to develop in detail, I will discuss the role of reciprocity and social cooperation in the next section. The third requirement of social cooperation addresses the conception of the good. Rawls identifies the role of a conception of the good for citizens when they are “engaged in cooperation” (*Political Liberalism*, p. 18) with other individuals, families or other types of organizations. In this way, citizens are clear what end they are attempting to achieve. When individuals are aware of their own good, they can claim a fair share of resources for their own projects. Part of this bargaining will have to do with reciprocity, which I will discuss in the next section. However, for the third component of social cooperation, these resources are measured through the idea of social primary goods. Social primary goods are an objective measure
for well-being. In *A Theory of Justice*, Rawls initially introduces these goods as “rights, liberties, and opportunities, and income and wealth” (p. 54). Citizens can make *just* claims to social resources depending on which publicly recognized rules are agreed to and upheld.

As we will see next, reciprocity has an even more vital role in Rawls’s theory of justice because reciprocity provides the “basis for equality” (*A Theory of Justice*, p. 447). To be given what one is owed by justice, citizens must be able to enter into reasonable agreements, not merely rational ones.

**Model of the person: social cooperation and reciprocity**

Since Rawls bases his account of justice on the idea of reciprocity, he claims that justice is owed to anyone who is capable of engaging in such reciprocity: “those who can give justice are owed justice” (*A Theory of Justice* (1999) p. 446). Reciprocity is possible once a bare minimum has been reached regarding who qualifies to be treated as an equal. This bare requirement must be the capacity and the possibility to develop the capacity to reciprocate justice. Rawls thinks of a just society as a fair system of cooperation. Therefore, in the first instance, he thinks of persons as capable of full participation in such a system. The model of the person strongly relates to the concepts of social cooperation and its relation to reciprocity. If a person is not capable of social cooperation because they lack the capacity to enter into reciprocal relations as a citizen,

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11 Rawls states that “the well-being of a person is constructed from the series of satisfactions that are experienced at different moments in the course of his life, so in very much the same way the well-being of society is to be constructed from the fulfillment of the systems of desires of the many individuals who belong to it” (*A Theory of Justice*, p. 21).
then these persons cannot be thought of as normal and fully cooperative citizens. Therefore, the hypothetical actors in the original position assume that the citizens for whom they are choosing principles will be able to enter into reciprocal relationships.

In order to support the claim that reciprocity is essential in Rawls’s theory, I will first define reciprocity, clarify the role that reciprocity has within Rawls’s theory and defend the following claims: first, reciprocity provides the groundwork for making initial claims in order to have access to social resources; second, reciprocity provides the means for stability and mutual respect; and third, most importantly reciprocity provides the basis for equality.

**Reciprocity defined**
The criterion of reciprocity as stated in “The Idea of Public Reason Revisited” can be reduced to the following definition: the criterion of reciprocity is met when rules and procedures are provided through reasonable terms of fair cooperation to individuals who can accept or reject them as free and equal citizens.\(^{12}\) If individuals are dominated, manipulated or forced\(^{13}\) to accept or reject certain rules or procedures due to their political or social positions, then the criterion of reciprocity has not been met.

Rawls provides the example of women’s suffrage.\(^{14}\) When women were not allowed to

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\(^{12}\) As stated in *Idea of Public Reason*, “it requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as *free and equal citizens*, and not as dominated or manipulated, or under the pressure of an inferior political or social positions” (p. 136, my emphasis).

\(^{13}\) These are Rawls’s criteria as quoted above from *Political Liberalism*, p. 136.

\(^{14}\) xlix, *Political Liberalism*. 
vote merely because of the fact that they were women, this was a violation of the
criterion of reciprocity. The rules that prevented women from voting were not made on
the basis of reasonable considerations. Reasonable considerations are those that
everyone can accept as free and equal individuals. Clearly there were many women and
some men who found the exclusion of women from voting to be unjustifiable. More
importantly, proponents of the right for women to vote should have good (public)
reasons for their views. Some of those reasons may have been that many women are
capable of developing their two moral powers and becoming active participants within a
stable democratic society. In this case, women were being excluded from voting
practices and were not viewed as agents capable of entering into reciprocal relations
with other citizens.

Rawls contrasts reciprocity with two perhaps more familiar types of relationships:

the idea of reciprocity lies between the idea of impartiality, which is altruistic
(being moved by the general good), and the idea of mutual advantage understood
as everyone’s being advantaged with the respect to each person’s present or
expected future situation. As understood in justice as fairness, reciprocity is a
relation between citizens expressed by principles of justice that regulate a social
world in which everyone benefits judged with respect to an appropriate
benchmark of equality defined with respect to that world (Political Liberalism, p. 16-17).

Reciprocity exists between the two ideas of impartiality and mutual advantage. Rawls
identifies impartiality as being altruistic. In this sense, for individuals who act based on

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15 “Persons are reasonable in one basic aspect when, among equals say, they are ready to propose
principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance
that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore
as justifiable to them; and they are ready to discuss the fair terms that others propose” (Political
Liberalism, p. 49).
altruism without a Rawlsian conception of reciprocity, they may be required to participate in society in order to benefit others without themselves gaining any benefit.\textsuperscript{16} In the other sense according to Rawls, reciprocity is not reducible to mutual advantage either. As the case of Cathy and Daisy shows, an agreement may violate the idea of reciprocity, and thus be unreasonable, even if it serves the narrow interests of some individuals and is therefore rational from the point of view of their conception of the good.

Let us now explore the relationship among three of Rawls’s core ideas: reciprocity, fairness, and justice. In his article, “Justice as Reciprocity”, Rawls argues that reciprocity relates to both fairness and justice. Rawls states that the concept of fairness is applicable in cases where individuals voluntarily interact with each other. For example, imagine that on a rainy afternoon you and your friend are bored. You want to watch television and your friend wants to play a game. Since there is nothing interesting on television, you agree to play a card game with your friend. You both have chosen to interact with each other in this game and you both agree to play by the established (unbiased) rules of the game. If the rules are followed appropriately, the play illustrates the idea of cooperation and outcome of the game is deemed fair. Reciprocity links to justice, as opposed to fairness, when individuals have “\textit{no choice whether or not to participate}” in the system of cooperation (my emphasis, p. 209).\textsuperscript{17} Here, Rawls

\textsuperscript{16} Allan Gibbard describes Justice as Impartiality in his review of Brian Barry’s \textit{Theories of Justice} (Vol. 1) as the following: “[justice as fair reciprocity] is distinct from Justice as Impartiality because it says that a person cannot reasonably be asked to support a social order unless he gains from it” (p. 266, \textit{Constructing Justice}). Rawls agrees with Gibbard’s view on Rawlsian reciprocity (\textit{Political Liberalism}, fn. 18, p.17).

\textsuperscript{17} “Fairness applies to practices where persons are cooperating with or competing against one another and
primarily has participation in the basic structure of society in mind. In particular, we cannot ground legal requirements on any kind of voluntary consent. Therefore, we say that a basic structure that satisfies the requirements of reciprocity is just.

The role of reciprocity

The role of reciprocity in Rawls’s theory is a central one. In fact, Rawls claims that reciprocity is the “core to political legitimacy” (p. 137, Idea of Public Reason). Social interactions are deemed legitimate when they respect individuals as free and equal moral persons. Certainly, this requires that an individual’s basic rights and liberties are not violated for the sake of another citizens’ political, social or economic gain. Justice is achieved in society when citizens are able to accept each other’s reasons for acting. Citizens can accept each other’s reasons for acting because they have developed the two moral powers, a determinate conception of the good, and can now apply the criterion of reciprocity. Again, the criterion of reciprocity is met when rules and procedures are provided through reasonable terms of fair cooperation to individuals who can accept or reject them as free and equal citizens.

The central role of reciprocity differentiates justice as fairness from other competing

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18 However, once the rules and procedures have been decided there can be coercive measures in place to ensure that these rules and procedures are followed. This is a different type of coercion because individuals have accepted these rules and procedures.
conceptions of justice. It provides the groundwork for making initial claims in order to have access to resources, i.e. reciprocity assists in justifying legitimate claims to social resources. Deciding who can make claims to social resources begins by examining measures used to identify the status of individuals within a particular society. If we ask the question, “at which point is the requirement of reciprocity satisfied?”, then we need a method to identify what it means to be well-off within a particular society.

Rawls argues that given the fact that persons will have different and competing ends once their positions in society are known, the parties in the original position would be less likely to choose principles that support positions similar to utilitarian claims (p. 25, Theory of Justice). Instead, they would rely on social primary goods, and give priority to the basic liberties.

**Reciprocity as a means for stability and mutual respect**

Reciprocity provides the means for the stability of institutions and mutual respect (Rawls (1999), p. 155-6) via a publicity requirement, the first aspect of a system of cooperation (Rawls (1999), p.158 and The Idea of Public Reason). Rawls’s system of justice provides stability through the necessary requirements of mutual respect. To make these requirements clear, they must be known to persons in the political community via a publicity requirement.

There are two different but related ways in which stability arises in Theory (p. 155-6). Rawls states that

when the basic structure of society is publicly known to satisfy its principles for
an extended period of time, those subject to these arrangements tend to develop a
desire to act in accordance with these principles and to do their part in
institutions which exemplify them. A conception of justice is stable when the
public recognition of its realization by the social system tends to bring about the
corresponding sense of justice. Now whether this happens depends, of course, on
the laws of moral psychology and the availability of human motives (p. 154,
Theory).

Stability in the first sense applies to the institutions of the basic structure when citizens
develop a desire to ensure their institutions satisfy the requirements of justice. This is
the primary sense of stability that Rawls develops. In the case of a well-ordered society
where the citizens are aware of the organization of the basic structure, these citizens
develop a ‘tendency’ to “act in accordance with these principles” (p. 154) and to maintain
the justice of the basic structure.

We can also discuss stability in a second sense although Rawls does not develop a deep
account of it. Stability in the second sense relates to how individuals develop a sense of
justice via the “laws of moral psychology” (p. 154). In this second sense, psychological
stability¹⁹ becomes another structural component of Rawls’s conception of the person,
especially as Rawls develops his conception of the person as a part of his discussion of
core components of a well-ordered society in Political Liberalism. Stability as it relates
to moral psychology addresses “whether people who grow up under just institutions (as
the political conception defines them) acquire a normally sufficient sense of justice so
that they generally comply with those institutions” (p. 141). Citizens who develop this
“reasonable moral psychology” participate in society in an important way. Rawls states

¹⁹ Rawls discusses this issue more in section 75 of Theory where he sketches out psychological laws that
allow for stable systems of justice. The importance of the psychological stability of the individual actors in
a particular society is something I will discuss more in the next section.
that “citizens’ sense of justice, given their traits of character and interests as formed by living under a just basic structure, is strong enough to resist the normal tendencies to injustice” (Political Liberalism, p. 142). When citizens are capable of acting from a sense of justice and meet the requirements of stability in the first sense, this is because citizens have achieved stability in terms of psychological stability. Stability in these two ways, due to an appropriate moral psychology and a tendency for citizens to act from a sense of justice, creates the possibility for both self-respect and mutual respect between citizens.

Not only does respect play a role in the development of a conception of justice, it also plays a role in the moral power for a conception of the good and a determinate conception of the good. In order to develop an appropriate conception of the good, public knowledge of the two principles provides additional support for developing self-respect. Rawls states that

> the public recognition of the two principles gives greater support to men’s self-respect and this in turn increases the effectiveness of social cooperation...a sense of their own worth is necessary if they are to pursue their conception of the good with satisfaction and to take pleasure in its fulfillment (Theory, p. 155).

Self-respect provides part of the basis for mutual respect which ultimately makes the fair terms of social cooperation possible. Citizens must be able to set their own conception of the good and then they must be able to rationally pursue it. The role that self-respect has in terms of both developing and pursuing one’s own conception of the good is that citizens have the idea that “the sense of one’s plan is worth carrying out” (Theory, p. 155). Citizens in a well-ordered society will not be able to do that if they lack self-respect. Mutual respect occurs when the
fair terms of social cooperation are terms upon which as equal persons are willing to cooperate in good faith with all members of society over a complete life. To this let us add: to cooperate on a **basis of mutual respect**. Adding this clause makes explicit that fair terms of cooperation can be acknowledged by everyone without resentment or humiliation (or for that matter bad conscience) when citizens regard themselves and one another as having the requisite degree the two moral powers which constitute the basis of equal citizenship (my emphasis, *Political Liberalism*, p. 303).

Lack of mutual respect between citizens would exist when the two moral powers are not recognized in other citizens. This lack of mutual respect may result in the unfair exclusion from being fully and normal cooperating citizens. We have already seen an example a violation of reciprocity and a failure to mutual respect when women were excluded from the vote. Obviously, an even more extreme violation of mutual respect and reciprocity occurs in the case of slavery. In this case, some persons are not viewed as citizens because they are viewed as lacking the relevant capacities to develop the two moral powers. Slaves are “socially dead”\(^{20}\) (*Political Liberalism*, p. 33) because they do not even have the moral standing of persons, let alone citizens. In the case of slavery, the criterion of reciprocity has not been met because persons are being forced and manipulated to help a citizen slave owner fulfill their own conception of the good. The claim that reciprocity is the means for stability through self-respect *via* a publicity condition includes important concepts for the foundation of justice; however, the most important defense of reciprocity rests on Rawls’s account of equality.

**Reciprocity and equality**

While self-respect and mutual respect are essential components of reciprocity, arguably

\(^{20}\) Rawls discusses social death as a part of his discussion of the conception of the person in *Political Liberalism*, p. 29-35.
the most important claim regarding reciprocity as the foundation of Rawls’s conception of justice is that it provides the “basis for equality” (Theory, p. 447). Rawls specifies three levels of equality in justice as fairness. The distinction between these three levels of equality is as follows. The first application of equality pertains to “the impartial application and consistent interpretation of rules according to such precepts as to treat similar cases similarly (as defined by statutes and precedents)” (1999, p. 442). Equality applied in the first sense is about the rule of law, i.e. how laws are applied through the legal system. The second application is “more difficult application of equality is to the substantive structure of institutions. Here the meaning of equality is specified by the principles of justice which require that equal basic rights be assigned to all people” (Rawls (1999), p. 442, my emphasis). By focusing on the substantive structure of institutions, Rawls identifies what the content of the principles of justice could be. So, in the first case of equality Rawls identifies the procedure of applying the rules fairly and in the second case what the content of those rules would be. However, the more important application of equality pertains to “what sorts of beings are owed the guarantees of justice” (Rawls (1999), p. 442) which is the third application of equality.

Those who are owed the guarantees of justice must be capable of satisfying the requirements of reciprocity and full participation in a scheme of social cooperation. This, in turn, requires that they are capable of having a conception of the good and actually have a determinate conception of the good as well as a capacity for a sense of justice. In the case of the capacity for a sense of justice, persons must also have “a normally effective desire to apply and to act upon the principle of justice, at least to a
certain minimum degree” (Rawls (1999), p. 442). In other words, in order to be a recipient of equal justice, a person must both be able to participate in society and to act from principles of justice.

There are two important implications which follow from the third level of equality. Emphasis on the two moral powers removes potential bias which could occur when considering who can be a recipient of justice. Morally arbitrary distinctions between persons such as height, skin color, or gender are not relevant as the basis of equality. This is in part because “once a certain minimum is met, a person is entitled to equal liberty on par with everyone else” (A Theory of Justice, p. 443). In this way, the use of the two moral powers as the basis of equality provides an inclusive theory of justice. A powerful implication of this idea of equality is that if persons meet the basic requirements, then it would follow that denying an entire group of people equal standing based on their race or accident of birth is unjust.²¹

Now, I can return to the second criteria of social cooperation which includes reciprocity. Since citizens are capable of recognizing and acting from principles of justice in a well-ordered society because they have the two moral powers, citizens are then capable of social cooperation. In other words, citizens can engage in reciprocal acts with each other as mediated by the basic structure. Reciprocity connects to the idea of social cooperation because “all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison. This element in

²¹ A Theory of Justice, p. 443.
social cooperation I call “the reasonable” (Political Liberalism, p. 300). What is deemed to be “fair terms of cooperation” will be answered by first considering the basic structure of society as a whole as a form of cooperation...what is distinctive about the basic structure is that it provides the framework for a self-sufficient scheme of cooperation for all the essential purposes of human life, which purposes are served by the variety of associations and groups within this framework (p. 301).

Reciprocity for Rawls identifies the basic structure as the framework for cooperation unlike other types of social cooperation. Thus, the idea of reciprocity as existing between impartiality and mutual advantage comes into focus. Rawls’s particular conception of reciprocity requires that citizens have and can recognize in others the two moral powers. This is because Rawls’s conception of reciprocity includes his conception of the person and the citizen. As stated earlier, Rawls describes a citizen as a normative, political conception which should be thought of as a democratic citizen who can develop and have these two moral powers. How these moral powers are developed in some way depends on the stability of moral psychology which helps citizens in a well-ordered society develop a consistent conception of justice. The development of these moral powers also may depend upon the development of the self-respect of citizens and mutual respect between citizens which occurs because the two principles of justice are publicly known and recognized. Once these conditions are met for citizens in a well-ordered society, fair terms of cooperation can be specified, i.e. those that participate can also benefit. This is not, however, the idea of mutual advantage alone because citizens focus on the role of reciprocity as it pertains to the basic structure, and not the idea of reciprocity one may think of as quid pro quo bargaining.
If a person is not capable of recognizing or exercising their own conception of the good or developing their own capacity of a sense of justice, they are incapable of being normal and fully cooperative citizens. Without these capacities, it is difficult to claim that a persons’ basic rights and duties are violated within a Rawlsian framework. This is because social cooperation is tied to these basic rights and duties. Social cooperation is necessary for Rawls in order to address “basic rights and duties within its [societies’] main institutions and regulate the arrangements of background justice over time” (Political Liberalism, p. 16). When persons as citizens are capable of reciprocating in this way, they create the foundation for justice. Citizens who come together to recognize rules and procedures will be able to fairly cooperate with one another and further their own reasonable conception of the good.

**Criteria for two moral powers**
I identified earlier that in order to “exercise the two moral powers” persons need “the intellectual powers of judgment, thought, and inference” (Political Liberalism, p. 81). These intellectual powers are necessary for the two moral powers. Rawls intends these requirements to be rather minimal and satisfied by the vast majority of actual people. Still, these are substantive requirements derived from the requirements of social cooperation.

In the case of using the intellectual powers of judgment, thought and inference for the development of the conception of the good, rational agents are capable of means-ends reasoning. A person who is rational has “the powers of judgment and deliberation in seeking ends and interests peculiarly its own” (p. 50). A rational person thus must have
the capacity to make these types of judgments and deliberations. They must choose which ends to develop and which path they must take in order to develop those ends. Part of the task of identifying the rational person’s means “is guided by such familiar principles: to adopt the most effective means to ends, or to select the more probable alternative, other things equal” (*Political Liberalism*, p. 50).

However, even leaving aside the requirements of a reasonable sense of justice, Rawls also identifies that rational agents are not only capable of means-ends reasoning. Rational agents can also “balance final ends by their significance for their plan of life as a whole, and by how well these ends cohere and complement each other” (p. 50). I illustrated this point with the example of the person who has a deep desire to care for others – but she could choose to follow the path of a doctor or as a director of a non-profit organization.

While rational (as opposed to reasonable) persons are not necessarily pure egoists, they do “lack[…] the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse” (*Political Liberalism*, p. 50). In other words, merely because a person is rational in the Rawlsian technical sense does not necessarily entail that they have the capacity for a conception of justice. They are separate powers which

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22 In *Political Liberalism*, Rawls describes the self-interest of rational persons as follows: “nor are rational agents as such solely self-interested: that is, their interests are not always interests in benefits to themselves” (p. 50).
work in tandem together but are not derived from each other. Rawls acknowledges that the moral sensibility which accompanies the reasonable, i.e. the capacity to act from a conception of justice, is not “the whole of moral sensibility, but it includes the part that connects with the idea of fair cooperation. Rational agents approach being psychopathic when their interests are solely in benefits to themselves” (p. 50).

The criteria for a conception of justice, i.e. the reasonable, relates to some criteria already defined. I identified that for Rawls, stability primarily applies to the institutions of a well-ordered society, but this requires a stable sense of justice among its citizens. In order for citizens to develop this conception of justice, certain psychological and rationality requirements must be met. Citizens can develop and act from a sense of justice only when they have developed the appropriate moral psychology. To achieve this, Rawls provides some details for his concept of moral psychology as it relates to a conception of justice.

**Elements of Psychological Stability**

Rawls appeals to three “psychological laws”23 which explain the development of a sense of justice (*A Theory of Justice*, p. 436). Rawls condenses the “elements” of these laws as an unconditional caring for our good, a clear awareness of the reasons for moral precepts and ideals (aided by explanation and instruction, and the possibility of giving precise and convincing justifications), and the recognition that those complying with these precepts and ideals, and doing their part in social arrangements, but accept these norms and express in their life and character

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23 I will summarize the three laws here as they are discussed in *A Theory of Justice*. The first law describes the relationship in ‘just family institutions’ where children first experience love, and learn to love their parents. The second psychological law describes the way in which persons can develop trust outside of the family with other persons. The third law describes how individuals form a sense of justice “as he recognizes that he and those for whom he cares are the beneficiaries of these arrangements” (p. 429-430). The second and third laws presuppose that “a society’s institutions are just and publicly known to be just” (p. 429).
forms of human good which evoke our admiration and esteem (A Theory of Justice, p. 436).

The elements of these psychological laws are meant to highlight the ways in which reciprocity can develop through various psychological stages. For example, the trust learned in the family in the first psychological law helps individuals develop their capacity for a conception of justice. Once citizens have embraced “doing their part in social arrangements” (p. 436) through the development of these three moral and psychological laws, reciprocity, as Rawls has in mind becomes possible. In fact, the better developed these psychological laws are, the stronger the developed sense of justice will be. Psychological stability is a precondition for developing a conception of justice. This is different, I argue, than the ability to be rational. Rawls makes the distinction between the rational and the reasonable. I am applying this to the discussion of psychological stability.

Psychological Stability, Rationality and Irrationality
Rawls makes a nuanced distinction which addresses the differences between the criteria concerning rationality, irrationality and psychological stability. This distinction has not been addressed in detail within the existing Rawlsian literature\(^{24}\) and perhaps is

\(^{24}\) Recent work on Rawls has documented the possible role of psychological stability within the context of Rawls’s body of work. In A Companion to Rawls, Essay, p. 212, Thomas E. Hill writes “it may seem that by projecting an overlapping consensus of reasonable moral and religious doctrines as the way to make a just society stable, Rawls gave up the idea that psychological principles (or “laws”) […] However, Hill continues “If, however, the psychological laws were adjusted to presuppose only a common political conception of justice, then they could still be relevant in explaining the possible stability of a well-ordered society that is just according to Rawls's political conception of justice” (p. 211-212). I think in this quote Hill is raising an interesting point that would essentially support my emphasis on the political model of the person.
underdeveloped by Rawls himself. This distinction will become important in Chapter 4.

Psychological stability as Rawls has defined it differs from the colloquial understanding of being ‘psychologically stable’. The colloquial understanding of psychological stability is equated with being ‘sane’ or ‘mentally stable’. The colloquial understanding of being not-sane, or psychologically unstable, usually reminds individuals of persons who lack any capacity to make decisions regarding their own well-being. They depend on others to care for their basic needs. And thus, someone who is psychologically unstable in the colloquial sense is de facto irrational. However, for Rawls, the distinction between rationality, irrationality and psychological stability is not the colloquial one.

In Rawls’s discussion of the “other capacities” (Political Liberalism, p. 74; A Theory of Justice, Section 70) for being a full and normal cooperating citizen, Rawls draws a distinction between rationality and psychological criteria. To be rational, in terms of choosing one’s own life plan, is different than achieving the psychological criteria. When a person is irrational in Rawls’s view, this means their engagement with their life plan and conception of the good is faulty - they are unable either to develop, revise, or rationally pursue one. However, when a citizen fails to meet the psychological criteria for stability in Rawls’s technical sense, this means that they do not have the ability to develop their own conception of justice or important moral precepts necessary for social cooperation and reciprocity. They fail to be reasonable.

There may be cases where individuals are psychologically stable in the colloquial sense and yet act irrationally. Individuals who are psychologically stable in the colloquial
sense can sometimes make decisions that are irrational, or make mistakes concerning their own conception of the good. However, there are other cases which I am interested in where an individual is deemed ‘psychologically unstable’ in the colloquial sense, but not in the sense in which I would like to extend the idea of psychological stability. I will argue this matters when discussing what is owed to persons with mental illness in terms of the requirements of justice.

Without psychological stability, citizens cannot develop and exercise their capacity for a sense of justice, and thus reciprocity and social cooperation would not be possible. I will consider both standard and non-standard cases of mental illnesses. A standard case will be a person who has physical and mental capabilities that make it possible for them as citizens to develop both their own conception of the good as well as a sense of justice. A standard case is where the two principles of justice can be used to outline the requirements of justice in cases where persons meet the minimum criteria for rationality and psychological stability. In these cases, citizens are capable of developing a reasonable and rational conception of the good.

**Standard Case 1: Young man, moral power of conception of the good**

For example, let’s imagine a young man who has the ability to develop a rational life plan as a part of his own conception of the good. He knows that he wants to serve in the military because it is a family tradition. To attain this goal, he must have a high school degree, otherwise he would be ineligible to serve in a specific unit within the Army.

Thus, his rational life plan ought to exclude any activities that would prevent him from achieving his goal. It would be irrational for this young man to miss a substantial
amount of class so that he did not have enough credits to graduate, if that would prevent him from serving in the Army.

This example illustrates the operation of the moral power to develop a capacity for a conception of the good. In order to develop a conception of the good, first this young man must have the powers of judgment, thought and inference. The young man is able to understand and to accept the goal of being a part of the Army. He has the rational ability to develop and choose his own conception of the good. Even though it is part of his family’s tradition to serve in the Armed Forces, it is important for the young man to choose this goal himself and be motivated to develop it. Beyond means-ends reasoning, the young man is also capable of “balanc[ing] final ends by their significance for their life plan as a whole” (Political Liberalism, p. 50). The young man can prioritize which steps are necessary to take to fulfill his greater life plan, whatever that might be. Of course, all of this pertains only to the moral power to develop a conception of the good, not the second moral power to develop a sense of justice.

**Non-standard case 1: Lack of two moral powers**

There are many examples of “non-standard” cases. One “non-standard” case would be a person who will never meet the rational and psychological criteria to develop their two moral powers. Instead, they must rely on other persons who do meet these two criteria for the satisfaction of their basic needs and functions.

In this example, we can imagine a person who does not meet the criteria for rational or psychological stability. Cases similar to these would be individuals who are born with
limited cognitive abilities and low adaptive functioning where they are unable to develop higher-order interests which are necessary for psychological stability. They may also not be able to develop their own conception of the good or to regulate their behavior according to a fair public system of rules. Without these, they could not be normal and fully functioning agents in terms of social cooperation. This is not, however, the only non-standard case.

**Non-standard case 2: Young woman**

Another “non-standard” case may include someone who does not clearly fit into the first “non-standard” case. In my second example of a non-standard case, imagine a young woman who also has a desire to join the military. However, she does not graduate from high school because she was having frequent psychotic episodes wherein she experienced visual and auditory hallucinations. She was under the impression that she was in danger if she left her home and stayed at home to remain safe.

Under Rawls’s theory as I have explained it thus far, it would seem that she has acted irrationally, contrary to her own rational life plan. And in one way she has. She acted counter to her own preferences and goals by missing class. However, her ‘irrational’ acts are irrational in the Rawlsian sense and not the colloquial sense. While some may make the connection between being ‘mentally unstable’ and ‘irrational’, with Rawls’s distinction we can see that she still has higher-order beliefs that are important to her. In her case, she may hold other higher-order beliefs such as the belief that missing class will interfere with her ability to achieve her life goal. In other words, she may agree with some of the important tenants necessary for meeting the criteria of psychological
stability. Her mental illness does not, by default, eliminate her ability to have higher-order moral interests.

The key issue in the example of the young woman is not only that she acted irrationally. And in favor of Rawls, I think that Rawls would recognize that many individuals without severe mental illnesses often have irrational life plans that need to be revised. In her case, the young woman met the physical requirements to join the army. She also has the deep sense of loyalty that may be required to fulfill the requirements of serving in the military. The purpose of her example is to show that merely because someone has a mental illness does not mean that they cannot develop a determinate conception of the good – even if sometimes they have difficulty achieving it.

Problematically, the reasons why Rawls’s theory as it stands right now could not recognize the case of the young woman is because the physical and mental capacities, i.e. the way her brain actually functions, will never be the same as the young military man. This is a problem for Rawls’s account. It is problematic for the case of the young military woman because she may have the desire, the drive and the fluctuating capacity to achieve her life goals, but fails to meet the criteria for developing the two moral powers if a biological conception of the person is used. In extensions of Rawls’s theory which develop ways in which persons with differing levels of functioning ought to be included, persons who do not function biologically like other persons of the species are either meant to be brought back up to the level of normal, biological functioning, or compensated for it. Although Rawls primarily argues for a normative, political conception of the person, Rawls also endorses Norman Daniels’s view which we will
discuss below (Political Liberalism, p. 184). In her case, it would seem that according to Rawls’s theory as it stands now that there is not a distinction between the two non-standard cases. I argue that these cases are distinct and deserve additional development and attention.

**Conclusion**
Returning to the example of the Young Man, he has the capacity for the moral power to develop a conception of the good. He also has a determinate conception of the good as well as the correlative higher-order interests which are necessary to pursue a conception of the good. The young man is capable of setting, planning, and revising his own conception of the good.

For deviations from the Standard Case 1, Rawls has three ways to account for these types of non-standard cases. In the case of an individual who does not, and will never develop the capacity for the two moral powers, Rawls suggests that these individuals may be outside of the scope of his theory of social justice. This is because his theory is grounded in reciprocity and cooperation, and they lack the capability to engage in such relationships and practices. Including them in a theory based on reciprocity does not work. Second, Rawls does consider how the **interests** of persons who will never develop the two moral powers could be considered at a later stage of justice. At the legislative stage, Rawls suggests that policies and rules could be adapted to make sure that individuals without the two moral powers would be included. The third way that Rawls considers ‘non-standard’ cases is through a brief discussion of temporary illnesses.

Justice as fairness as a political conception of justice has specific limits of inclusion of
particular persons by Rawls. It is meant to include those persons who can become fully cooperating citizens and engage in relations of reciprocity. Justice as fairness is not meant to cover all cases of justice. Justice as fairness does not build an active, participatory role for persons who do not meet the criteria for the standard cases of having the capacity for two moral powers. Rawls does not completely ignore persons who are not capable of being normal and fully cooperating members of society, but rather includes them in later stages of justice such as the legislative stage.

In Chapter 2, I will address the extension of the principle of fair equality of opportunity to temporary illnesses. In Chapter 3, I will discuss cases where individuals are thought to not have their two moral powers. In Chapter 4, I will discuss other non-standard cases where individuals do not clearly fit into Chapter 2 or Chapter 3. Chapter 4 will include individuals with a specific range of mental illnesses.

**Chapter 2**
In the primary case of chapter 2, I will focus on those individuals who cannot develop their two moral powers without additional claims to social goods and services when compared to other citizens. Rawls’s main project does not focus on cases where individuals lack the normal capacity to develop their two moral powers. Even though Rawls does not develop a detailed account of the role of health and disability, he does offer four places where we could consider the role of health care in his theory. The only case Rawls seriously considers the place of health, health care and disability is in *Political Liberalism* where he supports the extension of the principle of fair equality of opportunity as suggested by Norman Daniels.
In Chapter 2, Part 1, I discuss several ways that Rawls considers persons who are not yet capable, or who are temporarily incapable of developing their capacity to have two moral powers. I will address the role of paternalism, temporary illness, and the principle of fair equality of opportunity. The second part of chapter two assesses Daniels’s extension of Rawls. Part two of chapter 2 will consist of three sections which focus on Norman Daniels, ending with a fourth section considering limitations of both Rawls’s and Daniels’s views.

In 2.2.1, I focus on the principle of fair equality of opportunity as it has been extended by Daniels. Daniels develops the principle of fair equality of opportunity and its relationship to health care distribution and health care institutions. I explain why health care must be treated as “special” and what is lost when it is not treated in this way. In 2.2.2, I answer the question “how is an extension of the principle of fair equality of opportunity a resolution to the special nature of health care?” as discussed in 2.2.1. I connect the idea of health care needs with the idea of normal functioning and normal opportunity.

In 2.2.3, I will address why Daniels views his solution of an extension of the principle of fair equality of opportunity as discussed in 2.2.2 as providing fair and just health care. In this section, I will discuss the role of fairness and its connection to providing preventative health care services. In 2.2.4, I will identify limitations of Daniels’s and Rawls’s view. First, I will establish the limitations that Daniels and Rawls identify with their own positions. Then I will address other potential objections to their views.
Primarily, I will consider the extent to which Daniels’s application of the principle of fair equality of opportunity can assist those persons who are not yet capable of being raised to the level of normal functioning.

2.1 Rawls on paternalism, fair equality of opportunity and health
The first case I consider in this chapter concerns individuals who have not developed their two moral powers yet but it is likely that they will, such as in the case of children. The other case is adults who once had their two moral powers and temporarily lost them due to an illness or injury. In this section, I outline Rawls’s argument for paternalism in the case for children and individuals with temporary illnesses. I end this section with a discussion of the principle of fair equality of opportunity.

Paternalism and justice as fairness
Justice as fairness is compatible with some limited forms of paternalistic intervention, especially in the case of children and adults with temporary illnesses. Paternalism provides protection for individuals in society in two ways: first as a way to assist individuals in developing their own conception of the good, and second, as a way to assist an individual who already has their own conception of the good in mind, but has difficulty pursuing it. Paternalism only becomes an active part of Rawls’s theory in the later stages of justice where specific details about individuals are being revealed (A Theory of Justice, p. 219). I will focus on the way in which paternalism becomes an active part of his theory in these later stages of justice.

There are specific conditions under which paternalism can be applied according to
Rawls’s theory. For example, paternalism can be applied in the cases of children and individuals with temporary illnesses. On the other hand, there are certain situations where paternalism ought never to apply within Rawls’s theory. Cases where paternalism never ought to apply involve restricting basic rights and liberties in order to promote some particular conception of the good.

Paternalism works in cooperation with justice as fairness in two ways. First, individuals in society may require guidance via paternalistic intervention when they are initially developing their own conception of the good. Second, individuals in society may require paternalistic intervention when they already have their own conception of the good, but require assistance to pursue it. In the first case, individuals who may require assistance developing their own conception of the good are children and adults who require guidance to achieve certain goals. In the second case, an individual may have already developed and affirmed a conception of the good but require assistance to pursue it effectively. An example of this could be when an individual experiences a traumatic life event which distracts them from completing their goals. For example, if an undergraduate university student experiences a traumatic life event, there are mechanisms in place, like taking a leave of absence in order to protect the student’s goal of graduation. Rawls’s account of paternalism could be best summarized in the following way: Paternalistic intervention²⁵ is permissible when either there is (1) “evident failure” of reason and will or (2) “absence of reason and will”. Paternalistic

²⁵ Rawls states that “paternalistic intervention must be justified by the evident failure or absence of reason and will; and it must be guided by the principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods” (A Theory of Justice, p. 219-220).
intervention for either case will require (3) guidance from the principles of justice, and (4) knowledge of the individuals’ conception of the good. I will provide four examples below of the types of cases of paternalism that Rawls has in mind in his theory.

**Example 1: Absence of reason in children**

In the case of children, paternalistic intervention may be required for two reasons. First, paternalistic intervention may be required to assist this child to develop their own conception of the good. Second, paternalistic intervention may be required so that the child does not undermine their own good.

For example, imagine that a middle school child completes her homework quickly after school and is looking for an extra-curricular activity. She has trouble making friends at school so she is not sure how to get involved. As a naturally shy person, she would prefer to stay at home after school instead of going through the awkward process of meeting strangers. She is resistant to trying anything new. In this case, under the first type of paternalistic intervention which helps a child develop their own conception of the good, a guardian signs their child up for dance classes.

The second type of paternalistic intervention helps a child not to undermine their own conception of the good. We can now imagine that this child wants to dance more seriously with a competitive dance team which will lead to a career as a professional dancer. This is a goal she has for herself. She expresses the deepest desires to work on her dance techniques and flexibility as a child so that it will be easier for her to work as a dancer as an adult. And yet, this child may also have the desire to skip classes which focus primarily on strength and flexibility training because she finds them boring. In
this case, the parental figure can intervene justifiably to ensure that the child goes to class.

In this case, the parent knows that if the child skips strength training and flexibility classes, this will make it more difficult for her to perform later in life. Without proper training, she would be prone to long term injuries which would undermine the child’s own goal of becoming a professional dancer. Further, even though the child has the goal of becoming a professional dancer, the child lacks the foresight regarding the importance of having proper training and stretching techniques. And thus, the parent acts paternalistically by ensuring that their child attends these classes.

While both of these examples are individual in nature, these paternalistic interventions depend on the existence of underlying social or political frameworks to help support the beneficiaries of paternalistic actions. In the case of after-school activities, successful and sustained programs require funding, administrative support, and individuals to take on the mentoring role. Developing adequate funding structures must include social or political interventions. In the case of the dance program, the dance instructor must have access to the appropriate resources to nurture students’ talents. The purpose of this example is to show a general point about paternalistic intervention. Justification for specific interventions are not provided here.

**Example 2: Absence of will in children**
In the second example of paternalistic intervention, we can imagine a child who wants to pass the 3rd grade but lacks the motivation to attain this goal. To pass the 3rd grade, the student must regularly finish their homework. However, when the child returns
from school every day, they prefer to watch television. In this case, the parent requires the child to do their homework every night even though the child does not feel like it. My interpretation of absence of the will is akin to weakness of the will. Akrasia, as I understand it, is when an individual has a goal in mind, but lacks the motivation to realistically pursue it. Again, in this case, paternalistic intervention can be justified.

**Example 3: Absence of reason in adults**

In this case, an adult may have a developed conception of the good but at one time or another may have difficulty realizing it. For example, there may be certain situations where public guidance is necessary to help adults develop their own conception of the good or prevent adults from undermining their own conception of the good.

Symmetry exists between absence of reason in children and absence of reason in adults. In the first case of paternalistic intervention, where an adult may require assistance developing their own conception of the good, an adult may have problems identifying their career goals. For example, we can imagine a compulsory program which mandates that individuals who want to apply for jobs must meet with a career advisor. By attending this meeting, applicants receive useful information on the job market and how to market their individual skills.

In the second case of paternalism, adults may require paternalistic intervention to avoid undermining their own conception of the good. In this case, an adult may not realize that failing to visit regularly their primary care doctor undermines their ability to maintain a healthy lifestyle. In order to avoid undermining their own conception of the good, their insurance company may mandate regular visits to the doctor. In this way,
adults can receive important health screenings and information to promote their desire for a healthy lifestyle.

**Example 4: Absence of will in adults**
In the case of absence of will in adults, Rawls has in mind ways in which the principles of justice can be used to help individuals who may have and act on irrational beliefs, especially those irrational beliefs which are counter to their rational conception of the good. For example, Ingrid has a genetic predisposition towards high blood pressure and diabetes and becomes aware of this due to voluntary genetic testing. Ingrid knows that if she eats very salty food or drinks sweetened beverages this will impact her overall health. High blood pressure will prevent her from achieving those goals she set for herself, such as living a long, healthy life. However, Ingrid also has a predilection for fast food, especially hamburgers, French fries and soda pop. Counter the advice of her doctor, Ingrid eats fast food at least once a day. In this case, Ingrid suffers from weakness of the will. She knows what her goal is, but she is unable or unwilling to develop it.

To prevent Ingrid from acting irrationally, the government has developed policies with paternalistic ends. Namely, the calorie displays are unavoidable when ordering food. This means that when Ingrid goes to her favorite fast food restaurant, she will see the total calorie information including both salt and sugar. In that way, she cannot pretend the food is healthy when it is not.

When Ingrid becomes aware that drinking one 20 ounce soda contains the same amount
of sugar as eating 5 Little Debbie Swiss Rolls, or 65 grams of sugar\(^\text{26}\) due to the public health campaign, she realizes that drinking one soda a day was undermining her own conception of the good. Ingrid’s case is an example of absence of the will because she had a conception of the good that she would like to develop, but has problems realizing it because of lack of motivation. Once she is confronted with the empirical evidence contra her irrational belief regarding fast food and heart disease, she is able to overcome the irrational belief that eating fast food once a day will not have a negative impact on her overall health.

The types of agents that I consider in these four examples are children and adults who have the physical and mental capacities to develop and pursue their own conception of the good and yet they require assistance to develop it adequately. And in certain cases, paternalistic intervention can be used to help both children and adults accomplish this. Paternalistic intervention should properly focus on the possibility of developing autonomous choice when that is possible. Agents may require guidance in developing their own conception of the good as in the case of the adult who needs career assistance in example 3. Even though this person requires guidance, it is important that they choose and pursue their own determinate conception of the good as opposed to having another agent choose it for them. In this way, the criterion of reciprocity will not be violated. The criterion of reciprocity is violated when one agent is dominated, forced or manipulated to accept certain rules or procedures which override someone’s own reasonable conception of the good. The agents who require assistance must have a

reasonable conception of the good that other agents can support. Agents are not required to assist in the pursuit of unreasonable conceptions of the good as I discussed in Chapter 1 in the case of Cathy and Daisy. So, the application of paternalism can be justified when it assists others in either developing their own conception of the good or in the second case, preventing them from undermining their own conception of the good.

The justification for these paternalistic interventions depends on the nature of the case. For example, whether some intervention is justified or not may depend on who is intervening. While a parent or friend may be justified, the state might not be. But again, this will depend on further details. The purpose of these examples is to show a generic point about paternalism and to illustrate the possible goals of intervention. Complete justification for these interventions is not offered here.

Paternalism is especially relevant in the case of health. As a part of a persons’ determinate conception of the good, it is reasonable to assume that they care about their health. And understandably, temptations may sometimes cause difficulty in achieving this end. Paternalistic intervention can assist actors who are distracted by these temptations. In these cases, there is an internal conflict between the conception of the good that the individual affirms on reflection and their actual behavior. For example, I have already shown how paternalism can help agents fight these temptations as I discussed in the non-health related example of the young girl who wants to skip dance practice. Analogously, paternalism may be required to overcome temptations in the case
of health as well. Individuals may take health as one of their substantive goals and sometimes require paternalist intervention to achieve it.

At the same time, health is also necessary to have the capacity for a conception of the good. In this way, health is not just an end, but also a condition which makes it possible to pursue any ends. A lack of health may prevent an individual from having the capacity to develop and pursue their own conception of the good. They may lack the physical or mental characteristics necessary to develop or pursue their own conception of the good due to health issues. So, paternalistic intervention in support of one’s health might be justified in order to develop one’s capacity for autonomous choice.

So, the next question I am concerned with is what should the role of paternalism be in relation to health and health care within Rawls’s theory? To answer this question, I will identify four places in Rawls’s theory where he discusses the potential role of health and health care.

**Four places for health in Rawls**

Rawls’s early discussions of health and health care explore four places that health care could be included in his theory without truly committing to one view. In his later text *Political Liberalism*, Rawls supports an extension of fair equality of opportunity to health care. I explore the early conceptions of health care in Rawls in this section.
First, Rawls (1971) argues that the list of social primary goods that he generates does not include health (as opposed to health care). He argues that health is a natural good as opposed to a social primary good (Rawls (1971), p. 62; Rawls (1999), p. 54). The relationship Rawls suggests between health and social primary goods is that “their possession [natural goods] is influenced by the basic structure, [but] they are not so directly under its control” (Rawls (1971), p. 62). The principles of justice are meant to be applied to the basic structure. The possession of natural goods, such as being tall or short, are not necessarily ‘goods’ that can be redistributed. However, if being tall or short in a particular society causes unjust economic or social distributions to occur, then the two principles of justice could provide guidance on possible reforms to the basic structure. In this case, perhaps the principle of fair equality of opportunity could provide mechanisms to increase employment opportunities for individuals who are short. The principle of fair equality of opportunity does not require providing growth hormones to make shorter individuals taller. If height does not lead to social or economic inequality, then this is not an issue for the principle of fair equality of opportunity.

A second possible implication of Rawls’s view of justice on health care could be roughly aligned with the first principle.27 Although Rawls himself does not argue that health care is a social primary good, it does seem if we were able to make the argument that health care is necessary in order to realize the rights and liberties guaranteed by the first principle, then this would be protected from the “standpoint of equal citizenship” (Rawls

27 As a reminder, the first principle states “each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value” (Political Liberalism, p. 5).
(1999), p. 97). There would, of course, need to be a justification for placing such a large emphasis on health care in order to protect it under the first principle. In doing so, the equality condition is an appeal to the first principle of justice. If health care could be construed as a social primary good, then it could be a requirement for being a free and equal person in society.

Third, Rawls suggests that in some ways we can think of the distribution of health care as thought of along the lines of the difference principle. Protection of vulnerable populations through the difference principle is, however, the last line of defense against the unjust deprivation of social and economic resources for this population. Rawls suggests that inequalities in health care could be justified if “social and economic inequalities are just” (1971, p. 97). Just distribution of these inequalities in terms of the difference principle would not allow those persons who are worse off, the poor in the example that Rawls gives, to experience unjust economic and social inequalities. Rawls states in his book *Justice as Fairness*,

> Let us focus on the least-advantaged group and assume that information is available concerning its members’ likely needs in the aggregate and the cost of covering them at various levels of treatment and care. Within the guidelines of the difference principle, provisions can be made for covering these needs up to the point where further provision would lower the expectations of the least advantaged. The reasoning parallels that in fixing a social minimum. The only difference is that now the expectation of an assured provision of health care (calculated by estimated cost) is included as part of that minimum (2001, p. 173).

The concept of “fixing a social minimum”\(^{28}\) makes the problem of defining those who are the worst off a socially constructed problem. The difference principle is applied to

\(^{28}\) The idea of the social minimum is later picked up by Sachs as possibly being the basis for an argument for health (Rawls, (2001), Section 39).
institutions in such a way that it would protect the most vulnerable populations from being either abused by a loss of their liberties, or prevent them from living under conditions of drastic inequality.

Fourth, Rawls also mentions the limitations of health in his essay, “Social Unity and Primary Goods”. He acknowledges that he puts “special health and medical needs” to the side when he discusses rational actors in the first idealization of the original position. He states that the hypothetical persons he had in mind were those who “are normally active and fully cooperating members of society over a complete life” (p. 368). Rawls suggests that if we can add in some “social resources” (p. 368) for those persons who fail to meet the level of rationality, then this is something we ought to do. In fact, Rawls even suggests that if we cannot find a way to take these persons into account then “the idea of primary goods may have to be abandoned” (p. 368-369). The abandonment of social primary goods could be one alternative to approaching the satisfaction of medical needs. However, later developments of Rawls’s approach to health care that support an extension of the principle of fair equality of opportunity do not require a rejection of the use of social primary goods.

**Later extension of Rawls and health care**
The early discussion of health care in Rawls at best provides a thin outline of how to address the issue. Theorists could attempt to defend any of the claims that health care ought to be protected as a part of the social minimum, the liberty principle, the difference principle or as a social primary good. In *Just Health Care*, Daniels argues that health care deserves a special place in terms of resources within a society. He argues
that by focusing on the principle of fair equality of opportunity, access to health care resources could help protect opportunity.

As stated in Chapter 1.1, the principle of fair equality of opportunity focuses on promoting fair equality and not merely formal equality in terms of accessing opportunities and resources. This principle is connected to the idea of temporary illness by Rawls in *Political Liberalism* in support of Norman Daniels’s discussion in *Just Health Care*. In this section, I focus on Rawls’s definition of ‘the line’ of normal functioning. In 2.2, I elaborate on this distinction of the line as I discuss Daniels’s extension of the principle of fair equality of opportunity.

In *Political Liberalism*, Rawls devotes a small section to a discussion of the variation of “moral, intellectual, and physical capacities that enable them [citizens] to be fully cooperating members of society over a complete life” (2005, p. 183). Rawls distinguishes between those persons who have the ability to be above or below “the line” (2005, p. 183). The line refers to the line dividing persons with these capacities for full cooperation and those persons without the capacities for full cooperation. Rawls discusses four variations:

(a) variations in moral and intellectual capacities and skills; (b) variations in physical capacities and skills, including the effects of illness and accident on natural abilities, (c) variations in citizens’ conceptions of the good (the fact of reasonable pluralism); as well as (d) variations in tastes and preferences, though the latter are less deep (2005, p. 184).
For (a) “variations in moral and intellectual capacities and skills”, Rawls states that he has in mind persons who are “above the line” (p. 184) of normal functioning. In this case, variations are

handled by the social practices of qualifying for positions and free competition against the background of fair equality of opportunity, including fair equality of opportunity in education, together with the regulation of inequalities in income and wealth by the difference principle (p. 184).

These cases of variations above the line of normal functioning are considered ‘standard’ cases as discussed in Chapter 1. These are the cases for which the two principles of justice were designed.

In the case of (b), Rawls has in mind persons who temporarily fail to meet the requirements of (a). In the case of variations of functioning citizens below the line of normal functioning, Rawls states that

citizens below the line as a result of illness and accident (once we allow for these) can be dealt with, I believe, at the legislative stage when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure. The aim is to restore people by health care so that once again they are fully cooperating members of society (my emphasis, 2005, p. 184).

Within this quote, Rawls supports Daniels’s extension of the principle of fair equality of opportunity in the legislative stage to health care institutions. At the legislative stage, information regarding temporary illnesses may become known. More importantly, lack of access to health care that prevents full cooperation of citizens can be addressed
through the principle of fair equality of opportunity. Rawls suggests that the ‘legislative stage’ is where these types of temporary illnesses could be taken into account.29

At the stage of a well-ordered society at the second level of idealization, we can imagine how the details of a particular society can begin to shape the basic structure. For example, at the legislative stage, we may know a society’s level of wealth, medical technology, and the prevalence of various medical needs. These details would not be known in the original position.

The principle of fair equality of opportunity and paternalism have different implications for persons with disabilities. In the cases of temporary illnesses, individuals have their own conceptions of the good, but require additional resources to pursue them fairly. They are not necessarily lacking reason or have weakness of the will. These resources are used to ‘bring individuals back up’ to the level of normal functioning. Once they are brought back up, then they can compete for positions, offices and opportunities in a way that is fair.

**Paternalism and perfectionism**

A misapplication of Rawlsian paternalism would be to extend it beyond what the principles of justice may require. When paternalistic intervention goes beyond the principle of fair equality of opportunity, it would be similar to a case of perfectionism (A

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29 Importantly, these considerations of temporary illness are not taken into account at the first stage of idealization in the original position. This is part of the simplification of Rawls’s approach in the beginning of *A Theory of Justice*. Temporary illness is not a part of the initial bargaining stage because of the assumptions concerning the ‘circumstances of justice’.
Theory of Justice, p. 287) and this is not the purpose of paternalism in Rawls’s theory.

In A Theory of Justice, Rawls defines a moderate variation of perfectionism as “the sole principle of a teleological theory directing society to arrange institutions and to define the duties and obligations of individuals so as to maximize the achievement of human excellence in art, science, and culture” (p. 285-6). Rawls denies that the hypothetical actors in the original position would choose perfectionist principles to guide the evaluation of the basic structure. Proponents of perfectionism for example, may argue that we not only have a duty to bring individuals up to the level of normal functioning, but society has a duty to help persons achieve the best possible health outcome. This would mean that it is not enough to provide health care services for individuals to raise them to the level of normal functioning, but there ought to be further incentives or punishments in place to make sure that they do not harm themselves. For example, if we return to the example of Ingrid who suffered from weakness of the will in my discussion of Rawlsian paternalism in adults, then the contrast between paternalistic intervention and perfectionism can be shown.

The perfectionist account in Ingrid’s case would not be satisfied with merely providing sodium and sugar information. A perfectionist, in their effort to raise individuals beyond the level of normal functioning, may consider stricter actions. A perfectionist may

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30 In Theory, Rawls states that the hypothetical parties in the original position “while the persons in the original position take no interest in one another’s interests, they know that they have (or may have) certain moral religious interests and other cultural ends which they cannot put in jeopardy...the parties do not share a conception of the good by reference to which the fruition of their powers or even the satisfaction of their desires can be evaluated. They do not have an agreed criterion of perfection that can be used as a principle for choosing between institutions. To acknowledge any such standard would be, in effect, to accept a principle that might lead to a lesser religious or other liberty, if not to a loss of freedom altogether...” (p. 288, my emphasis).
suggest limiting portion sizes being sold by restaurants to encourage healthier eating habits. Smaller portion sizes could include limiting the size of fountain sodas from 40 ounces to 20 ounces. Certain laws and policies may even go as far as to suggest banning certain products from being sold.

For my purposes, the important difference between the appropriate application of Rawlsian paternalism and non-Rawlsian perfectionism is its relation to the range of normal functioning. There is an important balance in the Rawlsian position between the ability for persons in a well-ordered society to choose, pursue and develop their own conception of the good and reconcile this conception of the good with societal expectations. In the case of Ingrid, once she is able to overcome her irrational belief about her daily fast food diet by being confronted with caloric information, it is her decision to stop eating this food. Removing her access to this food would be beyond Rawlsian paternalism. Further, banning her access to this food would be an attempt to raise Ingrid not only to the line of normal functioning, but well above it.

**Perfectionism and Fair Equality of Opportunity**

The principle of fair equality of opportunity as Rawls and Daniels have in mind does not utilize perfectionist principles. A perfectionist may not agree with the underlying principles used to apply and limit the range of the principle of fair equality of opportunity. Whereas fair equality of opportunity focuses on protecting opportunity by either raising individuals to the level of normal functioning, or compensating those who cannot be raised to the level of normal functioning, perfectionism includes enhancements beyond the level of normal functioning. Enhancements include raising
individuals higher than the level of species-typical functioning. The principle of fair
equality of opportunity as Rawls has conceived it, and Daniels has developed it, does not
include a commitment to enhancements above the line of normal functioning.

**Fair Equality of Opportunity and Paternalism**

A third and important contrast must also be identified between the role of fair equality
of opportunity and the appropriate application of paternalism in Rawls. Paternalism
applies in certain cases where persons have difficulty developing or rationally pursuing
their own conception of the good. Paternalism is not meant to apply in place of the
principle of fair equality of opportunity. Paternalism is not a principle of justice in the
way that fair equality of opportunity is. Further, paternalism does not have primacy
over any of the other principles of justice.

However, I argue that paternalism does have a role in supporting the implementation of
a fair and just society. Part of the role of paternalism in Rawls has been explained
through the four examples in which paternalism helps persons to choose, to develop, or
to pursue their own conception of the good. Further justification for this role of
paternalism will be introduced in Chapter 3. I will argue that the appropriate application
of paternalism is part of what the hypothetical actors in the original position would
choose to accompany the principles of justice which are to be applied to the basic
structure for persons in a well-ordered society. Choosing to include appropriate

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31 Rawls states that the principle of perfectionism is not a principle of justice (Theory, p. 288). The
principle of fair equality of opportunity is a principle of justice. Perfectionism cannot be applied as a
principle of justice because it is not a principle of justice.
applications of paternalism differentiates Rawls’s position in an important way from other contract theorists such as David Gauthier. An argument in Chapter 3 will be made identifying how Rawls’s position differs from Gauthier’s and as a result of this difference, how Rawls’s position can include appropriate applications of paternalism.

**Application of Rawls and the question of health**

Next, I will present more diverse cases of individuals who could exercise their moral powers if their health care needs were adequately met. I will provide two examples which illustrate the role of physical and mental impairments and their connection to health care needs.

In the first example, I will imagine a woman named Anna. Anna has always been an active member of society serving as a doctor. She has adequately developed her two moral powers over her 30-year lifespan. However, when Anna reaches 35 she develops a strange symptom known as ataxia. When someone is ataxic, they are not capable of freely controlling their limbs which limits their ability to work, to walk, or even to communicate. The cause of Anna’s ataxia is a benign brain tumor. If this tumor is removed, then she will be able to return to her work.

In the second example, there is a young woman named Bridget. Bridget is also an active and productive member of society. In Bridget’s case, she contracts a type of pneumonia which makes her permanently blind in her mid-20s. This impairment is a completely life altering experience because beforehand she was able to drive on her own and read which allowed her to work full-time.
In these two cases, Anna’s ataxia and Bridget’s blindness, they both fully developed their two moral powers. Anna and Bridget both have been able to create a rational life plan that is reasonable in terms of what social resources they justly should be allocated. However, the question that can be raised from these two examples is whether or not Anna or Bridget are owed, as a matter of justice, any additional resources, in terms of medical and social interventions, because of their impairments.

Once impairments have been introduced, their cases are no longer ‘standard cases’ that Rawls focuses on. Even though I am still using the assumption of a well-ordered society, I am raising the additional question as to whether or not Anna or Bridget are entitled to additional social resources than they would have been prior to their impairments under the auspices of justice as fairness. Even if the virtue of justice does not entitle them to additional resources, it is possible that other social virtues, such as beneficence, may.

Rawls provides a rough sketch of an answer in A Theory of Justice (p. 218-9) and Political Liberalism (p. 184-5) when he suggests that citizens could be entitled to social resources as a requirement of the principle of fair equality of opportunity. To further understand this account, I examine Daniels’s defense of this extension of the principle of fair equality of opportunity to the satisfaction of health care needs.

2.2 Daniels on fair equality of opportunity and health
Norman Daniels develops the principle of fair equality of opportunity into a major
theory of justice and health care. Daniels begins this extension by suggesting that health care ought to be treated as something that is special and distinct from other issues of distributive justice. He argues that health care is an important and necessary societal obligation to raise individuals to the level of normal functioning. This is necessary in order for an individual’s opportunity to be made fair.

According to Daniels, normal functioning depends on the idea of *species-typical functioning*. Since Daniels is concerned with what is owed to humans in terms of access to health care institutions and services, he focuses on the typical range of functioning for humans. Daniels is however not only concerned with the biological functions of humans, but also the social functions. However, his account is grounded in a biological understanding of human beings. Together, operating with a certain range of social and biological functioning could be said to be normal or abnormal. Daniels states that species-typical functioning must “permit us to pursue biological goals as social animals” so we need to include “such actions as the acquisition of knowledge, linguistic communication, and social cooperation in the broad and changing range of environments in which we live” (1985, p. 29). Therefore, Daniels’s project in *Just Health Care* focuses on providing resources and protecting opportunities in order to raise citizens to the level of normal functioning. Once they have been raised to this level, citizens can then compete fairly for open positions and careers within society.

**Returning to the examples of Anna and Bridget**
In the examples of Anna and Bridget, they each may require additional resources to restore them to the level of normal biological and social functioning. In the case of Anna,
she may require access to neurological specialists who could perform this surgery. It becomes quite clear how to return her to the level of normal functioning because there is a straightforward surgical intervention. However, in the case of Bridget, it is not as clear how she could be raised to the level of normal functioning. As of now, there is not a medical cure for blindness. Does this now mean that according to Daniels’s theory that she is not entitled to additional resources because it is impossible to raise her to the level of normal functioning?

When it becomes impossible to raise an individual back to the range of normal functioning such as the case of Bridget, there still may be ways in which to bring her closer to the range of normal functioning. If that is the case, then Daniels can and should present a theory which develops the principle of fair equality of opportunity for many types of impairments. To do this, Daniels must make the connection that in order to protect the range of normal opportunity, health care ought to be treated as special. Next, I will present a simplified version of this argument.

**Health care as special, general idea**

Daniels’s argument that health care is special depends on his definition of a health care need. A health care need depends on the idea of normal functioning. In contrast to Rawls’s political definition, Daniels endorses an account of normal functioning that is more biologically grounded. The benefit of this more biological definition of functioning is that it leads to medically quantifiable claims for social goods. In the case of the woman who had a vision impairment, it becomes clear that to raise her to the level of normal functioning, she requires a type of visual aid to work such as brighter lights or
Health care as special, outline of Daniels’s argument

Daniels begins *Just Health Care* with a definition of what health care is. Daniels defines *health care* as

broadly to include personal medical services, preventative medical and public health measures, including health and safety regulation, and certain social support services for the chronically ill or disabled. So a health-care system involves a diverse set of institutions which have a major impact on the level and distribution of welfare (1985, p. ix).

Daniels’s claim that health care is a concern of social justice may be a true claim but it becomes much more difficult to parse out specific medical resources to individuals and groups without a clear measure of a health care need. Further, if the concept of health care needs is not clear, then it becomes impossible to answer questions such as whether or not pediatric surgery should have more resources than geriatric surgery or cosmetic plastic surgery. It is difficult to quantify the differences, in terms of which persons are justly owed which resources, if there is not a clear measure of who has a just claim to fulfill their needs and how those needs are to be balanced against other legitimate claims on resources. There may be instances where individual citizens claim that not receiving the most expensive care is a violation of social justice when they claim that it is a “need”. Others may claim that having access to basic services for all individuals is a “need”. To sort out this problem, Daniels defines *health care needs* as follows

Health care needs will be those things we need in order to maintain, restore, or provide functional equivalents (where possible) to normal species functioning. They can be divided into:

1. Adequate nutrition, shelter
2. Sanitary, safe, unpolluted living and working conditions
3. Exercise, rest, and some other features of life-style
4. Preventative, curative, and rehabilitative personal medical services
In *Just Health Care*, Daniels focuses primarily on numbers 4 and 5. However, he claims that 1-3 are also relevant concerns for health care needs.

It follows that a *health care need* is regulated by the partially objective measure of normal functioning. I will discuss this idea more in 2.2.2. For now, I would like to show how Daniels justifies this idea of health care needs. And then I will work out the further implications of this, including the implications of his definition of normal functioning.

**Argument from Fair Shares**

So far, my discussion of Daniels has only shown that health care is something that can properly be regulated by institutions guided by justice. This claim, however, has not yet shown that health care institutions ought to be treated differently than other social institutions. A Rawlsian scholar may suggest that the concern that individuals will have access to proper health care services and fulfillment of their health care needs could be adequately addressed by the difference principle’s distribution of social primary goods. In what Daniels calls the *Argument from Fair Shares* (1985, p. 21), a Rawlsian could argue that as long as it is ensured that individuals have a large enough share of the social primary goods of income or wealth, then they ought to be able to purchase health care for their own particular needs. And thus, it would be up to that person to decide how much they would spend on which services. No additional resources would be required by justice based on some medical need.
If the *Argument from Fair Shares* applies, then meeting health care needs will be possible if social or economic inequalities are just. So while some persons may need to spend more of their income on health care, as long as “social and economic inequalities are arranged so that they are...to the greatest expected benefit of the least advantaged” (*Theory*, p. 72), then these expenditures are just. Daniels, however, questions whether or not this approach to health care can actually be just for two reasons.

First, the *Argument from Fair Shares* would only work according to Daniels if citizens could purchase *reasonable* health care with their shares. And Daniels argues that it would be difficult to ensure that reasonable access is possible because “to know whether income shares are fair, we must know that they can buy reasonable coverage” (1985, p. 21). For example, there can be an incongruence between the range of income and wealth of a certain society, and the cost of health care services. It may be the case that social and economic inequalities are just, and yet persons are still not able to afford health care.

Second, Daniels reasons that unless we know what our health care needs are, it is impossible to know what health care coverage is reasonable. So, if a proponent of the *Arguments from Fair Shares* wanted to overcome the first objection concerning the incongruence between income and wealth and health care costs, a proponent may suggest a type of health care voucher system. A voucher system would provide individuals with a certain amount of access to the health care system in a way that distributes these resources in a more egalitarian way. A voucher system could work by either providing a set amount of money for services or a set amount of treatments. And
while this approach may provide better protections in conjunction with the difference principle, Daniels still rejects this approach to meeting health care needs. Daniels rejects this second approach because individuals would need to know in advance what types of medical treatments and interventions they would need in order to assess whether or not this voucher system was fair. And this is impossible to know, even if individuals have predispositions for certain illnesses or are more accident prone.

Due to the possibility of health care being unaffordable or not providing enough coverage, Daniels suggests approaching health care by thinking about the satisfaction of health care needs themselves. Daniels concludes that we must discuss health care needs because “we cannot reduce the problem of just health care distribution to the problem of just income distribution, for the latter presupposes income adequate to meet reasonable needs” (1985, p. 21). I highlighted this point in the example of a society which has just social and economic inequalities but health care itself is unaffordable. In the second example, attempts for a more egalitarian approach to health care needs via something like a voucher system still may not help individuals receive the treatments they need. Daniels illustrates this point by identifying that deciding what will count as “prudent for an individual [...] depends on his resources, needs and preferences” (1985, p. 21-2).

The upshot of Daniels’s rejection of the Argument from Fair Shares is that focusing on income distribution instead of satisfaction of health care needs misses out on an important component of justice. It would be unjust to place persons with chronic health issues at a disadvantage because they require more medical interventions than others.
For example, persons without serious health care needs can develop their income and wealth in ways that place them in a position of advantage over those who must spend their discretionary income on health needs. As is the case currently in the U.S., you are twice as likely to live in poverty if you have a disability.\textsuperscript{32} Many individuals who have chronic illnesses have fewer chances to gain employment or education. And one way of dealing with this issue would be to focus on redistribution of income in a more just way. However, as Daniels has just shown, there still may be problems meeting health care needs if we focus primarily on income distribution \textit{via} the difference principle. Reducing economic inequalities between those with chronic illnesses and those who do not share their health care needs does not guarantee that health care needs will be met. Health care can still be unaffordable or inadequate in quantity and quality of services. And so because of this, health care spending itself must be treated as different than other types of discretionary spending. In other words, Daniels thinks of health care needs as special.

Health care could be treated as special in two ways once we have moved beyond the \textit{Argument from Fair Shares}. Either Daniels could argue that if health care is indeed special then either we could add it to a list of social primary goods, in addition to income and wealth, or he could argue that protecting health care needs ought to be included under another principle of justice. First, I'll examine why health care needs ought to be treated as special.

According to Daniels, health care needs are different from other preferences that citizens may have within society once they are at a level of normal functioning. Daniels states that “health-care needs fit prominently into this characterization of important needs because they are things we need to prevent or cure diseases, which are deviations from normal functioning” (1985, p. 33). The measure of normal functioning becomes fundamental to understanding what basic health care needs could be. Understanding health care needs could guide policy makers in the process of creating health care systems which satisfy the requirements of justice.

If health care is a social primary good, then according to Daniels it would be in competition with other primary goods. Daniels states that

if we treat health-care services as a distinct primary social good, we abandon the useful generality of the notion of a primary social good. We risk generating a long list of such goods, one to meet each important need (for a defense of this approach, see Green 1976). Finally, I argued (pp. 20-3) that we cannot just finesse the question of whether there are special issues of justice in the distribution of health care by assuming that fair shares of primary goods will be used in part to buy reasonable health insurance (p. 45, Just Health Care).

Instead of arguing that health care needs are social primary goods, Daniels argues that the most promising strategy for extending Rawls’s theory simply includes health-care institutions and practices among the basic institutions involved in providing for fair equality of opportunity. Because meeting health-care needs has an important effect on the distribution of opportunity, the health-care institutions are regulated by a fair equality of opportunity principle (p. 45, Just Health Care).

In a footnote attached to this quote, Daniels also writes “Health care is not a primary social good – neither are food, clothing, shelter, or other basic needs...opportunity, not health care or education, is the primary social good here” (p. 45). Health care needs for Daniels must be protected under the principle of fair equality of opportunity. If denying health care needs are considered as those things which limit opportunity, then Daniels
can argue that health care needs are special and yet they do not have to compete against the social primary goods of income and wealth.

If we fail to recognize health care as having a special status, there may not be access to health care services within a society in order to protect the normal range of functioning for citizens. If health care is treated as no different than any other discretionary spending, then it could be in competition with other social primary goods as I have just shown. This would be a problem that is related to the Argument from Fair Shares. If health care coverage is assumed to be a choice of citizens with their own independently defined fair shares of wealth and income, there still needs to be a determinate for what is considered an actual health need. Ensuring the application of the difference principle or even a voucher system does not necessarily entail the meeting of health care needs. Further, protecting a citizen’s ability to have access to health care institutions is constrained by the idea of a health care need. This is important for Daniels because when a citizen’s normal range of opportunity is restricted by disease or disability, then this is unjust, regardless of their level of income or wealth, and it should be addressed even at the cost of resources that other citizens could devote to the pursuit of their conception of the good. An unfair restriction would be the restrictions on a citizen’s ability to have the capacity to act within the normal range of functioning due to this disease or disability. The lack of a normal range of functioning unfairly restricts a citizen’s range of normal opportunities. Further, it may lead individuals to be in a

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33 And thus the first example from my discussion of Rawls’s ‘early views on health care’ is rejected. Health care cannot be a social primary good according to Daniels because it would be in competition with other social primary goods.
position where they have to weigh meeting health care needs against certain rights or freedoms which may be unjust to ask individuals to sacrifice.

While Rawls does not himself develop this particular extension of the principle of fair equality of opportunity, Rawls does endorse Daniels explicitly in *Political Liberalism*. Thus, it would be fair to say that Rawls views Daniels’s extension of this principle as a satisfactory way in which to include persons who may not be capable of being full and normal cooperating citizens without additional shares of social resources.

**2.2.2**

In this section, I will answer the question “how does an extension of fair equality of opportunity address the special nature of health care?” I will connect the idea of health care needs with the idea of normal functioning and normal opportunity. Importantly, I will highlight the connection between normal functioning, normal opportunity and the biomedical model of disability.

So far I have established Daniels’ argument that health care is special. However, the idea that health care is special must also be connected with the idea of normal opportunity. After making this claim, Daniels connects the satisfaction of health care needs to the idea of fair equality of opportunity.

**Formal equality and fair equality**

Daniels relies on the same distinction made by Rawls concerning the difference between formal equality and fair equality. Daniels interprets this distinction as negative equality and positive equality. Daniels equates formal equality with negative equality which
“requires only that society refrain from imposing certain barriers to equal opportunity, such as anti-black ‘Jim Crow’ laws or racial or sexual quotas on hiring” (1985, p. 41). On the other hand, Daniels equates fair equality of opportunity with positive equality which are focused on correcting disadvantages which “result[s] from racist and sexist practices” (1985, p. 41). Affirmative action programs in the United States are a prime example that Daniels provides. While the principle of fair equality of opportunity can assist in addressing racist or sexist practices, other types of interventions would be required in society as well. For example, the application of the first principle of justice to guarantee basic rights and liberties would assist in removing potentially racist or sexist policies or laws.

**Fair equality of opportunity and health care**

Daniels’s distinction between negative equality and positive equality also applies to health care institutions. In the case of health care resources and institutions, we can distinguish between health care institutions which are focused on achieving mere formal equality versus fair equality of opportunity. Formal equality of health care could include a policy which requires that individuals do not blatantly discriminate against certain health care users. Formal equality would be met if individuals were not turned away from health care centers or resources because of their race, gender or sexual orientation.

Fair equality of opportunity, however, must go farther than mere formal equality. Laws and policies which apply positive equality to health care institutions could be focused on eliminating unjust forms of discrimination. For example, many pharmacies now have a
‘language hotline’ number they can call if a health care consumer has a question about their new medication. The ability to communicate with a health care professional about your medication may help eliminate unequal access to health care resources. Individuals may be more inclined to take their medication if they can ask the pharmacist questions.

The extension of the principle of fair equality of opportunity when applied to health care institutions takes positive steps to ensure that citizens are receiving these services. For example, I could focus on one constraint of Daniels’s definition of health care which focuses on “preventative medical and public health measures”\textsuperscript{34} as well as one part of his definition of a health care need such as “preventative, curative, and rehabilitative personal medical services”. Fair equality of opportunity ensures that health care is provided as defined above to satisfy a health care need may be possible under other existing social programs in the United States.

Another example of a social policy that is focused on meeting preventative medical and public health measures would be the National School Lunch Program. This program focuses on providing healthy food options for children who may not be able to afford lunch based on their total earned income of their family. This program is particularly relevant because it is a preventative public health measure in order to supply preventative personal medical services. In this case, if children were nutritionally deficient, this would affect them in many negative ways. Similar to affirmative action

\textsuperscript{34} This is number four on Daniels’s list of health care needs.
programs insofar as it represents a form of positive equality, this program is focused on protecting the opportunity of children by making sure they have adequate nutrition during critical developmental years. Without this support, children will have worse health, educational and vocational outcomes when they are adults. The lack of enough nutrients to nourish an adolescent may impact their ability to focus in school and be full and active participants.

In the case applications of fair equality of opportunity, there is an underlying assumption that it is known what the level of functioning of the individual should be. In other words, ensuring that children are “full and active” participants in school could be viewed as vague when working out policies at the legislative stage. Thus, to identify what it means to ensure that children are treated fairly, Daniels would suggest linking the idea of fair equality of opportunity to normal functioning and normal opportunity. Otherwise it would not be clear when a health care need was being fairly met or not.35

**Normal opportunity and normal functioning**

Fair equality of opportunity can help secure ‘normal opportunity’. One reason to apply the principle of fair equality of opportunity to health care institutions is that it secures what Daniels calls a normal opportunity range. The range of normal opportunity (1) depends on reasonable persons’ life plans, and (2) is determined by an individuals’ range of talents and skills. A normal opportunity range “for a given society is the array of

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35 Such as in the case where some states can argue that pizza is a vegetable because of the tomato sauce used and thus children are meeting one of the major nutritional guidelines (National Public Radio, November 15, 2011, Allison Aubrey. Web).
life plans reasonable persons in it are likely to construct for themselves” (1985, p. 33).
The range of what is normal for a society can differ depending on a society’s “stage of
historical development, its level of material wealth and technological development, and
even important cultural facts about it. This is one way in which the notion of normal
opportunity range is socially relative” (1985, p. 33). For example, I could say that
enacting the National Free Lunch Program assists children insofar as providing enough
nutritional support to develop their higher brain functions, such as higher order
reasoning. Being able to reason well and become a contributing member of society is
something that is difficult to do while one is malnourished. Thus, having access to a
“normal range of opportunity” in America may entail satisfactory childhood nutrition.

Concerning the second part of normal opportunity, it is determined by an individual’s
range of talents and skills. Daniels states

the share of the normal range open to an individual is also determined in a
fundamental way by his talents and skills. Fair equality of opportunity does not
require opportunity to be equal for all persons. It requires only that it be equal for
persons with similar skills and talents (1985, p. 33).

To continue with my childhood nutritional example, certain government programs may
be focused on providing satisfactory levels of nutrition to raise children to the level of
normal functioning. However, once all students have met this nutritional level, they are
not entitled to additional resources beyond that provided to others in order to fulfill
their own private conceptions of the good. For example, one high school student may be
an athlete and as such requires additional protein and fats to sustain their activity. If,
however, a child experienced a type of muscular dystrophy that prevented her from
meeting state mandated physical requirements, such as running the dreaded one mile,
then the state has a requirement to make sure she receives enough nutritional resources to reach the level of normal functioning. However, it is not required to provide the resources necessary for the student to become an elite athlete.

Once the normal range of functioning has been set by a particular society, individuals can now make claims concerning unfair or restricted access to their range of normal opportunities. Daniels argues that

impairment of normal functioning through disease and disability restricts an individual’s opportunity relative to that portion of the normal range his skills and talents would have made available to him were he healthy. If an individual’s fair share of the normal range is the array of life plans he may reasonably choose, given his talents and skills, then disease and disability shrinks his share from what is fair (1985, p. 33-4).

Again, to continue my nutritional example, it would be unfair for a poor non-athlete and a poor athlete to not reach the minimal necessary nutritional requirements to function. However, the poor athlete could not claim that the state must provide additional nutritional supplements to win the next game.

However, something is missing from Daniels’s discussion of the normal range of opportunity. I have suggested that there is some minimum nutritional level that any student should meet. So far, I have discussed satisfying nutritional levels so as to maintain a normal range of functioning. To justify this claim in something more than just subjective understandings of normal functioning which may vary from society to society, Daniels introduces an even more objective measure. In order to judge the range of normal functioning from a more objective perspective, Daniels suggests that there is an important biological component used to gauge the range of normal functioning.
**Biomedical model of disability**
Daniels’s account of “normal functioning” depends on a medical model of disability. The medical model in its simplest form states that *health is the absence of disease*. Daniels defines health and disease as variations of natural functioning. Daniels argues that “the basic idea is that health is the absence of disease and diseases (I include deformities and disabilities that result from trauma) are deviations from the natural functional organization of a typical member of a species” (1985, p. 28). Daniels did not originate the connection between the medical model and natural functioning in philosophy.

Christopher Boorse uses the simplified version of the medical model and connects it to the idea of normal function (1977). In the next two paragraphs, I will add a quick aside on Boorse which will explain the origin of Daniels’s use of normal functioning as related to species-typical functioning.

Boorse’s view on disease is a naturalist, value-free, biological concept. Boorse (1975) argues that disease is a “theoretical concept [which] applies indifferently to organisms of all species” that is to be “analyzed in biological rather than ethical terms” (p. 57). Boorse identifies ‘disease’ by first understanding the ‘natural’ or ‘normal’ functioning of an organism. According to Boorse, “the state of an organism is theoretically healthy, i.e. free of disease, insofar as its mode of functioning forms to the natural design of that kind of organism” (p. 57). So what follows is that the ‘natural’ design of the organism is defined by that organisms functioning. In other words, Boorse views biological
functioning\textsuperscript{36} as value-free. This naturalist, value-free definition of disease as limited to the biological functioning of an organism is considered normal and species-typical (Daniels, p. 57). For example, a person has a disease when their eye has a cataract. Since their eye does not function in the way that most other eyes function in the species, then they can be said to have an abnormal, or non-species-typical functioning of the eye. Further, a diseased eye becomes an illness when the disease is considered severe. An illness is a disease but only a certain subset of diseases is severe. The severity of diseases is decided upon by practitioners in the medical field. In Boorse’s own example, he specifies that mild athlete’s foot is not ‘serious’ because “a reasonably serious disease with incapacitating effect [would] make it undesirable” (p. 56, 1975). While mild athlete’s foot may be an inconvenience and is still a disease, a person with a mild disease is not “deserving [of] special treatment and diminished moral accountability” (Boorse, 1975, p. 56).

Daniels connects the idea of health care needs with Boorse’s idea of species-typical functioning. Daniels supports Boorse’s view that the medical model is both value-free and even goes as far to say that using the functioning of an organism is an “uncontroversial baseline”.\textsuperscript{37} Daniels augments Boorse’s definition of disease which is based on the medical model by including injuries as a type of disease as well. Daniels

\textsuperscript{36} Boorse (1975) uses the ‘biologist’s sense of functioning’ is a “standard causal contribution to a goal actually pursued by the organism” such as in the case of “cells are goal-directed toward metabolism” (p. 57).

\textsuperscript{37} Of course, the use of the medical model became quite controversial and I will identify why in Chapter 4 when I apply the medical model to the case of mental health. Boorse has defended the species-typical model for almost 40 years.
also further develops the social functioning of our species. Using the medical model as the basis, Daniels includes social functioning as an aspect of species-typical functioning. However, normal functioning depends on both biological and social components when considering what is within the range of species-typical functioning. Daniels states that species-typical functioning must “permit us to pursue biological goals as social animals” so we need to include “such actions as the acquisition of knowledge, linguistic communication, and social cooperation in the broad and changing range of environments in which we live” (1985, p. 29). Therefore, Daniels’s project focuses on providing resources in order to raise citizens to the level of normal functioning. Once they have been raised to this level, citizens can then compete fairly for open positions and careers within society.

Applying the parameters of normal functioning, biological function and limited range of social functions is provided in my example below. In a simplified example, we could extend Daniels's version of the principle of fair equality of opportunity to the case of Anna and her symptoms of ataxia. In an earlier example, I described Anna’s difficulty walking because of a benign tumor. When Anna has the tumor and does not have access to the required medical procedure and follow-up treatment, this may prevent her from being able to operate within the expected parameters of ‘normal functioning’. Normal functioning inasmuch as it relates to species-typical functioning would mean that there is not undue pressure on the part of her brain which controls motor functioning. However, the second way that Daniels extends normal functioning is that Anna, through the extension of Daniels’s account of the principle of fair equality of opportunity, is to be returned to the level of normal functioning for her. So for example, if Anna was a
medical doctor, then returning her to the level of normal functioning means meeting her health needs so that she can returned to what is ‘normal functioning’ for her in a social and economic capacity.

**Relationship between Daniels’s fair equality of opportunity and the biomedical model of disability**
The biomedical model of disability has a central role in terms of making the connection to the ability for a theory of distributive justice to fairly meet a health care need. As stated above, Daniels utilizes the biomedical model of disability to identify the biological basis for normal functioning. Further, Daniels also advocates for the role of social intervention, as was in the case of Anna. However, any view which uses the biomedical model of disability has not been accepted by many disability theorists. However, many disability theorists reject views that are grounded on the biomedical model of disability. They argue that the use of this model understates the importance of social interventions because it prioritizes a focus on biological intervention.  

23 years after *Just Health Care*, Daniels revisited his discussion of the role of the biomedical model in *Just Health*. Interestingly, Daniels agrees that his original account

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38 For example, in Adrienne Asch’s book chapter “Disability, Bioethics and Human Rights” in *Handbook of Disability Studies* (2001), she writes

> When it concerns life with disability, most people who call themselves bioethicists have viewed having a disability from within what Gliedman and Roth (1980) and Bickenbach (1993) term the medical or biomedical model, as contrasted with a minority group (Gliedman and Roth 1980; Hahn 1983) or social model (see Shakespeare and Watson, this volume) of disability. **Disability community critics of standard bioethics reject the medical model of disability, with its belief that functional impairment leads to an unacceptable, unsatisfying life.** The critics do not demand to use theological or "sanctity-of-life" values; they claim that even on "quality-of-life" measures; a life with disability can be rewarding (p. 299).
of the use of the biomedical model of disability is too narrow (Daniels, (2008) p. 42).

Daniels in *Just Health* states that ‘health as the absence of disease’ is too narrow as a basis for the justification for health care needs and is even “misleading” (*Just Health*, p. 37) as a definition of health. This biomedical model of health is too narrow, according to Daniels, because “it captures neither our ordinary usage nor the even broader theoretical notion of pathology” (p. 36). To explain this, Daniels provides an example that “we do not consider people healthy when they have injuries from trauma or from environmental hazards or toxins, none of which are diseases” (p. 36). Further, Daniels states that using the biomedical model becomes more complicated when discussing “functional” and “cognitive deficits” (p. 36). Functional deficits, such as in his example of deafness, are more difficult to make sense of under the medical model of health because someone who is deaf may not view themselves as ‘unhealthy’. Daniels, I think correctly, identifies that labeling someone who is deaf or blind as ‘unhealthy’ merely because of their ocular or auditory functioning could be offensive to that person (*Just Health*, p. 36). However, instead of moving away from these strict biological accounts of functioning, Daniels doubles-down on another biological view of health.

Daniels has two ways of responding to the view that the medical model of health is too narrow as the basis for the justification of health care needs. First, he grants that his use of normal functioning is conceptually narrow and claims that this is not a weakness of his view. It is conceptually narrow because it rejects the World Health Organization’s

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39 It is important to note that Daniels does distance himself from Boorse’s narrow use of health as the absence of disease in a partial way in *Just Health Care* Daniels himself does include injury as a part of his definition of disease. Regardless, Daniels’s earlier definition of health depends on the medical model.
definition of health as “a state of complete physical, mental, and social well-being, not just the absence of disease” (Constitution of the World Health Organization, page 1). Daniels argues that the World Health Organization’s definition is too broad to have achievable goals for health care and health care needs. Second, Daniels shifts to another biological view of disease and health which is a revised version of the classical medical model from Boorse.

Instead of advocating for Boorse (1975), Daniels instead advocates for Boorse (1997) that “health is the absence of pathology” (p. 37). Pathology refer[s] to any deviation from the natural functional organization of a typical member of a species. Pathology, viewed as disrupted part function, takes place at various levels (genetic, organelle, cell, tissue, organ, systemic) with different consequences, ranging from innocuous to fatal...In short, pathology is a departure from normal functioning (p. 37) (my emphasis).

Once the connection between pathology and normal functioning has been made, then Daniels can revise his extension of the principle of fair equality of opportunity. Daniels’s view highlights pathology over disease as a way of moving away from possible negative normative claims about the role of disease and normal functioning.

Daniels connects and extends the principle of fair equality of opportunity to the concept of ‘just health’. He argues that a right to health must be based in a system of distributive justice. Otherwise, he claims, that individuals will not be sure what a health care need is and how to distribute it fairly. He rejects the general notion of a ‘right to health’ claim that does not utilize a theory of distributive justice. In this way, his

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40 Whether or not this protects him from the ‘narrowness’ objection is not initially clear. I will explore this in Chapter 4.
arguments made in *Just Health Care* which state that health care is special because it protects opportunity can still hold. Importantly, Daniels still maintains that ‘health’ ought to be treated as something that is special, and not like any other commodity bought and sold in the market.

### 2.2.3 Fair share of social resources

The principle of fair equality of opportunity may help provide guidance regarding which social resources individuals can make a legitimate claim to. In the case of Daniels’s extension of the principle of fair equality of opportunity, Daniels argues that health care needs must be met in order to protect the social primary good of opportunity. Let’s return to the example of Bridget who experiences partial blindness as an adult. Before her vision changed, she was able to develop her own conception of the good without making additional claims to social resources. She completed her high school education and is now working in an office building. In order to complete her work before she had low vision, she did not require her employer to provide any additional lighting or equipment to read some text aloud.

When Bridget’s vision changes, her employer faces a question regarding the distribution of limited resources at work, “to what extent does the employer have to accommodate an employee who requires additional resources to perform their duties?” To answer this question, Daniels separates Bridget’s claim to additional resources from requests from other current employees. In Bridget’s case, she can claim that she requires brighter lighting at her work station as a way to meet her health care needs which in turn
protects the social primary good of opportunity. If another employee also requested
brighter lighting only because they preferred it, the other employee does not have as
strong a claim to these social resources. In the case of the non-visually impaired
employee, they do not require brighter lighting at their work station to meet protect the
social primary good of opportunity. The principle of fair equality of opportunity as it
relates to the satisfaction of health care needs does not require the employer to meet the
non-visually impaired employee’s request. If the non-visually impaired employee made
another claim, such that low lighting causes unnecessary strain on his eyes which causes
a decrease in ocular functioning, then the employee may be able to use Daniels’s
extension of the principle of fair equality of opportunity.

**Fairness as related to a reduction, elimination or compensation for
disability**

What is deemed fair concerns the resources necessary to raise an individual to the line
of normal functioning. It would be unjust to allow an individual to fail to be a
cooperative member of society because of disease or injury. When this disease or injury
cannot be prevented or cured, then other forms of compensation can be requested. In
this case, Daniels’s account focuses on preventative measures, rehabilitative
interventions or providing accommodations when required. The medical model of
disability states that health is the absence of disease. The updated version of the medical
model which focuses on pathology states that health is the absence of pathology. Daniels
connects the idea of pathological functioning as a value-neutral term to natural
functioning. Natural functioning of an organism then becomes normal functioning for
the species. Health care needs are described as restoring individuals to normal
functioning. Using a model of health which focuses on the importance of biological functioning must view non-typical species functioning as a disease. Using Daniels’s connection between health care needs and normal functioning, Daniels’s view also necessitates that disability is seen as something to be cured because it hinders normal opportunity. Disease that limits species typical functioning as well as hinders someone socially is viewed as an unjust limitation of opportunity.

In the above sense, fairness relates to possible reduction, elimination or compensation for below normal functioning. Fairness also extends to what Bridget would be required to do to fulfill her duties. Bridget is not guaranteed to keep her office position if she fails to meet the required duties. Supporting Bridget’s life plan does not necessarily ensure that her life plan must be fulfilled. Even if her preference is to work in an office building, she may need to change jobs. As long as she is given a fair opportunity to compete for the job, then the principle of fair equality of opportunity has been satisfied.

2.2.4

The overall argument from my discussion of Daniels above is that in order to help secure ‘normal opportunity’ for citizens, their health needs must be met. This extension of the principle of fair equality of opportunity is meant to more adequately to include those persons who may not have their range of normal opportunity protected without this special interpretation of health care. However, Daniels’s extension of this principle does not adequately protect opportunity of persons with many different types of physical and mental impairments.
Daniels’s and Rawls’s solution to the problem of variations below the line of normal functioning may not provide an adequate account for other cases of disability. In fact, in most of the extreme cases of disability where full cooperation is never possible, Rawls and Daniels suggest that these cases may be beyond the scope of justice (Daniels (1985), p. 48; Rawls, (1999) p. 446). Daniels makes this point clear when he discusses the “four layers of health-care institutions” (1985, p. 48). Daniels states that “where there is no chance of protecting opportunity, as in the fourth level, where we are concerned with the seriously, permanently disabled, that we may be beyond measures that justice requires. Here principles of beneficence may be a more important guide to our obligations” (1985, p. 48). If Daniels is correct concerning the place of individuals who fit into the fourth layer of health care institutions, then the next logical question is which virtues, such as beneficence, protect these individuals at the level of institutions?

**Two objections**

I will raise two main objections to Daniels’s extension of Rawls’s principle of fair equality of opportunity. First, it does not provide an adequate solution for individuals who are never capable of reciprocity. If the individuals truly are beyond the scope of justice, then it seems to me that there may be many, if not all, opportunities where the

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41 One way that Daniels explains the connection between the principle of fair equality of opportunity and health care institutions is through a four “levels or layers” (p. 48) of institutions. These layers are not meant to correspond to “a different principle of justice, or that the layers are ranked in moral priority” (p. 48). These four layers are meant to deal with different ways to bring individuals closer to the idealization that persons can become “normal, fully functioning persons with a complete lifespan” (p. 47). These four layers are (1) “preventative health-care institutions[...] to minimize the likelihood departures from the normality assumption”, (2) non-preventative “departures from normal functioning” which “deliver personal medical and rehabilitative services that restore normal functioning”, (3) third layer includes institutions “involved with more extended medical and social support for the moderate chronically ill and disabled and the frail elderly”, and (4) a fourth layer involves health care and related social services for those who can in no way be brought closer to the idealization. Terminal care and care for the seriously mentally and physically disabled fit here, but they raise serious issues which may not just be issues of justice. Indeed, by the time we get to the fourth layer moral virtues other than justice become prominent” (my emphasis) (Just Health Care, p. 48).
interests of these individuals are not protected. As I will explore in chapter three, there may be cases in which persons who cannot reciprocate in the way that Rawls and Daniels have in mind, can still reciprocate in other ways. Thus, stating that these individuals are beyond the scope of justice may be an unjust claim. Primarily, I suggest that although these citizens may not be capable of developing a capacity of a conception of the good or a sense of justice as Rawls and Daniels have conceived of it, they still may be owed justice. In chapter 3, I will address concerns towards those individuals who are never capable of being full and normal functioning citizens.

Second, I object to Daniels’s understanding of the person. One of Daniels’s major claims is that in order to protect the range of normal opportunity for individuals, we must understand their health care needs. The measure of these health care needs depends on the biomedical model of disability. I disagree with this model of disability. Within the disability literature, there are many competing views on what is the best theory of disability, and within the past 20 years this model has become less accepted. Primarily, it is rejected because it presupposes that normal opportunity can be protected through medical advancements instead of a more social response.

I critique the idea that functioning is value-neutral, and instead, I argue that functioning is value-laden. This impacts the ways that social resources are distributed to meet health care needs. In Bridget’s example, instead of stating that Bridget has a deficit in functioning, and is thus owed social resources because this is non-typical for the species, we can say something else. Instead, we could argue that lighting in buildings ought to come with a dimmer-function which is available to all employees. This is because
individuals have legitimate ranges in visual ability, and certain forms of functioning should not be given preference merely because there are more of them. This is the critique of the idea that normal functioning and natural functioning are both value neutral. While this view may not seem like it would have a significant impact on health care policy, I argue that it does. Further, rejecting a biomedical model of health has a significant impact on those individuals who feel that due to their impairments that they are social outcasts or are non-legitimate members of society.

A few brief comments about my objection. First, it does not deny that biological impairment plays a role in identifying health care needs. It only states that biological functioning is not value-neutral. Second, my view does not disagree with Daniels’s model of health because Daniels ignores social intervention. Daniels does include social interventions when disability cannot be cured.

The question is whether or not normative claims about health and disease should come prior to identifying ‘objective biological functioning’ or if normative claims should happen simultaneously. I support the view that normative judgments happen when we decide what is normal function and what is not.42 In other words, deciding what is normal functioning is a value-laden decision even if it includes judgments about biological functioning. My point of disagreement with Daniels is not that normative judgments about health occur or do not occur – Daniels thinks that they do occur. My point of disagreement is where they occur.

42 This is a critique that is found in the disabilities studies literature, especially in the critique of Dan Brock by Anita Silvers.
Contra my view, Daniels argues that we must first decide what is objectively normal or not normal as an expression of biological functioning. Once this is decided we can have disagreements about which social resources individuals are owed. Daniels argues that this type of disagreement can occur once natural functioning has been established as a type of normal species-typical functioning, and then we decide how and where individuals can have their health care needs met.

A major component of Daniels’s theory depends on returning individuals to the level of normal functioning. This is a crucial and fundamental part of Daniels’s theory because restoring individuals to the level of normal functioning, or bringing them as close as medically possible, is what makes protection of normal opportunity possible. However, I contend that there may be many cases where meeting someone’s health care needs does not adequately protect their range of normal opportunity. In Chapter 4, I will primarily examine the role of stigma and its limiting effects on the range of opportunity.

Many disability theorists view physical and mental impairments as having disabling effects. What this means is that someone is not disabled because their eyesight does not reach 20/20, but instead someone is disabled because society views them as different and less worthy as members who can be a part of the enterprise of social cooperation. In many cases, disability theorists may view Rawls’s or Daniels’s view as insensitive to the issue of stigma either because of Rawls’s requirements of the two moral powers, or Daniels’s requirements of normal functioning. I will address these problems in chapter 4. The general argument that I will make concerning the importance of stigma is that if
this issue is not addressed it is not possible to protect normal opportunity. I will argue that addressing the role of stigma is a necessary precondition to make the protection of normal opportunity even possible.

**Normal opportunity, normal functioning and certain implications**
The overall argument from my discussion of Daniels above is that in order to help secure normal opportunity for citizens their health needs must be met. This extension of the principle of fair equality of opportunity is meant to include better those persons who may not have their range of normal opportunity protected without this special interpretation of health care. However, I will argue that Daniels’s extension of this principle does not adequately protect opportunity of persons with many different types of physical and mental impairments.

**Chapter 3**
The first section of chapter three focuses on persons who cannot develop or exercise their two moral powers. They lack the capacity to revise and rationally pursue their own conception of the good. Further, they lack the capacity for the second moral power to understand, to apply, and to act from a public conception of justice. Lacking the capacities for both moral powers interferes with a person’s ability to participate fully in a fair system of cooperation.

Within an actual society, it is expected that individuals experience variations within their natural abilities which influence how they develop their talents and skills. Some
individuals may have natural abilities which allow them to excel in certain areas. For example, to return to the examples in chapter 2.1, the young girl had a natural talent for dancing. Providing an opportunity for her to train would allow her to develop these natural talents. Once she becomes an adult, she will be able to develop her own determinate conception of the good and decide whether or not she would like to further develop these talents. However, some individuals have such limited abilities that they are not capable of developing their two moral powers.

Within this chapter, I focus on two cases where individuals cannot reciprocate: individuals who have lost the capacity to reciprocate and individuals who never had the capacity to reciprocate. In this chapter, I will define these individuals as non-reciprocating persons. After I define this terminology, I will identify two places where non-reciprocating persons are taken into account by Rawls: paternalism and within the four-stage sequence. Daniels takes non-reciprocating persons into account in his own discussion of paternalism.

After establishing the two places where Rawls’s theory could consider non-reciprocating persons, I will raise two questions which serve as possible objections to Rawls’s use of the conception of reciprocity in relation to non-reciprocating agents. The first question asks: Is Rawls’s conception of reciprocity too narrow? Recall his definition of reciprocity as existing between mutual advantage and impartiality as defined in Chapter 1. Does his understanding exclude non-reciprocating persons from being treated justly or as

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43 I addressed this in Chapter 2, Section 1.
equals? A background assumption regarding the first question is that reciprocity has a place in a discussion of justice. The underlying concern regarding the first question is that Rawls’s understanding of reciprocity is too limited. The first question does not challenge whether or not reciprocity belongs in a discussion of justice but rather questions Rawls’s specific account. The second question is broader: is Rawls’s conception of justice flawed because the concept of reciprocity itself does not belong in a theory of social justice? The second question is broader because it questions the appropriateness of all conceptions of reciprocity to questions of justice, not only Rawls’s conception.

To address the narrowness concern of the first question, I identify a mistaken assumption that is often made about Rawls’s conception of reciprocity. The general problem is that Rawls’s conception of reciprocity is often viewed as having a “contribution variant of justice”. The general idea behind this objection is that individuals must be able to both agree to the rules which govern society and contribute in order to receive the benefits of living in society. Since persons with extreme impairments who I have called non-reciprocating persons cannot engage in society in this way, they seem to have either a weak or missing claim to social goods and resources. To address this question, I will distinguish between Rawls’s account of justice as reciprocity, Gauthier’s account of justice as mutual advantage and highlight the misconception of conflating these accounts.

44 Buchanan, Allen. *Justice as Reciprocity versus Subject-Centered Justice*, p.228.
3.1

Two variations of non-reciprocating persons
There are two variations within the group of individuals who do not have the capacity to develop, rationally pursue or revise their own conception of the good. Additionally, they lack the second moral power for a capacity for a sense of justice. To illustrate these variations, I will provide two examples.

First, we can imagine Patricia who is in a permanent vegetative state. Her daily life involves lying in a hospital bed. She is unable to move her body. She may open her eyes or appear to be sleeping, but none of these actions show that she is aware of the activity around her. She is placed on “supportive care” which involves the use of a feeding tube, life support and mechanical ventilation. With her brain and body both being in this state, she no longer has the mental or physical capacity to choose her own life plan or to express preferences or pursue goals. Of course, there may have been a time where she did have a capacity to develop her two moral powers. At one time she could have had the capacity to develop her own conception of the good, rationally choose and revise it, but she has permanently lost this capacity. The same holds true for her capacity for a sense of justice. We can imagine that before Patricia was in the permanent vegetative state, she had a set of determinate ends which may have included being a construction worker. However, she can never develop these goals. Patricia’s case will be the paradigm case for individuals who have permanently lost their ability to participate fully in society.

The second example includes someone with an extreme intellectual impairment. We can imagine someone, in this case Selina, who has a severe case of schizophrenia. According
to the National Institution of Mental Health, schizophrenia is “a chronic and severe mental disorder that affects how a person thinks, feels, and behaves.” Persons with schizophrenia can experience three types of symptoms: positive, negative, and cognitive. Positive symptoms can include hallucinations, thought disorders, or movement disorders. Negative symptoms can include difficulty speaking, difficulty engaging in activities or reduced feelings of pleasure. Cognitive symptoms can include problems with attention, short term memory and using available information to make decisions.

In Selina’s case, she has all three of these types of symptoms. For example, Selina may have an idea of what she would like to do with her life, but because of extreme negative symptoms she cannot express or pursue her interests. We can imagine that due to the positive symptoms of hallucinations or thought disorders, it is difficult for her to develop or pursue a rational conception of the good. Further, she cannot understand, apply, or act from a conception of justice. She just lacks the capacity to understand what a conception of justice might be. She may not understand how to restrain her own conception of the good in a reasonable way due to these extreme negative symptoms. Unfortunately, her intellectual impairment cannot be alleviated with current medical interventions.

In both cases, these persons do not develop the sufficient requirements for being a fully and normally cooperating citizen within Rawls’s framework. They lack the capacity for

45 https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml
46 Ibid.
the two moral powers. As I argued in chapter 1, citizens are fully and normally cooperative if they are capable of developing and acting on their two moral powers. Social cooperation includes three criteria: publicly recognized rules and procedures, reciprocity and a citizen’s conception of the good. The two examples of Patricia and Selina go beyond the temporary impairments that I discussed in chapter 2, which could be addressed in terms of the principle of fair equality of opportunity. The idea was to raise individuals above the threshold at which they can be fully participating members of society. But now, without the capacity to develop the two moral powers, these persons are also not capable of being a part of the reciprocal relations of citizens.

3.1.2 The basis of equality and non-reciprocating persons

Non-reciprocating persons are individuals who either never had a capacity to develop their two moral powers or permanently lost them. If non-reciprocating persons are not capable of reciprocity, then the question arises how equality pertains to non-reciprocating persons within the confines of Rawls’s theory.

In chapter 1, I argue that reciprocity provides “the basis for equality” (A Theory of Justice, p. 447). Rawls claims that “those who can give justice are owed justice” (A Theory of Justice, p. 446). More specifically, those who have the two moral powers developed to the point where they can participate fully in the social order – what Rawls calls “moral personality” - are owed equal justice (p. 442, A Theory of Justice).

The idea of equal justice used by Rawls does not entail that those persons who completely lack the two criteria for moral personhood are lacking any basic rights or
protections. In fact, Rawls argues that “the capacity for moral personality is a sufficient condition for being entitled to equal justice. Nothing beyond the essential minimum is required. Whether moral personality is also a necessary condition I shall leave aside” (p. 442-3, *A Theory of Justice*). Moral personhood as it stands as a sufficient, and not necessary, criteria for equal justice leaves open the possibility that there may be other criteria that could be developed to include persons within the scope of justice. The nuanced claim that Rawls makes here is that “provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice” (p. 443, *A Theory of Justice*). At least in these passages, Rawls takes the capacity for moral personhood as a sufficient condition, and not a necessary one.

Although Patricia and Selina are non-reciprocating persons, they still are owed some protections as a matter of justice and rights, not merely benevolence or charity. These rights are owed to all persons regardless of their ability to develop their two moral powers. Some of these rights owed to persons can include the right to health care and the right not to be tortured. Both non-reciprocating individuals and fully and normally cooperating individuals are persons as members of the species. The grounding for these rights cannot be in Rawls’s criteria of having the two moral powers. However, the defense of the basis of these rights will be discussed in section 3.1.4 when I address Rawls’s discussion of paternalism and the four-stage sequence.
3.1.3

Non-reciprocating persons and the principle of fair equality of opportunity

Persons whose mental and physical conditions fall under the two paradigm cases of Patricia and Selina would not be in the position to benefit from the principle of fair equality of opportunity. Selina and Patricia cannot benefit in ways that other individuals could, i.e. those who have the capacity to develop their two moral powers. Regardless of the opportunities presented for either Selina or Patricia to develop their two moral powers, it is impossible for them to do so. Since they are unable to develop their moral personality, they are not owed justice via the two principles of justice. For example, Patricia could not claim that she is being discriminated against if she is not able to apply for a certain job. She would be ineligible to perform any work because she cannot move her body herself or make use of her mental faculties. The same restraints can be applied to Selina because she does not fulfill the psychological criteria either.

As I argued in chapter 1.3, in order for individuals to develop their two moral powers, citizens must attain psychological stability. I extend the use of this idea of psychological stability beyond what Rawls had initially intended (Political Liberalism, p. 74; A Theory of Justice, Section 70). In the two cases of non-reciprocating persons, they do not meet these psychological criteria. No intervention can raise these particular individuals to the level of normal functioning or provide rehabilitation for their conditions. The scientific and technological advances that are necessary to cure these extreme impairments do not exist. However, the role of non-reciprocating persons within a Rawlsian system can be further developed by discussing the role of paternalism and the four-stage sequence.
3.1.4

The role of non-reciprocating persons for Rawls and Daniels

The role of non-reciprocating persons is neither fully developed by Rawls nor by Daniels. However, there are two ways in which Rawls’s theory can be expanded to address non-reciprocating persons. First, non-reciprocating individuals could be included through an extension of paternalism. Second, non-reciprocating individuals are considered in Political Liberalism at a later stage of justice in the four-stage sequence. Daniels could incorporate non-reciprocating individuals in the fourth layer of his four part division of health care institutions which focuses on the role of the principle of beneficence instead of the requirements of justice.

Paternalism and non-reciprocating individuals

Paternalism, as it applies to those individuals who are considered to be non-reciprocating, falls under two “stipulations” according to Rawls as discussed in chapter 2. Rawls (Theory, 1999) states that

paternalistic intervention must be justified by the evident failure or absence of reason and will; and it must be guided by the principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods (p. 219-220).

Based on these two stipulations, persons who are never capable of developing their two moral powers are dependent on citizens to advance their interests. If the non-reciprocating persons cannot express or pursue any part of their own conception of the good, then it is up to other individuals in society to best approximate it and develop it. It is important to note that paternalism can also apply to those who have temporary impairments such as the earlier cases of Anna’s ataxia or Bridget’s blindness in chapter 2.
In Section 2.1, I discussed in detail the four ways\textsuperscript{47} in which paternalistic intervention would apply in the case of temporary illness. I argued the appropriate place of paternalistic intervention within a Rawlsian conception of justice was primarily to provide guidance for those individuals who require assistance developing or restoring their two moral powers. Paternalistic intervention cannot be used to force individual agents to choose a set of determinate ends regarding their own reasonable account of the good.

Individuals who are non-reciprocating persons such as Patricia and Selina do not have a clear way of expressing, developing, and revising what their own conception of the good would be. Further, they are not capable of developing their own conception of the good. Even though they cannot express their own conception of the good, others can still identify what would likely be good for them. Thus, in their case paternalistic intervention is required and is appropriate. Patricia and Selina have basic rights, including a right to life, which extends to all persons based in the appropriate application of paternalism, and without such interventions, they would die; and other citizens have correlative duties based on these rights.

Although all people have basic rights in cases represented by Patricia and Selina, they cannot express a claim to this right because of their biological limitations. Thus, an appropriate application of paternalism works as a guarantee of this particular right-

\textsuperscript{47} The discussed cases in chapter 2 where the absence of reason in both adults and children and the absence of will in adults and children. Together this represents four different cases.
claim. Without the appropriate paternalistic intervention Patricia and Selina would be unable to protect their right to life. Their deaths are preventable with proper medical and community support. For Patricia, she can be provided clean linens, proper nutrition and other necessary amenities for her biological functioning. In Selina’s case, the auditory and visual hallucinations are so overpowering that she cannot distinguish between them and reality. In this case, she does not need to be restrained constantly, but rather placed in an environment where she can still retain limited freedom of movement. Within this environment she receives proper medical attention when needed. Without this medical and community support Selina would likely die unnecessarily.

As we saw in 2.1, the limited use of paternalism at the later stages of justice can apply when there is “evident failure” of reason and will or (2) “absence of will and reason” (A Theory of Justice, (1999), p. 219-220). Paternalism can appropriately be applied to Patricia and Selina without violating the ability to choose their own conception of the good. In their case, their own conception of the good cannot be overridden because they do not have the ability to develop or express it. And since that is the case, citizens who

48 In the case of Patricia and Selina, they would both be dependent other agents for their own well-being. Unless Patricia has some type of advanced directive which specifies what should be done with her body while she is in this state, paternalistic intervention is required. As for Selina, I argue that her situation would be analogous. Unless Selina had some type of advanced directive wherein certain treatments were expressly forbidden by Selina, she would also fall under a paternalistic purview. In these two ways, the case of Selina and Patricia are similar to the cases of temporary illnesses. The major difference between the examples of temporary illness and the cases of Selina and Patricia is that it is highly unlikely that either Selina or Patricia will ever leave these mental and physical states.

49 For example, as discussed in Bradford, Daniel W., et al. “A Cohort Study of Mortality in Individuals With and Without Schizophrenia After Diagnosis of Lung Cancer”, persons with schizophrenia have poor health outcomes (The Journal of Clinical Psychiatry 77.12 (2016): e1626-e1630).

50 Except of course if Patricia has an advanced directive.
had the responsibility to protect the interests of individuals with temporary illnesses through the appropriate application of paternalism also have this obligation to non-reciprocating persons.

I argued that the paternalism is compatible with justice as fairness because it assists individuals in developing their two moral powers. If paternalism can be applied in cases of temporary illness, then I argue that it can be applied in cases of illness where recovery of the two moral powers is not possible. An appropriate use of paternalism in the Rawlsian sense is that it is not used to overrule another rational individual’s reasonable conception of the good. In Patricia’s and Selina’s case, they cannot have their conception of the good overruled. They can, however, have their basic interests protected through the care of others. These interests are connected to what Rawls calls an individuals’ ‘more permanent aims and preferences’. These interests are those preferences that all persons would like to have respected. These may include access to housing, clean water, physical safety, and primary physical and mental health care. Thus, I argue that an extension of paternalism to the case of non-reciprocating persons is grounded in the appropriate application of paternalism to the case of temporary illness.

Many critics of Rawls claim that either justice as fairness is incapable of taking non-reciprocating persons into account, or if it does his account is insufficient. If critics reject the idea that paternalism can be extended to individuals with permanent illnesses as in the case of non-reciprocating persons, then it suggests that there is a relevant moral or political difference between those with temporary illnesses and permanent illnesses. I argue that there is not. Cases like Patricia and Selina are included under the
appropriate application of paternalism which is compatible with the two principles of justice. Citizens in the Rawlsian technical sense would undermine their duties and responsibilities in a just society if they ignored cases like Patricia and Selina. Holding the position that there is a moral or political difference between the two would, I argue, undermine the view of the critics who claim that justice as fairness is either insufficient or not applicable to non-reciprocating persons. It would undermine the view of the critics because these critics want to include cases of physical and mental impairments, and they want to avoid arbitrarily excluding persons from society based on their physical and mental capacities. A major component of their critique of Rawls is that Rawls excludes individuals who do not meet the two criteria of moral personhood either intentionally or non-intentionally. However, their critique may not be as damaging as they assume. Justice as fairness includes the two principles of justice but it is also compatible with and requires other supporting principles such as an appropriate application of paternalism.

In Patricia’s case, paternalism seems to apply clearly. She at one time had the capacity to develop her two moral powers but lost it. Any of her interests, such as those that she might express in a living will or an advanced directive, ought to be respected when possible. In the case of Selina, it may be more difficult to ascertain what her interests are. This, of course, does not imply that Selina has no interests. She is just unable to express, to understand, to reflect on, to revise or to pursue what those interests may be. It may be more difficult to know what her rational life plan would have been.
Many neurological diseases develop slowly. As such, her capacities to develop her talents as an artist could fade as the disease itself becomes more intense. And even though as a child Selina may have shown a strong affinity towards drawing, once her disease is at its strongest, she can no longer develop these talents. Due to the stage of her illness as an adult, she cannot clearly exercise her higher-order desires to draw, even though this talent and passion still remains. She also has interests in terms of her overall well-being, i.e. not to be in pain and to have proper nutrition.

**Non-reciprocating persons and the four-stage sequence**

The second way in which non-reciprocating persons could be interpreted as being a part of Rawls’s theory is in his discussion of the four-stage sequence. The purpose of the four-stage sequence according to Rawls is to “clarif[y] how the principles for institutions are to be applied” (*A Theory of Justice*, p. 171). Its purpose is to “give us a schema for sorting out the complications that must be faced” (p. 172) when inevitable conflicts concerning the application of the two principles of justice to institutions arise. The first stage of this schema is the original position, in which the principles of justice are agreed to by the hypothetical parties (p. 172). The second stage allows for some specific information about their society to be known, such as its “level of economic advance[ment] and political culture” (p. 173). This is the constitutional stage at which the principles chosen in the original position are applied to determine a political constitution. The third stage is the legislative stage whereby “laws and policies” (p. 174) are determined. The last stage is the judicial or administrative stage where the veil of ignorance has been completely lifted and the laws and policies are applied to particular cases.
Rawls uses the same structure of the four-stage sequence in *Political Liberalism* in his discussion of persons who are not capable of fully developing their two moral powers as briefly discussed in Chapter 2. Rawls states that those individuals who are not capable of fully developing their capacity for the two moral powers “can be dealt with, I believe, at the legislative stage when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure” (*Political Liberalism*, p. 184). However, Rawls does not pursue this possibility and instead he returns to the idea of using the legislative stage to “restore people by health care so that once again they are fully cooperating members of society” (p. 184). In the case of non-reciprocating persons, it is not clear how the legislative stage can help because there is no chance of recovery.

**Daniels, paternalism and non-reciprocating persons**

Daniels’s use of paternalism provides even less guidance in terms of assisting those persons who are non-reciprocating persons than Rawls. Daniels does not focus on the permissibility of paternalistic intervention of individuals who have severe illnesses. Instead, Daniels’s discussion of paternalism highlights the regulation of autonomy of individuals who are near or above the line of normal functioning.51

51 Daniels states (p. 17) “in the acute-care context, there has been much discussion about this conflict [“when protecting health interferes in unjustifiable ways with individual liberty”], and there is an extensive literature on paternalism and informed consent[...] however special health care is, it cannot be allowed to interfere with individual liberty or opportunity” (*Just Health Care*, p. 17).
In chapter 7 and 8 of *Just Health Care*, Daniels closely examines the application of the principle of fair equality of opportunity on preventative health care in specific institutional settings. Within this discussion, he provides some discussion on the role of paternalism and preventative care. He focuses on the role of paternalism and its extension of Occupational Safety and Health (OSHA) regulations in the American workplace. He justifies this narrow focus because it is one of the few examples where the principle of fair equality of opportunity is “actual regulation and not just education” (*Just Health Care*, p. 142). Unfortunately, for our discussion of non-reciprocating persons, this is Daniels’s most developed discussion on paternalism. The most developed account of paternalism for Daniels focuses on preventing paternalism from unfairly limiting liberty or opportunity (*Just Health Care*, p. 17, p. 156-159), but this focus is on the group of individuals who are already active members of the work force.

Some policy makers and employers may have been concerned that OSHA regulations are paternalistic and therefore would interfere with workers’ autonomy. Daniels addresses the concern regarding an unfair restriction of autonomy by stating that “if unregulated worker ‘choices’ about risk-taking must fail, or generally do fail, to be informed, competent, or truly voluntary, then we are not compromising autonomy by intervening” (*Just Health Care*, p. 159). In this case, paternalism is only to be applied to individuals who are functioning above the line of normal functioning. Thus, in this case, it is not clear how individuals who are never capable of reciprocating would fall under the role of paternalism.
In the other cases where paternalism could apply, Daniels does not offer as much analysis. The cases where non-reciprocating persons are represented in Daniels’s theory is in the fourth layer of health care institutions (Just Health Care, p. 48). I previously discussed the four layers of health care institutions in chapter 2 in regards to the natural variations of abilities of citizens. Briefly these four layers of health care institutions are: preventative health care institutions, non-preventative health care institutions, institutional support for ‘moderate chronically ill and disabled and the frail elderly’ and “terminal care and care for the seriously mentally and physically disabled” (p. 48, Just Health Care).

Daniels’s discussion of paternalism in regards to individuals who are close to the line of normal functioning is clear. The principle of fair equality of opportunity works in conjunction with paternalism to raise individuals to the level of normal functioning. In this way, they are able to develop, to pursue, and to revise their own conception of the good. Such as in the case of the enforcement of OSHA regulations that make the workplace safer by regulating the risks and harms employees could experience. However, for cases where individuals cannot develop their two moral powers, such as the case of non-reciprocating persons, they would have to depend on either the application of paternalism or as Daniels suggests in Just Health Care “by the time we get to the fourth layer [of health care institutions] moral virtues other than justice become more prominent” (p. 48). The other virtue that Daniels suggests here is that of beneficence. However, the way in which beneficence extends to non-reciprocating persons is not developed by Daniels.
Conclusion for 3.1
In 3.1, I argued for the extension of the appropriate application of paternalism to non-reciprocating persons. I argued in the case of Rawls, non-reciprocating persons can be taken into account within the later stages of the four-stage sequence. In the case of Daniels, non-reciprocating persons are not adequately addressed. However, Rawls’s account can sufficiently include non-reciprocating persons. What I mean by this is that non-reciprocating persons who by the definition of the term lack the capacity to develop the two moral powers are in one sense excluded from a Rawlsian account of justice. They do not meet the sufficient criteria for moral personality. However, non-reciprocating persons are still persons, and as such are owed certain protections under appropriate applications of paternalism and the development of the four-stage sequence. In the case of Selina and Patricia, they will never develop their two moral powers. And as such, it is unlikely that paternalism when applied to protect their interests, such as clean water, food and shelter, would be violated. As I have argued, Rawls’s account can include non-reciprocating persons primarily under the appropriate application of paternalism. I contend that including non-reciprocating persons under Rawls’s legislative stage alone is not sufficient.

Even with my defense, the role of paternalism for non-reciprocating persons would likely be met by criticism from philosophers who doubt that other principles can work jointly with justice as fairness. To these critics, those who are non-reciprocating due to severe permanent physical and mental disabilities seem to fall outside of the scope of justice for Rawls and Daniels. At the center of their critique is the place of non-
reciprocating persons within a conception of justice. To address these concerns, I will raise two questions concerning the role of reciprocity.

3.2 Two questions concerning reciprocity
I began chapter 3 with the two following questions. The first question asks: is Rawls’s conception of reciprocity too narrow? The second asks a broader question: is Rawls’s concept of justice flawed because the concept of reciprocity itself does not belong in a theory of social justice?

Many theorists who critique Rawls’s position on reciprocity argue in some way that reciprocity itself – and not only his particular conception of reciprocity - is too narrow because it excludes certain individuals from the scope of justice. The general narrowness objection raised against Rawls is that Rawls’s conception of reciprocity is too weak because the contractual obligations which arise from justice as fairness cannot include non-reciprocating persons. One theorist who defends this type of narrowness objection is G.A. Cohen.

Cohen’s narrowness objection is relevant for two reasons. First, it represents a general misunderstanding regarding reciprocity and the role of cooperation for Rawls. Second, this type of narrowness objection, I argue, serves as the basis of further critiques of Rawls which are mistaken due to the reliance on Cohen’s narrowness objection. The narrowness objection defended by Cohen serves as the basis for Martha Nussbaum’s own objection.
Cohen’s background assumptions

In Cohen’s book, *Self-ownership, Freedom and Equality*, Cohen’s observations about the role of reciprocity are made against the background assumptions of his own example of the decision-making possibilities of two hypothetical actors. Cohen provides the example of two hypothetical persons ‘Able’ and ‘Infirm’. Their natural attributes follow from their descriptive names.

Cohen claims that within Rawls’s theory, Rawls does not outline what is to be done “about radically unproductive people who make no contribution to the social product” (p. 225). Since Infirm is physically incapable of producing anything which would help keep both persons alive, Able does not directly owe anything to him. In other words, since Infirm cannot enter into reciprocal relations with Able, then Infirm does not have an adequate claim to the social resources. Importantly, what Cohen means by entering into reciprocal relations, is that both individuals have to contribute to the overall production of goods in order to have a claim to it. I will call this the contribution variant, following Allan Buchanan’s discussion. What is important to point out in this example is that Cohen works under the assumption that both ‘Able’ and ‘Infirm’ are rational. And in these cases, Cohen thinks that since ‘Infirm’ is unable to physically produce anything, he is seen as a ‘radically unproductive person’.

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In Rawls’s view, the difference principle is meant to be applied to institutions and not individual interactions between citizens. Rawls states that viewing the difference principle as focused on “private transactions is based on a misunderstanding” (Political Liberalism, p. 283). The role that reciprocity has with Rawls’s understanding of the difference principle is not one where one individual citizen is responsible for giving part of her social primary goods to another citizen. Instead, when Rawls identifies the “reasonable” aspect of social cooperation, he argues that “all who cooperate must benefit, or share in common burdens” (Political Liberalism, p. 300). When citizens have agreed to what the fair rules of cooperation will be, all cooperative citizens indirectly share the burdens and benefits.

**Cohen’s critique of Rawls**

Although Rawls argues that the difference principle is meant to apply to institutions, Cohen rejects this limitation. Contrary to Rawls’s own depiction of the difference principle, Cohen views the difference principle as focused on the redistribution of the products of shared cooperation which he refers to as ‘co-operative surplus’. Further,

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53 The difference principle “apply[s] to the main public principles and policies that regulate social and economic inequalities. They are used to adjust the system of entitlements and earnings and to balance the familiar everyday standards and precepts which this system employs. The difference principle holds, for example, for income and property taxation, for fiscal and economic policy. It applies to the announced system of public law and statutes and not to particular transactions or distributions, nor to the decisions of individuals and associations, but rather to the institutional background against which these transactions and decisions take place” (Political Liberalism, p. 282-3).

54 “Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison” (Political Liberalism, p. 300).

55 This is David Gauthier’s term for the share products of social cooperation. Rawls does not refer to these shared products of social cooperation in this way.
Cohen views this redistribution of the shared products of cooperation such as redistributive taxation as other-assisting (p. 223) and thus is objectionable because it violates Cohen’s principle of self-ownership. Cohen replies to this objection by claiming that the Rawlsian sense of reciprocity is too weak. Cohen argues\(^{56}\) that Rawls’s notion of reciprocity is weak partially because Rawlsian reciprocity is generated by hypothetical actors in the original position. Cohen suggests that we ought to conclude that Rawlsian reciprocity is “arbitrarily weak” because “in order to determine whether he is a net beneficiary of social interaction, we are to consider only what he would get in the autarkic alternative in which he withdraws completely from society” (p. 225). The criterion of reciprocity is weak according to Cohen because it does not allow for “coalition withdrawal” (p. 225), i.e. to end our agreements with another party and possibly form new coalitions with other parties. In other words, in Cohen’s view the idea of reciprocity generated behind the veil of ignorance is “arbitrarily weak” (p. 225) because it restricts redistribution of ‘the social product’ in Cohen’s terms via the difference principle. If instead, Cohen argues we used another notion of reciprocity

\(^{56}\) The quote from Cohen which focuses on reciprocity states that: “one can show, secondly, that either Rawls’s criterion for reciprocal benefit is too weak or his principles apply only to societies very different in composition from our own. Which of these unwelcome consequences we confront depends on whether, in comparing what an individual can obtain through social interaction to what he can get without it, in order to determine whether he is a net beneficiary of social interaction, we are to consider only what he would get in the autarkic alternative in which he withdraws completely from society; or, alternatively, and more appropriately, we are to consider the rewards he would get in all the possible withdrawing coalitions (all members of which would benefit from withdrawal) in which he would be a member. The former criterion of reciprocal benefit is arbitrarily weak. The most talented individual in society might benefit even from a flatly equal distribution of the social product, relative to what he can produce entirely on his own, but he is nevertheless likely to get much more than what the difference principle gives him if he withdraws with a suitable set of other talented individuals. If, however, the criterion of reciprocal benefit is strengthened to allow for such coalition withdrawal, then reciprocal benefit will be consistent with the difference principle only in societies strikingly unlike the sort Rawls would want his theory to cover [...]” (p. 225, my emphasis).
which allowed actors to perform ‘coalition withdrawals’, then both the conception of reciprocity would be stronger and individuals would not have their principle of self-ownership violated.

And so in Cohen’s view, Rawls’s view of reciprocity seems to be too weak. In other words, Cohen imagines that if those cooperators thought that they would have a greater share of the common good by not entering into this society, then Cohen suggests that they may not want to contribute and share in the common burdens associated with another society. For Cohen to make this comparison, he makes an assumption that Rawls does not make. Cohen assumes that he can compare the share of social goods cooperators may have outside of society as opposed to being within society.

To return to the example of ‘Able’ and ‘Infirm’, Cohen’s interpretation of Rawls’s criterion of reciprocity would be too weak to uphold their reciprocal relations. If ‘Infirm’ is unable to add to the co-operative surplus in any physical and meaningful way, then the requirements of reciprocity cannot be met through their interaction. And if Infirm attempted to force Able to stay, then this would be a violation of the criterion of reciprocity according to Cohen. By returning to Cohen’s background assumptions, I am drawing attention to the basis for Cohen’s understanding of reciprocity, i.e. as requiring some type of coalition withdrawals which views the difference principle as being applied to individuals instead of institutions.
I argue that the mistake that Cohen makes is that his incorrect interpretation of the difference principle leads him to an incorrect understanding of Rawls’s conception of reciprocity. This can be clarified by examining Buchanan’s distinction between two conceptions of the relationship between justice as reciprocity, which he calls justice as self-interested reciprocity and justice as fair reciprocity. Buchanan argues that they both share in the reciprocity thesis: “the claim that only those who do (or at least can) make a contribution to the cooperative surplus have rights to social resources” (p. 230).

The difference between these two views according to Buchanan is that justice as self-interested reciprocity establishes its foundation for justice and morality on “rationality as individual utility-maximization” (p. 229). Whereas justice as fair reciprocity is not focused on individual utility-maximization. Buchanan contrasts these two views, justice as self-interested reciprocity and justice as fair reciprocity, against his own view of justice called subject-centered justice (p. 231). Buchanan views Rawls’s theory as “a Kantian version of what I call subject-centered justice” (fn. 6, p. 230). The core to Buchanan’s notion of subject-centered justice is focused on non-strategic capacities. Non-strategic capacities serve as the grounds for individual’s claims to justice and moral status. Buchanan’s concept of subject-centered justice “focuses upon the needs and nonstrategic capacities of the person and upon our collective ability to help satisfy those needs and develop those capacities, not upon the bargaining power of the individual” (p. 233). So, Cohen’s mistake would be that he attributes a version of the reciprocity thesis described by Buchanan.
Buchanan identifies David Gauthier’s project as *justice as self-interested reciprocity* (p. 229). In Gauthier’s *Morals by Agreement*, he defends a contractarian view of justice whose strategy is to “generate, strictly as rational principles of choice, without introducing moral assumptions...constraints on the pursuit of individual interest or advantage” (p. 6). The goal of morals by agreement is to “validate the conception of morality as a set of rational, impartial constraints on the pursuit of individual interest, not to defend any particular moral code” (p. 6). As a fundamental part of his project, Gauthier wants to begin with a “morally free zone” (p. 13) where moral assumptions are not presupposed. Instead, Gauthier begins with “real” (p. 9) individuals who enter into “voluntary *ex ante* agreement[s] among rational persons” (p. 9). These voluntary agreements are made with individuals who are rational in the sense of being “constrained maximizers” (p. 15). As constrained maximizers, these rational actors enter into co-operative relations with each other with the *ex ante* hopes that by cooperating with other rational agents they will be the recipients of reciprocal benefits (Gauthier, p. 15). These actors are now capable of making “rational claims” to the co-operative surplus.

The identification by Buchanan of Gauthier’s position as “self-interested” determines the motivation of the constrained maximizer who is not likely to cooperate with others if he is unlikely to benefit. Gauthier’s position does allow for the possibility that sometimes other rational actors may not uphold their ends of the bargain but overall, it

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57 According to Gauthier, a rational claim is when “each person must claim the co-operative surplus that affords him maximum utility, except that no person may claim a co-operative surplus if he would not be a participant in the interaction required to provide it” (*Morals by Agreement*, p. 143).
is still better for the constrained maximizer to cooperate (p. 15). What follows from this understanding of the motivation of the constrained maximizer is that if individuals are not capable of contributing to the overall “co-operative surplus”, then they should not benefit by sharing in these resources.

Gauthier is quite clear about the place of individuals who cannot contribute to the cooperative surplus. Gauthier defines cooperative interactions as only those where there are two rational agents who share in similar mental and physical abilities. They may ‘benefit’ each other because their actions are mutually beneficial. For example, if both you and I are roughly the same mental and physical abilities, we can agree to assist each other in the common project of building a house. You may agree to help me build my house based on the assumption of reciprocal benefit – I will help you in the future. However, if you are someone who is physically or mentally incapable of assisting me with this project, then I as a constrained maximizer, do not have adequate motivation to enter into this project with you. In Gauthier’s example, he states that “humans benefit from their interaction with horses, but they do not cooperate with horses and may not benefit them” (p. 17).

Those people who are not capable of cooperation also fall into the same level as horses in Gauthier’s theory. While I myself may benefit from interacting with a person who is physically or mentally “unequal” to me, I cannot cooperate with them. Following along

58 “The co-operative surplus is a set of utility-differences, one for each co-operator, each non-negative in value and equal to the difference between his utility from co-operation and his utility in the initial bargaining position. (The distribution of the co-operative surplus, that is the selection of a particular set of utility-differences constituting such a surplus, is at stake in the bargaining process” (p. 141).
Gauthier’s theory and my previous example of house building, if you physically could not contribute to the house, then I could not cooperate with you. And as a constrained maximizer, I would not see our interaction as mutually beneficial. Those individuals who share in various physical or mental disabilities are “not party to the moral relationships grounded by a contractarian theory” (Gauthier, p. 18). Gauthier can further justify this exclusion of persons with disabilities because his system of morality is derived from being a rational, cooperative agent. His contractarian view precludes certain moral considerations which do not depend on the presence of rationality.

The upshot of explaining Gauthier’s position in light of Buchanan’s distinction is to show that Rawls’s and Gauthier’s positions should not be conflated. According to Rawls reciprocity exists between impartiality and mutual advantage. Rawls states “as understood in justice as fairness, reciprocity is a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world...it is clear from these observations that the idea of reciprocity is not the idea of mutual advantage” (p. 17, my emphasis).

The reciprocity thesis put forward by Buchanan that is operative in Gauthier’s theory is not the same as reciprocity found in Rawls. Buchanan’s identification of the reciprocity thesis is “the claim that only those who do (or at least can) make a contribution to the

59 Gauthier states “animals, the unborn, the congenitally handicapped and defective, fall beyond the pale of a morality tied to mutuality. The disposition to comply with moral constraints [...] may be rationally defended only within the scope of expected benefit” (Morals by Agreement, p. 268).
cooperative surplus have rights to social resources” (p. 230). And here is the contribution variant misattribute that is made to Rawls’s own contractarian view.

**Disability critique of Nussbaum in relation to the contribution variant misattribution**

The narrowness objection defended by Cohen, I argue, also serves as the basis for understanding the “disability critique”60 of Rawls from Martha Nussbaum. In general, I identify the disability critique as one which focuses on the role of dependency for persons with physical or mental impairments. This particular disability critique is centered on the reciprocity thesis. Nussbaum’s disability critique holds that Rawls’s reciprocity account is too narrow because it is focused on the contribution variant. To make the connection between Nussbaum’s disability critique of Rawls’s conception of reciprocity, I will first explain Nussbaum’s critique.

Martha Nussbaum61 claims that Rawls’s principles of justice are not designed for persons with disabilities because they cannot reciprocate (*Frontiers of Justice*, p. 98). She claims there is an inconsistency between social contract theories and the occurrence

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60 Adrienne Ashe in “Disability, Bioethics and Human Rights” in *Handbook of Disability Studies* states:

In virtually every instance of a disability rights critique of bioethics literature or of decision making in bioethics cases, the issue has revolved around the assessment of an author or a court that impairment provides a reason to deny medical intervention or to provide less treatment than would have been the case had there been no impairment (p. 303).

One aspect of the disability critique that I am focused on is where traditional bioethical debates do not clarify the definition of disability, impairment and disease. Asche states “Nor has bioethics suggested that what was unacceptable might not be inherent in quadriplegia, stroke, or a degenerative neurological disorder but instead could result from the social arrangements facing people living with such conditions” (p. 299).

61 It is important to note that Nussbaum does not necessarily disagree with Rawls’s concept of reciprocity. She merely argues that it is limited insofar as its ability to include persons with disabilities (*Frontiers of Justice*, “Rawls and the Unsolved Problems”).
of disability because various social contract theories include “a serious flaw [...] that conceive[s] of basic political principles as the results of a contract for mutual advantage” (*Frontiers of Justice*, p. 98). The type of persons Nussbaum argues that Rawls excludes through “deliberate design” (p. 109) are persons with “the more extreme forms of needs and dependency that human beings may experience, both physical and mental, both permanent and temporary” (*Frontiers of Justice*, p. 109). And as such, Nussbaum’s position supports the view that reciprocity is too narrow because it requires a contribution variant from full and normal cooperating persons only.\(^6^2\) To put Nussbaum’s argument in Buchanan’s terms she views the reciprocity thesis as Rawls’s.\(^6^3\)

I have three responses to Nussbaum’s critique. First, I argue in support of Buchanan’s reading of Rawls’s concept of reciprocity.\(^6^4\) Namely, that Rawls does not use a contribution variant to defend reciprocity. This is made clear by the comparison between Gauthier’s and Rawls’s concepts of reciprocity. Rawls’s view of reciprocity does not depend on a contribution variant whereas Gauthier’s view does.

Second, in response to Nussbaum’s claim that Rawls through deliberate design leaves out persons with temporary illnesses, I argue that this is also incorrect. As I have established in chapter 2, Rawls’s theory can take persons with temporary illnesses into

\(^{6^2}\) Nussbaum states “thus, in effect, people with mental impairments are not among those for whom and in reciprocity with whom society’s basic institutions are structured” (*Frontiers of Justice*, p. 98).

\(^{6^3}\) The narrowness objection defended by Cohen, I argue, also serves as the basis for understanding the “disability critique” of Rawls from Martha Nussbaum.

\(^{6^4}\) Buchanan describes Rawls’s view as ‘subject-centered’. Buchanan views Rawls’s theory as “a Kantian version of what I call subject-centered justice” (fn. 6, p. 230) in “Justice as reciprocity versus subject-centered justice”. *Philosophy & Public Affairs*, 227-252.
account. Her dissatisfaction with Rawls’s account of temporary illness is not that Rawls does not take it into account, but that Rawls takes it into account in the later stages of justice. These are not the same claim.

Nussbaum argues that the “postponement” of persons with dependency issues “makes a large difference to his [Rawls] theory of political distribution” (p. 108) and that “unusual dependency” (Frontiers of Justice, p. 109) is not taken into account. She further claims that “thus, the unusual needs of citizens with impairments and associated disabilities—needs for special education treatment, for the redesign of public space (wheelchair ramps, wheelchair access on buses, tactile signage, and so on) – do not seem to be included at this initial stage, when basic political principles are chosen” (p. 109). In response to this claim, I have argued that including persons with temporary and permanent illnesses through the extension of either the principle of fair equality of opportunity or the appropriate application of paternalism can include these individuals in a way that would not make “large differences” for Rawls. Further, Rawls does acknowledge that the parties in the original position can consider the possibility of temporary impairment. It is not clear why Nussbaum does not think that creating wheelchair ramps or tactile signage is not something that could be taken seriously by

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65 Frontiers of Justice, p. 109.

66 An issue raised in a comment by Jon Mandle questioned why this is supposed to be a problem. I share in this concern. What I think she is saying is that since persons with disabilities are not a part of the initial bargaining in the original position, then resources or opportunities that they may need are not guaranteed by Rawls’s theory. Nussbaum thinks that non-inclusion of persons with various disabilities in the original position leads to “large differences” in “political distributions”, Frontiers of Justice, p. 109. I disagree with her.

67 Rawls discusses this in his section on paternalism.
full and normal cooperative agents. Regardless of her description of Rawls here, I have made the case for non-reciprocating persons in Rawls’s theory that does not depend upon any significant changes to the bargaining positions of the hypothetical actors.68

Buchanan resolves this misunderstanding of reciprocity by arguing that Rawls’s theory itself does not fit into either justice as self-interested reciprocity or justice as fair reciprocity, but instead is a Kantian variant of Buchanan’s category of subject-centered justice (p. 230). The core to Buchanan’s notion subject-centered justice focuses on non-strategic capacities. Non-strategic capacities serve as the grounds for individual’s claims to justice and moral status. Instead of identifying the capacity of individuals to contribute as the basis for justice, Buchanan focuses on different features. Buchanan identifies a strength of his view is that justice does not depend on “the ability to harm or to contribute” (p. 230, fn. 4).

Buchanan has correctly identified that Rawls’s theory does not depend on Gauthier’s interpretation of reciprocity. Buchanan also correctly identifies the complexity of Rawls’s understanding of the relationship between equality, moral status and fairness when he states (p. 234) that

The first framework [that supports fundamental equality of persons] operates with a very broad conception of fairness—the notion of fairness to persons as such—according to which treating persons as such fairly requires redressing, within limits, those morally arbitrary disadvantages that significantly impede their flourishing. This framework accepts the thesis that basic entitlements to social resources are grounded in fairness and in fairness alone, but rejects the claim that fairness is only fairness among contributors.

68 In other words, the hypothetical actors also consider the appropriate application of paternalism in cases of temporary illness. One may require the use of a wheelchair, and thus require wheelchair cut-outs in the sidewalk if they have a temporary impairment like a broken leg.
Buchanan’s description above is how he views Rawls’s position. Buchanan rejects the necessity of the contribution variant as connected to the idea of equality of persons and reciprocity. Buchanan identifies how critics of Rawls could confuse the connection between fairness and contract bargaining which only rewards those individuals who can directly contribute.

Rawls’s conception of reciprocity depends on the idea of a mutual scheme of cooperation. One primary component of cooperation is the capacity to develop and act on the two moral powers. For persons capable of cooperation, they must have and develop these two powers. However, since Rawls’s idea of a mutual scheme of cooperation does not depend on the contribution variant for reciprocity, it is possible for social cooperation to include the application of principles of paternalism as discussed in Chapter 2 to non-reciprocating persons. And in this way, Rawlsian justice as I have defended it can include those individuals who are within the category of non-reciprocating persons. Lacking the sufficient criteria of moral personality does not mean that non-reciprocating persons are excluded from consideration. Individuals who are non-reciprocating persons still benefit from the application of the principles of justice to the basic structure in a well-ordered society, even if they themselves cannot develop their two moral powers. Such as in the case of non-reciprocating persons where neither Patricia nor Selina can reciprocate, persons in a well-ordered society may be able to, and because of that we can ensure that appropriate extensions of paternalism apply to cases of non-reciprocating persons. Under reciprocity which uses the reciprocity thesis, the interests, like not being in pain, of Patricia or Selina, would not be taken as serious considerations by individuals who do have their two moral powers. Cohen’s view on
reciprocity would also exclude Patricia and Selina when we consider his own thought experiment of Able and Infirm.

The idea that non-reciprocating persons are not completely excluded from a Rawlsian conception of justice is contrary to Nussbaum’s disability critique which claims that reciprocity, and thus fairness is only among physical and mental equals (Frontiers of Justice, p. 31). The key to my defense is that these individuals are still persons even though they may not be capable of direct bargaining for goods. In the case of individuals who have lost the ability to be in reciprocal relations this case is a little clearer. They may be able to design or request some type of advanced directive which states what they wish to be done with their body and belongings. While some may argue that they are no longer a person at a certain point, I am maintaining that their (social) conception of the self still stands. The request that their body be treated in a certain way and as cooperative agents in society we ought to respect it.\textsuperscript{69} Persons who have the ability to uphold other reasonable conceptions of the good should uphold documents like an advanced directive in a way which satisfies the criterion of reciprocity.

\textsuperscript{69} This, I argue, is a part of Rawls’s conception of reciprocity. Full and normally functioning citizens have developed the two moral powers, and who can develop, revise and form their own conception of the good. For these citizens to act like the types of citizens Rawls has in mind, as cooperating in a system of fair cooperation and meeting the criterion of reciprocity, they must act on Rawls’s criterion of reciprocity. That is, they consider non-reciprocating persons in their considerations of the two principles of justice. Because of Rawls’s criterion of reciprocity, we treat non-reciprocating agents in this way. With other accounts of reciprocity, non-reciprocating agents would be treated in worse ways, such as in the case of Gauthier or Cohen. On the other hand, Nussbaum’s assumption of the reciprocity thesis in Rawls, she assumes that non-reciprocating persons have no place in Rawls’s theory because they are not a part of the initial bargaining position. But she is wrong insofar as persons who are non-reciprocating do have a place in Rawls’s theory.
However, in the case of individuals who have never developed their two moral powers, they cannot make the claim that they have certain interests that ought to be protected by the fact that they are a person who is a part of our society. However, what Rawls can say about these individuals is related to what Rawls has to say in his argument for paternalism and fair equality of opportunity. Even though we cannot clearly establish what their interests are, there are a certain set of interests that we as citizens can imagine that they would like protected. And, as citizens in a mutual scheme of cooperation we have certain obligations to protect these interests.

**Second narrowness question**
The first narrowness objection was addressed in detail by taking on what I think is one of the strongest objections against Rawls: Cohen’s claim.

The second narrowness question asks whether or not reciprocity has any role in a theory of social justice. This broader question is in some ways too large to answer in the scope of this chapter. However, a claim that I can make is that of the theorists that I have covered, reciprocity does play an important role. The dispute between Rawls, Gauthier, Cohen, and Nussbaum involves the scope of what reciprocity includes.

**Conclusion for Chapter 3**
In section 3.1, I identified two types of individuals who cannot develop their two moral powers. The first case was of Patricia who lived in a persistent vegetative state, and Selina with an extreme case of schizophrenia. I used these two cases to identify the role of non-reciprocating persons.
In section 3.1.2, I argued that there may be other criteria which exist that allow for non-reciprocating persons to have rights other than Rawls’s criteria for the capacity to develop the two moral powers. Based on the possibility of this other criteria, I argued that non-reciprocating individuals are deserving of rights and are owed duties by citizens. In 3.1.3, I argue that these duties and rights cannot be extended through the principle of fair equality of opportunity because these non-reciprocating persons cannot develop their two moral powers. In 3.1.4, I argued that the grounds for the rights and duties in 3.1.2 are based in the appropriate application of paternalism. By appropriate, I am identifying a type of paternalism that is compatible with Rawls’s conception of justice. This appropriate use of paternalism does not allow the basic interests of non-reciprocating persons, such as the right to safe and clean housing, to be violated for the benefit of full and normal cooperating citizens.

The basis for these rights and duties are rooted in the fact that both citizens and non-reciprocating individuals are still persons. As non-reciprocating persons they are still recipients of rights and be owed duties even though they do not meet the sufficient criteria provided by Rawls for the two moral powers.

In section 3.2, I addressed two framing questions regarding the narrowness of Rawls’s conception of reciprocity. Critics of Rawls view his conception of reciprocity as flawed because it supposedly excludes non-reciprocating persons. To respond to this critique, I addressed the narrowness objection of G.A. Cohen. I rejected Cohen’s view of Rawls’s conception of the difference principle which has lead Cohen to a misunderstanding of Rawls’s conception of reciprocity. Following from this observation, I also showed that
Cohen’s view of Rawls’s conception of reciprocity depended on a contribution variant of reciprocity. I connected this contribution variant to the reciprocity thesis, a term from Allan Buchanan, to Martha Nussbaum’s critique of Rawls’s conception of reciprocity. Next, I connected my observation from 3.1, namely that there are other criteria which exist that can be the basis for rights and duties owed to non-reciprocating persons which do not depend upon the two moral powers. To accept my claim from 3.1 that non-reciprocating persons can be the recipients of rights and duties in a way that is compatible with Rawls’s conception of justice, I rejected the contribution variant interpretation of reciprocity.

Other cases of reciprocation not yet taken into account
There still exists another group of individuals who represent an unacknowledged group within discussions of justice. There are individuals who fail to meet the criteria for the two moral powers and yet they are not non-reciprocating persons. Instead, these individuals are ones who constantly fluctuate above and below the line of normal functioning. I argue that these individuals who may be too constrained by the limits of Rawlsian and Daniels’s concept of paternalism. What may be owed to them in terms of justice is different because they will never reach the level of normal functioning and yet paternalism might not be enough to protect their fair equality of opportunity. As I will explore in Chapter 4, individuals with disabilities who are not non-reciprocating individuals may have their range of normal opportunity limited unfairly by a connection between normal opportunity and paternalistic medical intervention. The problem to be addressed in chapter four is whether or not a Rawlsian conception of justice can include these individuals.
To clarify this, imagine Mary who has a mild form of schizophrenia that is sometimes controllable with medication. She has the desire to work and be an active member of society, even if this is on a part-time basis. She may even be entitled to some additional social resources, such as medical disability care to help treat this impairment. However, her ability to enter the work force is hindered by her impairment. Even though she is not a violent person, many employers assume that she is and are afraid to hire her.

Questions that I will raise in chapter 4 are whether or not the extension of Rawlsian paternalism, the later stages of justice, Daniels’s extension of fair equality of opportunity, or Daniels’s discussion of paternalism can appropriately handle situations like Mary’s.

In the real world cases of individuals with severe and persistent mental impairments who have a desire to work, they may have their basic medical care needs met. Many individuals who have a desire to work but cannot find employment are on Social Security Disability Insurance. Under this coverage, individuals can have access to some medications and therapy. However, I will argue in chapter 4 that even if basic health care needs are met, via either the legislative stage from Rawls, or the third layer of health care institutions from Daniels, this group of individuals is still not being provided what I argue they may be owed in terms of justice. My preliminary answer to what I think individuals like Mary are owed in terms of justice is to develop their own conception of the good as much as possible, within reasonable bounds, without fear of other citizens or social institutions. Chapter 4 seeks to resolve whether or not
paternalism, the legislative stage of the four-stage sequence, and the third layer of health care are satisfactory.

Chapter 4
Under the Rawlsian conception of the role of reciprocity between citizens, those individuals with disabilities have either to be raised to the level of normal functioning or treated as individuals with severe disabilities who are dependent on others. However, there is an important group of individuals who have the capacity to exercise their two moral powers in a more limited but important way. Neither Rawls nor Daniels provides a clear account of persons who belong to the group which fluctuate above and below the line of normal functioning.

I will argue in this chapter that a group of individuals who may have initially been thought to be excluded from Rawls’s conception of justice do not have to be. Initially, I will argue that neither Rawls’s nor Daniels’s account can adequately answer the problem of persons who fluctuate above and below the line of normal functioning as they stand. Rawls’s inattention to this group of individuals is due to the two idealizing assumptions that he makes in his project. The first assumption concerns working out the principles of justice that “characterize a well-ordered society under favorable circumstances” (A Theory of Justice, p. 215). The second idealizing assumption pertains to the model of the person, i.e. for whom the principles of justice are designed. I have focused primarily on this second idealizing assumption. As Rawls’s work stands, this second idealizing assumption does not directly discuss or include persons who fluctuate above or below
the line of normal functioning. On the other hand, Daniels addresses the idea of
disability more directly than Rawls in *Just Health Care* and *Just Health*.

In Daniels’s discussion of the model of the person, he introduces the role of species-
typical functioning. It is important to note that Daniels himself does not use the phrase
*model of the person*; I use this phrase to describe the biological account of the person
used to achieve species-typical functioning as well as the assumption of functioning as
being value-neutral. Below, I will argue that Daniels’s model of the person is too narrow
to include fluctuating-reciprocating persons. Further, I will argue that using Daniels’s
model of the person creates circumstances under which the creation of policies that
unfairly exclude fluctuating-reciprocating persons are possible. The form of exclusion
that ultimately becomes a barrier to the protection of the extension of fair equality of
opportunity is stigma. Further, stigma as a form of discrimination not only prevents the
protection of opportunity, but also undermines the exercise of Rawlsian basic liberties.

However, the principle of fair equality of opportunity does not focus on the exercise of
these basic liberties, and so Daniels’s account misses these important considerations. I
will raise a separate concern regarding the connection between stigma and its role in
limiting the exercise of basic liberties. Once stigma has been accounted for, I will argue
in favor of an extension of a Rawlsian type position.

To overcome the omission by Rawls, and limited understanding of disability with
Daniels, in section 1, I will identify the conceptual problem individuals in this
fluctuating group face. In section 2, I will introduce a definition of stigma and assess the
way in which Rawls and Daniels’s accounts are limited. In section 3, I will offer my own
account of ways in which individuals who fluctuate above and below the line of normal functioning can be included under the scope of Rawlsian justice. Ultimately, in this section, I will address what is owed to these individuals in terms of justice. The primary question for chapter four is: is Rawls’s conception of reciprocity too narrow to consider individuals who constantly fluctuate above and below the line of normal functioning?

4.1
4.1.1 Three categories of disability

In this section, I will examine three cases of disability. Each case requires a different type of medical or social intervention and thus each case represents a different category of disability.

**Case 1: Physical Disability**
The first case of disability concerns those individuals who may have limitations concerning their physical movements. In my example, imagine a woman who does not have the ability to walk. Instead, she uses a wheelchair for her primary mode of transportation. Other than requiring the use of ramps, elevators, and a workspace that is accessible to her, she can function without being fully physically dependent on another person.

**Case 2: Intellectual Developmental Disability**
In case two, the woman with a disability cannot care for herself in almost any capacity and depends on caretakers for basic needs to be met. The occurrence of this intellectual developmental disability does not allow her to function on her own. She can recognize some family members and is able to recognize and express whether or not she is in pain. Other times she is unsure of her surroundings. She may not be able to work or clearly
express her needs and desires. In other words, she is not capable of being a full cooperating citizen because of her cognitive state. Her case is severe in the sense that “extensive and daily support”\textsuperscript{70} is required for her continued existence.

**Case 3: Intellectual Disabilities, Fluctuating Case**
Case 3 involves a woman who has a mild form of schizophrenia named Mary.\textsuperscript{71} This woman suffered her first psychotic episode in her early 20s. She has the positive symptoms\textsuperscript{72} that include hallucinations and thought disorders. When her health care team, which may include physicians, social workers, family members, or members of the community are not managing her illness, these symptoms prevent her from functioning well in society. However, with some medication, talk therapy, and community support, she can suppress many of these hallucinations. She has the desire to enter the workforce; however, she has not been able to find a job. She has many gaps within her employment history due to times when she could not manage her illness well. However, she does not remain in this passive state for long.

\textsuperscript{70} There is a very large range of what is included as an intellectual disability. For the DSM-IV, intellectually disability was measured in ranged of IQ: 69-50 as mild, 49-36 as moderate, 35-20 as severe and less than 20 as profound. **Now intellectual disability is measured by ability to function:** **mild is ability to live independently, moderate is limited daily support needed, severe is extensive daily support and profound is assistance with every aspect**\textsuperscript{(my emphasis)}. (Information taken from Table 9-1 “Classifications of Intellectual Disability Severity” in Committee to Evaluate the Supplemental Security Income Disability Program for Children with Mental Disorders; Board on the Health of Select Populations; Board on Children, Youth, and Families; Institute of Medicine; Division of Behavioral and Social Sciences and Education; The National Academies of Sciences, Engineering, and Medicine; Boat TF, Wu JT, editors. Washington (DC): National Academies Press (US); 2015 Oct 28).

\textsuperscript{71} I mentioned Mary at the end of Chapter 3 as a milder case of schizophrenia in comparison to Selina.

\textsuperscript{72} As discussed in chapter 3, section 1.
Discussion of the three cases
As a central concern of the previous chapters of my dissertation, I have considered in what ways persons with varying degrees of disability can be a part of society and what this means for their just treatment. I have answered this question in chapters 2 and 3 regarding two of these cases.

In Chapter 2, I identified the cases of Anna and Bridget, who with medical or social intervention could be restored to their relevant level of biological and social functioning. In Anna’s case, removal of her benign brain tumor allowed her to continue her work as a doctor. And in Bridget’s case, she was able to continue her work with enlarged type face and brighter lighting as a social intervention which was required for her to be able to read due to her low-vision. In Chapter 3, I identified the cases of Patricia and Selina who were non-reciprocating persons. Due to the limits in their biological functioning, they were unable to express their own desires and interests, and thus paternalism ought to be extended to these individuals.

Case one of chapter 4, Physical Disability, represents the case of individuals who can be raised to the level of fully cooperating citizens if their health care needs can be met through an application of the principle of fair equality of opportunity to institutions. This would be applied to both Anna and Bridget. In case two of this chapter, Intellectual Developmental Disability, the model of non-reciprocating persons represents these individuals. She would require the appropriate application of paternalism. However, in case 3, Intellectual Disabilities, Fluctuating Reciprocity, I argue, cannot be considered in the same way as case 2. Considering these two cases, case 2 and case 3 as the same
would place unfair constraints on the interests of the woman in case 3. In other words, case 3 should not be treated as a non-reciprocating person. To clarify, the definition of interests that I am using is the one defined in chapter 1 as an individual’s more permanent aims and preferences.

4.1.2 Full cooperation, reciprocity, and the two moral powers
Case 1 identifies an individual with the physical disability who requires the use of a wheelchair for mobility. Even though she has a physical impairment,\(^{73}\) she can still act as a full and normal citizen. First, she has a determinate conception of the good which she has chosen. She also has the capacity to develop a conception of the good, which means that she can reflect on, adjust, and choose other goals to develop as she adjusts her determinate conception of the good. Importantly, her impairment does not prevent her from sharing her own determinate conception of the good with other citizens. Further, she can act on the second moral power by developing a sense of justice. In other words, she can act both rationally and reasonably in the Rawlsian technical sense.

Reasonable accommodations for the woman who uses a wheelchair or Bridget’s low-vision allow these individuals to perform certain roles as citizens. One role would be entering the labor market. Another important role would be voting. Individuals who fall under similar cases as these and have a desire to work can clearly identify why these types of accommodations are required as requirements of justice. For example, we can

\(^{73}\) Michael Oliver importantly identifies a distinction between impairment and disability which I will discuss in section 4.1.3.
Imagine in Bridget’s case, she would like to vote but cannot read the ballot because the font size is too small. Experiencing low-vision is not a legitimate reason to make voting inaccessible. It is the obligation of public institutions to ensure that Bridget can vote if she chooses to do so – either by making the ballot available prior to voting so that she could have someone read it to her or use some form of technology to enlarge the size of the font. Similar extensions could be made for persons who require wheelchairs for mobility. If ramp access is provided at her local voting booth, she could cast her vote. It would be unjust to deny her access to a polling place only because she uses a wheelchair for mobility, or in Bridget’s case only because she would require larger typeface. This type of exclusion would be akin to other forms of unjust discrimination such as racism or sexism. Restricting her ability to vote, either because she does not have a wheelchair or because she does not have access to a wheelchair ramp, would be a violation of the liberty principle. In her case, public funds would be required to build a ramp so that she could access her local voting place. As for the wheelchair itself, this woman may be entitled to additional social resources to pay for mobility assistance as an extension of meeting a health care need.

In Case 2, the individual with an intellectual developmental disability cannot enter into agreements with other citizens to uphold their reasonable conceptions of the good through a system of fair cooperation and reciprocity. So far, in my discussion of disability in Chapters 2 and 3, I have not explicitly discussed the case of persons with intellectual developmental disability. A person with this type of intellectual disability is not capable of being a fully cooperative member of society. Rather, in this example of
Case 2 of a person with an intellectual developmental disability, she is not capable of forming or expressing her own conception of the good. She is not capable of having a determinate conception of the good. Instead, she depends on a third party to interpret and help pursue her interests. This third party could be a caretaker at an institution or could be a family member within the home. It is only through this proxy that this individual’s interests in case 2 can be protected. Her interests are those things that represent her more permanent aims if she were able to understand and to express them. However, since reciprocity is never possible because the woman in case 2 fails to meet the criteria of normal functioning in terms of species-typical functioning, she is not considered a full and normal functioning citizen. Since reciprocity is not possible, her case falls under paternalistic intervention.

The case of Patricia who is in a persistent vegetative state, and the case of a person with an intellectual developmental disability are not identical but they share qualities, which allow them to be under the same category of disability. They both require similar forms of intervention. And paternalism can be applied to both cases in a way that does not unfairly impose one person’s ends onto another which means that it is applied appropriately.

The third case, fluctuating-reciprocating persons
“Mary” represents a modified version of Selina74 and has a mild case of schizophrenia. She has many natural talents that include the ability to work as a computer

74 Selina was the woman with severe schizophrenia discussed at the end of Chapter 3.
programmer. Technology has always interested her. Her goal is to become a senior level programmer at her mid-size company. Since her diagnosis was in her early 20s, she was able to complete a 4-year degree in computer programming before her symptoms prevented her from attending work daily. As her illness developed undiagnosed, her symptoms began to affect her ability to function. Eventually these symptoms caused her to miss so much work that she was fired.

Luckily, Mary’s primary care provider accurately diagnosed her and encouraged Mary to enter talk therapy. After a few sessions, she began to take anti-psychotics that have suppressed some of her most vivid hallucinations, although they are still present daily. The medications have side-effects which cause her to feel lethargic and put her at risk for elevated blood pressure, heart disease, and obesity. Regardless, Mary still has the desire to work, has the skills to do so, but her employer will not hire her back. When she must apply to new positions, she needs to explain the conditions surrounding her termination. In this example, even though she has the desire, talent and goal in mind to develop her own reasonable determinate conception of the good and act on her own two moral powers, employers are unlikely to hire her.

**Key differences between fluctuating-reciprocating and non-reciprocating persons**

As shown in Mary’s case, fluctuating-reciprocating persons are different from non-reciprocating persons in two ways. First, Mary can express her own conception of the good in ways that non-reciprocating persons never can. In fact, she can have a determinate conception of the good and revise it overtime if certain social resources are
made available to her. Mary’s case is different from that of Patricia who was in the persistent vegetative state or Selina with a severe case of schizophrenia.

Second, Mary is capable of sometimes being an agent who can uphold other citizens’ conceptions of the good if her illness does not impair her. More importantly, Mary can follow shared public rules while she is compliant with her medication, therapy, and appropriate social support. This makes her unlike non-reciprocating persons because she does not remain in the position of non-reciprocating persons for her entire life. Instead, she fluctuates from the level of functioning and to the level below it.

**Definition of fluctuating-reciprocating persons**
Fluctuating-reciprocating persons, as I define them, regularly fluctuate above and below the threshold of normal functioning, yet they clearly have the two moral powers based on their capabilities when they are functioning well. As Rawls’s theory stands, fluctuating-reciprocating persons are not taken into account. And although we have seen how his theory can be extended to treat non-reciprocating persons, it would be a mistake to think of fluctuating-reciprocating persons in this same way.

Although Daniels discusses disability in more detail than Rawls, Daniels’ discussion of health care needs does not address the role of fluctuating-reciprocating persons. Daniels focuses on the protection of health care needs that fall under the category of either “preventative, curative, and rehabilitative personal medical services” or “non-medical
personal and support services” (*Just Health Care*, p. 42). An unfair restriction of any of these services to someone in need would be an unjust restriction of normal opportunity. Within a certain set of limits, individuals who have disabilities, according to Daniels, deserve to be brought back up to the level of normal functioning in order to protect normal opportunity. Those individuals who cannot be raised to the level of normal functioning do not have normal opportunity to protect according to Daniels.

Based on a cursory reading of Daniels’s discussion of disability, it may appear that Daniels’s theory ought to apply to individuals who fall into the category of fluctuating-reciprocating persons. Daniels’s extension of the principle of fair equality of opportunity may seem as though it can take fluctuating-reciprocating persons into account. Further, it may appear that they could be considered since fluctuating-reciprocating persons are sometimes capable of being a part of reciprocal relations; they then have opportunity to protect. However, there are two important limitations.

Daniels’s extension of the principle of fair equality of opportunity does not adequately protect the opportunity of fluctuating-reciprocating persons for two reasons. First, Daniels’s conception of the person is grounded primarily in biology and is inadequately sensitive to social contexts. Second, Daniels’ account is insensitive to and cannot adequately recognize how stigma can undermine the social primary good of self-respect. I will make the further critique that the principle of fair equality of opportunity, including Daniels’ extension of it, is not designed to address the barriers that prevent the exercise of basic liberties for fluctuating-reciprocating persons. In Section 4.3, I will
provide my positive argument where I address the issue of stigma by arguing for a hybrid view of disorder, the use of a version of the social model of disability, and a Rawlsian political conception of the person. First, I will address Daniels’s and Rawls’s conception of the person.

**Daniels’s and Rawls’s conception of the person**
In Chapter 2, I introduced Daniels’s conception of the person. Daniels introduces both a social and biological definition of the person that differs from Rawls’s discussion of the person in *Political Liberalism*. Rawls’s definition of the person that I emphasize is primarily a political, not biological account.

In Chapter 1, I outlined Rawls’s model of the person. Of the idealizing assumptions that Rawls makes, the idealizing assumption that I focused on is ‘what assumptions do the parties in the original position make about the kind of person for whom the principles are designed?’ 75 Chapter 1 focused on Rawls’s model of the person as it relates to his ideas of reciprocity 76 and social cooperation.

A person is a normative, moral conception which Rawls “adapt[s] to a political conception of justice and not a comprehensive doctrine” (fn. 20, p. 18, *Political Liberalism*).

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75 I discussed this in Chapter 1, Section: Model of the Person.

76 In *Political Liberalism*, “as understood in justice as fairness, **reciprocity** is a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world. This brings out the further point that **reciprocity** is a relation between citizens in a well-ordered society expressed by its public political conception of justice. Hence the two principles of justice with the difference principle, with its implicit reference to equal division as a benchmark, formulate an idea of reciprocity between citizens” (my emphasis, p. 17).
Liberalism). The normative conception of the person “is to be distinguished from an account of human nature given by natural science and social theory and it has a different role in justice as fairness” (fn. 20, p. 18, Political Liberalism). The moral conception of the person is “one that begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility” (fn. 20, p. 18, Political Liberalism).

Daniels expands on Rawls’s political conception of the person to include a more developed account of the biological requirements of normal functioning. Daniels’s account of the principle of fair equality of opportunity depends on the satisfaction of health care needs, which uses the biological functioning of persons as an important criterion. The ideas of natural functioning, normal functioning, and species-typical functioning are Daniels’s criteria, not Rawls’s criteria. I will argue in the rest of this chapter that relying on this biological model of the person is too restrictive in the case of fluctuating-reciprocating persons. Further, I will argue that Daniels’s argument for normal species-typical functioning as it relates to his definition of the person detracts from the strength of his overall account of extending opportunity to health care needs.

Two Objections with Daniels’s account and the case of mental illness
The conception of the person, which relies on species-typical functioning as its basis, also extends to Daniels’s discussion of persons with mental illnesses. Daniels extends his view of meeting health care needs by satisfying underlying biological needs to the case of

77 I discuss this distinction in detail in the section Biomedical Model of Disease and Daniels.
mental disease. However, this extension is more difficult. In *Just Health Care*, Daniels identifies the difficulty of extending the idea of species-typical functioning to an account of mental health and disease. After Daniels provides a general account of species-typical functioning as it relates to the biological and social functioning of humans in the case of physical illnesses, Daniels observes that

adding mental disease and health to the picture, which we must do, complicates the issue further. *We have a less-developed theory of species-typical mental functions and functional organization.* The biomedical model clearly presupposes we can eventually develop the missing account and that a reasonable part of what we take to be psychopathology will show up as diseases within the model (Boorse, 1976a:77). *The difficulty of so extending the biomedical model to mental disease does not deter me from assuming such an extension here.* To anticipate the result of this extension: psychopathology covers an important class of diseases which generate major health care needs, many of which are *unmet* in our health-care system (*Just Health Care*, p. 29, my emphasis).

While it is clear from this quote that Daniels acknowledges that mental health care needs are part of general health care needs, identifying how to restore individuals to the level of species-typical functioning and raise persons with mental diseases back to the level of normal functioning depends on discovering the biological basis for mental disease, if there is one. According to Daniels, even though modern science cannot yet provide guidance for a medical intervention, the expectation from Daniels as expressed in the quote above is that eventually the biological causes of mental disease will be better understood. And, once the causes are known, they can be addressed with the biomedical model of disability and eventually restore normal functioning.

Daniels apparently assumes that mental health concerns are primarily biologically based. And therefore, the first type of intervention to be considered is biomedical. He
acknowledges, of course, given the state of psychopharmacology, we do have to consider other forms of social accommodations, even though his first instinct is a medical intervention. Under the biomedical model of disability, mental diseases are interpreted as reducible to biological functioning. Thus, a person’s mental functioning can be viewed as species-typical or not based on the biological functioning of their brain. I argue, alongside other theorists, that there may be issues with using this biological relation. For example, there are cases in which certain persons’ brain functioning may not meet species-typical functioning standards, and yet they do not present as being diseased. Such as in cases of atypical brain functioning which do not necessarily lead to limits in overall functioning. For example, Vernooij et al.\textsuperscript{78} showed that atypical brain functioning is much more frequent than previously thought and can be asymptomatic. In a study of 2000 individuals, about 7.2% had asymptomatic brain infarcts, which are a small-localized area of dead tissue relating from failure of blood supply. In other words, their brains have atypical biological functioning but the overall biological and social functioning of the person is not impacted. They do not present as impaired. So, this may represent a group of individuals who do not themselves feel impaired, and yet medically may be deemed so.

In other cases, some persons may present with signs of impairment without identifiable underlying biological causes. In these cases, it may be difficult to argue for protection of health care needs based on issues in underlying biological functioning. Not being able to

specify what the underlying biological problem is may make it difficult or impossible to
identify which biological interventions are required for returning to species-typical
biological functioning. For example, a person may describe severe back pain without
having an X-ray to show abnormal functioning. Similarly, persons with mental health
issues may claim that there are certain symptoms that they feel which are not
substantiated through underlying species-typical malfunctioning.

**Limitations of Daniels’s Extension of Fair Equality of Opportunity**
The two points that I addressed above where the biomedical model may not clearly
apply are: (1) either where persons have non-species typical biological functioning but
do not appear to have an impairment which impacts social functioning or (2) have signs
of impairments without a clear underlying biological cause. The biomedical model
would address these two issues by focusing on correcting underlying biological function.
When a biological intervention is unknown or unsuccessful, Daniels then makes
suggestions for social interventions.

Daniels addresses protecting opportunity as also having a social component. I
highlighted this connection in the cases of Anna and Bridget in Chapter 1. Certain
corrections to underlying biological functioning also allowed for a protection of Anna’s
normal social functioning. And so, in this way, it is clear how biological intervention
relates to social intervention. However, as cases become more complex, such as cases
where the underlying biological cause cannot be identified, this extension of the
principle of fair equality of opportunity does not lead to clear interventions.
Another concern I have is that someone who is a fluctuating-reciprocating person may be able to have their opportunity protected without relying on the satisfaction of health care needs as a restoration of underlying biological functioning. And of course, someone may be able to have their opportunity protected without focusing on health care needs if we were to look at the principle of fair equality of opportunity as protecting the basis of opportunity beyond these needs. This would be an approach closer to Rawls’s initial discussion of this principle. For example, providing resources for individuals to learn how to read do not always relate to meeting health care needs. However, Daniels intertwines the protection of health care needs and the protection of opportunities in the important cases I am interested in such as entering the work force. So, on the one hand, health care needs are important to meet to protect an individual’s ability to develop a capacity for a conception of the good, a determinate conception of the good, and a capacity for a conception of justice. However, I question whether or not the protection of health care needs that are being used to protect opportunity like employment must rely on Daniels’s account of the person.

Daniels’s account of the person is problematic for fluctuating-reciprocating persons. We have someone like Mary, who has a mental disorder, which causes her to fluctuate above and below the line of normal functioning. The underlying biological cause of her mental illness is not completely understood, and so direct biological intervention will not raise her brain functioning back to the level of species-typical functioning. It is not part of species-typical functioning for persons to have audio or visual hallucinations. Some medications could help quiet these symptoms, but they will never go away. And yet,
Mary may be able to control these symptoms enough to gradually develop her own determinate conception of the good, and a capacity to develop the two moral powers.

I argue that fluctuating-reciprocating persons will continually have this type of difficulty with a biological account of the person. Since the current scientific understanding of the biological causes of many mental diseases is unspecified,\(^7^9\) the idea of returning these individuals back to the level of normal functioning via restoration of biological species-typical functioning is not instructive.

The limitations from Daniels’s account regarding his conception of the person could be resolved by looking closer at Rawls’s own conception of the person. I argue that the important way in which Daniels’s account of the person shifts away from Rawls is the reliance on species-typical functioning as the basis for the biological functioning model of disability. This shift also helps to identify issues regarding the application of the principle of fair equality of opportunity for persons with mental health issues. In other words, the use of Daniels’s conception of the person makes meeting health care needs for persons with mental illnesses more difficult.

\(^7^9\) As discussed in Picchioni et al.’s discussion of schizophrenia, the most that is known about biological causes is that it can be related to the role of dopamine in the brain. However, other causes also include genetic factors as well as environmental factors. Environmental factors can include environmental stressors such as “social isolation, migrant status and urban life” (p. 92) as well as “early cannabis use...increases future risk of schizophrenia fourfold” (p. 92).

Objection 2: Failure to protect the exercise of basic liberties for fluctuating-reciprocating persons
The aim of this objection is to show that in the case of fluctuating-reciprocating persons, even an extension of health care needs using Daniels’s conception of the person, does not necessarily protect opportunity. Even worse, an extension of the principle of fair equality of opportunity that uses Daniels’s conception of the person may even undermine the exercise of basic liberties of fluctuating-reciprocating persons. Daniels’s account cannot address the problem of stigma insofar as it undermines the social primary good of self-respect.

An application of Daniels’s approach is as follows. Mary takes her medication but cannot be brought back up to the level of normal functioning as measured by biological species-typical functioning. The medication has a moderating effect on the symptoms of her schizophrenia, but it does not correct the underlying biological or pathological malfunctioning. The next step for the application of Daniels’s extension of the principle of fair equality of opportunity would then look to potential social interventions. The use of a biomedical model of disability and the conception of the person used by Daniels would then suggest other ways of incorporating the individual. For instance, in the case of Bridget, her eyesight cannot be corrected. So she was provided a social intervention with access to larger typeface. Thus, her biological functioning below species-typical functioning is not a legitimate reason to exclude her from participating as a citizen. However, Daniels does not provide justification as to why his version of the conception of the person as a biological model is necessary for satisfying a social intervention such as in the case of Bridget.
This lack of justification represents one major component of my objection. The ambiguity surrounding the justification for basing social interventions on biological interventions is problematic. Other philosophers have expressed this ambiguity. As has been noted by Ron Amundson,\textsuperscript{80}

Daniels does not actually argue for the reality of species-normal functioning. He cites Boorse, and accepts it as an obvious fact. He goes beyond Boorse in one important respect: the linkage between normality and opportunity. Abnormals have reduced opportunity, and so maintenance of normality is maintenance of opportunity. Health care sustains normality, and normality sustains opportunity. Normality is the crucial objective link between health care and opportunity. And since normality is determined by objective science, judgments based on it carry a high authority” (my emphasis).

Amundson correctly identifies the assumption that Daniels makes, namely the assumption that species-typical functioning can extend to normal opportunity without further justification. And, Amundson’s description of Daniels’s acceptance as “obvious fact” is exactly my concern. I argue that further problems with this assumption is that the basis for the concept of species-typical functioning relies on the biological functioning model of the person. And the use of this model of the person as a part of the assumption is also not justified and possibly not required for meeting all cases of health care needs.

So far, there are two major components of Objection 2. First, there is a lack of justification for social interventions based on the biological conception of the person. Second, when this biomedical model of the person applies to cases of mental disorder,\textsuperscript{80} He states this in “Against Normal Functioning,” Studies in History and Philosophy of Biological and Biomedical Sciences, Vol. 31, No. 1, p. 46.
the prioritized intervention is pharmaceutical and then some possible forms of non-pharmaceutical therapy. Now I will examine what impact these two components have on a case represented by Mary.

In Mary’s case, unlike the case of physical disabilities, changes to the built environment cannot be made to accommodate Mary. Building a ramp or providing larger typeface as forms of social interventions will not protect opportunity for Mary as they would for Bridget or the woman who requires a wheelchair for mobility. Due to the lack of clarity between the connection between biological and social intervention, it is not clear what persons with mental illnesses would be entitled to.

Under Daniels’s account, the type of intervention that may be required for persons with fluctuating-reciprocating status may not be what Mary herself would prefer, and further it may not be what she is owed in terms of justice. The prioritization of pharmacological interventions which follows from the biomedical model of disability and of the person may do two things: first, it may contribute to unfair constraints of the exercise of basic liberties and second, this method may support the continued exclusion of persons from participating in society via a development and application of the two moral powers necessary to maintain the basic liberties. Extensions of the biomedical model of disability may not recognize Mary as being capable of being a full and normal cooperating citizen because even with medication she still experiences hallucinations. Further, Daniels’s extension of the principle of fair equality of opportunity and its relation to health care needs may place Mary and other fluctuating-reciprocating
persons on a disability status\textsuperscript{81} which by default excludes individuals from entering the labor market because they are deemed unemployable.

Applications of the biomedical model of disability for persons with mental illnesses prioritizes the return of biological functioning. The practical policies such as Social Security Disability Insurance (SSDI), which support the biomedical model of disability, place many individuals who have the type of mental diseases that Mary has in a non-work status. This is because they would only be able to work part-time. And further complications arise if they work part-time, because the American health care system depends on household income to qualify for public assistance and medication, these individuals would then lose access to the medications required to moderate their mental status. For these reasons, someone like Mary is in a double-bind.

She has a desire to work, but she can only work part-time. If she works part-time, she will lose the access to medications needed to help suppress her symptoms. To keep her medication, she will have to remain outside of the work force. And to keep Mary outside of the work force simply because she has a mental illness is a grave moral wrong. This would be the same as denying Bridget the ability to work because she requires larger typeface to read.

\textsuperscript{81} Disability status as identified through public policy, state and federal regulations. This would be different than philosophical definitions of disability. For example, to qualify for Social Security Disability Insurance (SSDI) a person must fall under the following definition: “disability as the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”
https://www.ssa.gov/disability/professionals/bluebook/general-info.htm
Further, following the biological model of disability, adherents to this model may not view placing Mary on disability and keeping her out of the workplace as morally problematic because her health care needs have been met. She has access to the medication, which best controls, her symptoms. However, I argue that even if she has access to the medication to meet her health care needs, this may not fully protect her opportunity to enter the workplace.

If Daniels’s extension of the principle of fair equality of opportunity in collaboration with the biomedical model of disability does not protect opportunity for persons like Mary, then I suggest there may be a more fundamental problem occurring. The problem is that the ability for her to exercise her basic liberties are being unfairly constrained because she is being viewed as a person through a biological approach instead of a political approach, in Rawls’s technical sense of the term. In addition, viewing persons with mental impairments through this biological view leads to stigmatized beliefs and behaviors. Additionally, her ability to exercise basic liberties are unfairly constrained further because her ability to develop her two moral powers are being constrained by social institutions, even though these social institutions themselves under the biomedical model of disability view themselves as protecting the exercise of basic liberties and opportunity.

Stigma limits opportunity, and in particular, the type of opportunity that the principle of fair equality of opportunity is supposed to protect. Further, stigma limits opportunity and the exercise of the basic liberties because it prevents individuals from developing
their own conception of the good, and acting on it, due to false or stereotypical beliefs. Daniels’s reliance on the biomedical model of disability reinforces stigmatized beliefs and behaviors about mental health.

Further, stigmatized beliefs undermine self-respect, which also limit the exercise of basic liberties. In Mary’s case, if the individuals who she interacts with have negative views of her due to her mental status, she may very well internalize these beliefs. She may think of herself as not worthy of pursuing jobs or making claims on the behalf of herself due to weakened self-respect. Without self-respect, citizens would have difficulty developing, pursuing and acting on their two moral powers. In order for citizens to set their own conception of the good and to rationally pursue it, they must think that their plan is “worth carrying out” (A Theory of Justice, p. 155). Without this self-respect, they may not think that their own conception of the good is worth pursuing. If a person is viewed as a social outcast, or as inherently violent or bad due to their mental diagnosis, this may undermine their ability to develop and rationally pursue their own conception of the good. Further, the lack of self-respect undermines the second moral power. Stigma interferes with a persons’ ability to understand, to apply, and to act on a conception of justice. They may not think of themselves as capable of acting on a conception of justice. This may occur because they lack the confidence required to do it.

The two objections that I raised against Daniels are as follows. The first objection claims that Daniels’s conception of the person is limited due to its reliance on the biomedical model of disability. Due to this limitation of the conception of the person, the
application of Daniels’s extension of the principle of fair equality of opportunity to fluctuating-reciprocating persons is also limited. The limitations of Daniels's application of the principle of fair equality of opportunity then leads to the second objection. Namely, in objection two, the consequence of this extension of the principle of fair equality of opportunity leads to a failure to address restrictions on the exercise of basic liberties for fluctuating-reciprocating persons.

4.1.3 The conceptual problem
To include fluctuating-reciprocating persons under a Rawlsian conception of justice, a conceptual problem needs to be resolved. The conceptual problem is that individuals who are fluctuating-reciprocating persons have their cooperative powers undermined. They are thought of as being outside of reciprocal relations because of their biological deficits. To show that fluctuating-reciprocating persons can be a part of reciprocal relations, two issues must be resolved. First, I will address the simplification of the concept of disability. Second, the effect of stigma on social and political institutions requires further attention.

Further, to understand how fluctuating-reciprocating persons have their cooperative powers undermined, I will assess the foundation for health care needs in terms of mental health care needs under Daniels's view. My analysis will show that the use of Daniels’s definition of species-typical functioning as related to pathological functioning harms fluctuating-reciprocating persons. Instead of protecting opportunity, this model allows these individuals to have their opportunity unfairly restricted because it introduces normative judgments about functioning too late in Daniels’s analysis.
To put my disagreement with Daniels simply, he argues that normal functioning is a neutral concept we decide on prior to adding in normative judgments about which individuals ought to be given compensation and what resources are owed to protect opportunity. My view is that judgments about biological functioning are not neutral. And thus, when we make normative judgments about what a disease, illness, or disability is, this occurs when deciding what functioning is. This is an important distinction that has implications especially in the case of mental disease. The implications will be that using Daniels’s model of health does not protect opportunity for fluctuating-reciprocating persons because it is ill-equipped to handle a specific form of discrimination, the negative consequences of stigma. Mental disease at its origin must be considered both as related to biological functioning but also include normative and social judgments.

I argue that the satisfaction of health care needs should not weigh the restoration of normal biological functioning as heavily as it does in Daniels’s case. Instead, satisfaction of health care needs, I argue, ought to focus on quality of life, longevity, and self-rated well-being. My view of health care needs is wider than Daniels’s because of the hybrid

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82 Hybrid in the sense of Jeremy Wakefield’s discussion on mental disorders (see next footnote). The term “hybrid” has been applied to a range of views which include both biological claims and normative claims about functioning as the basis for disease. A good discussion of this can be found in Marc Ereshefsky’s article “Defining ‘health’ and ‘disease’” in Studies in History and Philosophy of Biological and Biomedical Sciences. Philosophers who also acknowledge the legitimacy of a hybrid view are Arthur Caplan (in Gene Mapping, “If Gene Therapy is the cure, what is the disease? (p. 128-141), Caplan in Applied Ethics in Mental Health Care, and psychiatrist Jeremy Wakefield.
view\textsuperscript{83} of health that I endorse, but it is not as wide as the World Health Organization’s (WHO) definition of health.\textsuperscript{84}

My account relies on a hybrid model of disease and health as well as a conception of the person that is closer to what Rawls had in mind in \textit{Political Liberalism} before Rawls’s endorsement of Daniels.

\textbf{Simplification of disability: two reasons}

This simplistic view of disability occurs for two reasons:\textsuperscript{85} as an operational strategy and as an oversight concerning the varied nature of disability. The operational benefit of viewing individuals as either disabled or not disabled makes it simpler to generalize for discussions of justice. However, what follows from this simplification of disability for operational benefits are oversights concerning the varied nature of disability. One of the primary oversights that I am concerned about is the prioritization of individuals with physical disabilities (Case 1, Chapter 4) or intellectual developmental disabilities (Case 2, Chapter 4) over individuals with intellectual disabilities (Case 3, Chapter 4) in philosophical considerations. The theoretical models for identifying health care needs

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\textsuperscript{83} Jeremy Wakefield develops an account of mental disorders. Wakefield argues for a “conception of disorder “as harmful dysfunction,” where “harm” is judged according to social values and a “dysfunction” is the failure of an internal mental or physical mechanism to perform a function for which it is naturally selected” (Wakefield, p. 269) in (1997) \textit{What is development disordered? Development psychopathology and the harmful dysfunction analysis of mental disorder}. 9: 296-290.

\textsuperscript{84} WHO’s definition of health is: “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.

\textsuperscript{85} Of course, there may be other reasons for simplification of disability, but I will not explore those here. I focus on these two reasons because they are relevant in Daniels’s discussion of health, illness, and disability.
for cases of physical disabilities are not necessarily the best for meeting mental health care needs or for protecting opportunity for persons with mental disease.

This objectionable prioritization occurs in Daniels for two reasons. First, the biomedical model of disability provides direct interventions in the case of physical disability. If a tumor needs to be removed to restore species-typical functioning, then the type of intervention required is clear. Daniels’s discussion of the difficulty of treating mental health issues further underlines the difficulty of using the biomedical model to identify interventions for persons with mental disorders beyond limited pharmaceutical interventions.

The second way prioritization of physical disabilities over mental disorders occurs for Daniels in *Just Health Care, Just Health* and many of his other articles focus on physical disability as opposed to mental disability. His current view of mental disorders is problematic based on the limitations of Daniels’s position: reliance on the biomedical model of the person, the extension of the principle of fair equality of opportunity based on this model of the person, and the lack of justification between his use of normal species functioning and social functioning.

The core differences between (Cases 1 and Case 2 in Chapter 4) and (Case 3 in Chapter 4) is the distinction between non-reciprocating persons and fluctuating-reciprocating persons. Confusing these two categories occurs when individuals who have a loss of rationality at one-time in their life and someone who has permanently lost their rational faculties are deemed qualitatively identical. However, loss of the use of one’s rational
faculties at one time does not necessitate that an individual could never make rational decisions in the future. With the use of these higher order interests, fluctuating-reciprocating persons may sometimes be treated both unfairly and unjustly because of their perceived ability and functioning. This unfair treatment would not be something that Daniels himself may argue in favor of, but I argue is a consequence of the two limitations discussed earlier.

The conceptual problem I identified is that fluctuating-reciprocating persons have their cooperative powers undermined. This is a serious conceptual problem that must be dealt with so that persons with a variety of mental disabilities can be given what they are owed in terms of justice. Part of my solution is to provide a revision to the conception of the person offered by Daniels. I argue that this revision ought to occur because the conception of the person used by Daniels unfairly excludes these individuals. The other part of my solution highlights ways in which fluctuating-reciprocating persons can have their opportunity and the exercise of basic liberties protected from the negative consequences of stigma.

**Impairment, disability and the social model of disability**
The social model of disability, a term coined by sociologist and disability activist Michael Oliver, moves away “from the functional limitations of individuals with an impairment to the problems caused by disabling environments, barriers and cultures” (p. 45). To make this shift Oliver introduces a distinction between an impairment and a disability.
Oliver popularized this distinction in 1976. He extracted the idea from a landmark publication in the field of disability called *Fundamental Principles of Disability* written by the organization Union of the Physically Impaired Against Segregation (UPIAS, 1976). This landmark piece argues that there is a core difference between impairment and disability. An impairment is a “lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body” (UPIAS, 1976; Oliver, p. 42). Whereas a disability is “the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities” (UPIAS, 1976; Oliver, p. 42). Understanding impairment and disability in this way thus claims that “physical disability is therefore a particular form of social oppression” (UPIAS, 1976; Oliver, p. 42). This document further claims that “exclusion from participation” can be viewed by examining the prevalence of individuals with disabilities who also experience poverty, lack of access to income, lack of housing, lack of education, and inequitable access to public transportation.

The social model moves away from the limitations of the biomedical model of disability. Instead of looking at species-typical functioning as the base line of normal functioning, the distinction between impairment and disability considers disability as a form of social oppression. In contrast to the social model, the medical model does not make the distinction between impairment and disability. Instead, the medical model focuses on
underlying biological or pathological functioning. This is the preferred model of disability for Norman Daniels and Christopher Boorse.

**Naturalist Assumption and the Biomedical Model of Disease**

As discussed in Chapter 2, Section 2.2, Boorse adapts the definition of health as the absence of disease that is the model of health used within the medical field. Boorse holds a naturalist position which claims that this idea of disease is a value-free and biological concept. The natural functioning of an organism is normal or species-typical functioning in the biological sense. Daniels takes this value-neutral, biological, naturalist definition of functioning in *Just Health Care* as an “uncontroversial baseline” (p. 31) to develop the concept of a health care need. To be fair to Daniels, in *Just Health Care* he adds that disease which is also caused by injury should also be added to the definition which makes Daniels’s view not as narrow as Boorse’s.

As I argued in chapter 2, Daniels in *Just Health* states that ‘health as the absence of disease’ is too narrow as a basis for the justification for health care needs and is even “misleading” (p. 37) as a definition of health. This biomedical model of health is too narrow, according to Daniels, because “it captures neither our ordinary usage nor the even broader theoretical notion of pathology” (p. 36). To explain this, Daniels provides an example that “we do not consider people healthy when they have injuries from trauma or from environmental hazards or toxins, none of which are diseases” (p. 36).

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86 It is important to note that Daniels does distance himself from Boorse’s narrow use of health as the absence of disease in a partial way in Just Health Care Daniels himself does include injury as a part of his definition of disease. Regardless, Daniels’s earlier definition of health depends on the medical model.
Further, Daniels states that using this definition becomes more complicated when discussing “functional” and “cognitive deficits” (p. 36). Functional deficits, such as in his example of deafness, are more difficult to make sense of under the medical model of health because someone who is deaf may not view themselves as ‘unhealthy’. Daniels, I think correctly, identifies that labeling someone who is deaf or blind as ‘unhealthy’ merely because of their functioning could be offensive to that person (Just Health, p. 36). However, instead of moving away from these strict biological accounts of functioning, Daniels maintains another biological view of health.

Instead of advocating for Boorse’s view that health is the absence of disease (1975), Daniels instead advocates for Boorse (1997) that “health is the absence of pathology” (p. 37). Pathology refers to any deviation from the natural functional organization of a typical member of a species. Pathology, viewed as disrupted part function, takes place at various levels (genetic, organelle, cell, tissue, organ, systemic) with different consequences, ranging from innocuous to fatal...In short, pathology is a departure from normal functioning (p. 37, my emphasis).

Once the connection between pathology and normal functioning have been made, then Daniels can revise his extension of the principle of fair equality of opportunity. The next relevant question is to ask how does ‘health as the absence of pathology’ improve Daniels’s theory?

The shift to pathology widens Daniels’s scope of health care needs in the sense that it can include more factors that cause problems in biological functioning. In Daniels’s example above, pathology could now include discussing toxins as the cause of organ malfunctioning. So by using the pathological definition, we can include an example
where someone is exposed to elevated levels of lead through state-maintained water supply. By using the pathological definition, we can now include these individuals’ needs under the umbrella of health care needs. Individuals exposed to toxic levels of lead in their drinking water may have a legitimate claim to social resources to protect their normal opportunity. Daniels devotes much of *Just Health* discussing these types of examples that stem from the field of “social epidemiology”.

Even though Daniels does not view Boorse’s naturalist assumption as problematic (Daniels states “I shall argue that Boorse’s strict naturalism is not important to my argument” p. 39, *Just Health*), he still endorses it and he will not endorse a hybrid view on health and disease. Daniels states that one of these hybrid views from Jeremy Wakefield is an “initially plausible” account that “makes disease or pathology a normative notion” (*Just Health*, p. 39). However, Daniels argues that this initial plausibility is lost because Daniels disagrees with Wakefield’s definition of dysfunction.

My question about Daniels’s commitment to Boorse is if he does not endorse Boorse’s strict naturalism, why maintain Boorse’s account? Daniels defends his use of Boorse by stating “what attracts me about Boorse’s account is where it locates normative

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87 According to Kaori Honjo in “Social Epidemiology: Definition, history and research examples” in *Environmental Health Preventative Medicine*, 2004, Sept., Vol. 9(5): 193-9,

Social epidemiology is a branch of epidemiology that studies the distribution and determinants of health and disease in populations (2). In “Social Epidemiology,” Berkman and Kawachi defined social epidemiology as “the branch of epidemiology that studies the social distribution and social determinants of states of health (1).” Social epidemiology focuses particularly on the effects of sociostructural factors on states of health (Table 1). The major premise of social epidemiology is that each society forms its own distribution of health and disease (1) (p. 193).
judgments about health, not that it avoids them altogether” (Just Health, p. 38). And this is where I disagree with Daniels, namely where normative judgments about functioning should occur. And this is where the role of stigma needs to be discussed.

4.3 Positive Argument
I argue in favor of the use of the social model of disability especially in the case of mental illness. However, the version of the social model that I support uses a hybrid view of disorder. With this hybrid model of disorder that uses a social model of disability, I aim to address the negative influences of stigma on opportunity, resources, and social recognition. Finally, I argue that a political conception of the person, a conception that is compatible with a social model of disability, can adequately protect fluctuating-reciprocating person’s ability to develop, revise and maintain their two moral powers.

4.3.1 Formal definition of stigma
The definition of stigma that I use is informed by the social sciences. The definition of stigma most applicable to fluctuating-reciprocating persons, in my view, originates from psychologist Stephen Hinshaw. In Mark of Shame: Stigma of mental illness and an agenda for change (2007), Hinshaw brings together three components to define what

88 This model of health is more restrictive that the World Health Organizations (WHO)’s definition of health but wider than Daniels’s model.

89 The types of opportunities I have in mind are barriers to employment, education, housing, health care needs, public transportation and etc. The resources I have in mind compliment these types of opportunities. As for social recognition, I will explain this when I discuss Rawls’s conception of the person. Namely, I focus on Rawls’s discussion of the requirements for being free in the Rawlsian technical sense and the role of institutional identities (Political Liberalism, pp. 30-31,) for reciprocity.
the idea of stigma incorporates. He maintains that stigma must incorporate all three of the following: stereotypes, prejudice, and discrimination (p. 24). He defines stereotypes as occurring when a “group identity overrides personal identity”; prejudice as “negative perceptions of groups”; and discrimination as “the act of shunning, exclusion and punishment” (p. 24). Stigma is not just limited to the persons the stigma describes, but stigma can also include family, friends, and the community (p. 24).

My understanding of the difference between stereotypes, prejudice, and discrimination is as follows. Only when all three of these conditions exist in tandem are stigmatizing effects possible. For example, it may be possible to have a stereotype that is not necessarily a negative perception, i.e. prejudiced. Sometimes, a stereotype could be something like the “model minority” stereotype. Some different racial minority groups are seen as hard working, dependable, and intelligent participants in society. While this stereotype may override an individual’s own sense of identity, it is not necessarily negative. However, when the stereotype is tied to negative perceptions of a group, then it has the capacity to become a form of stigma.

**Philosophical account of stigma**

While stigma is something that can be measured empirically through survey data, self-reporting, and analysis of policies and practices, it is also a theoretical problem to be

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Sociologist Erving Goffman produced an in-depth study of stigma in *Stigma: Notes on the Management of Spoiled Identity* (1963). Goffman identifies stigma as when a person has “an undesired differentness from which we had anticipated”[...] “by definition, of course, we believe the person with stigma is not quite human” (p. 5). The way that we treat stigmatized persons as opposed to “normals” (p. 5) is to create a “stigma-theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences...[using] specific stigma
dealt with like discrimination by political philosophers. Because stigma is a form of discrimination, it is a core concern of social justice.91

The way in which I am conceiving of stigma is negative. That is, stigma often results in violations of Rawls’s two principles of justice. While there may be justified arguments for the role of disgust or shame in terms of developing our moral judgments, institutionalized stigma as a political idea should not in my view play a part.

Stigmatized beliefs and actions that occur based on these beliefs can be the unintended consequences of social institutions and policies. And so, while on the surface some of these policies may not seem objectionable, they have an indirect stigmatizing effect. Further, stigma is an issue for distributive justice because it can undermine the social primary good of self-respect, the exercise of basic liberties, and the application of the principle of fair equality of opportunity. Thus, stigma is an unjust form of terms such as cripple, bastard and moron...” (p. 5). Goffman’s study became a reference point for developing empirical measures of stigma.

For example, Goffman’s attention to stigma allows for the development of “explanatory models based on individual and psychological levels” and eventually to “macrosocial levels of analysis” of the role of stigmatized behavior as performed by psychologist Patrick Corrigan in Structural Levels of Mental Illness Stigma and Discrimination in Schizophrenia Bulletin, Vol 30., No. 3, 2004, p. 481. Corrigan examines how “policies of private and governmental institutions that intentionally restrict the opportunities of people with mental illness, and policies of institutions that yield unintended consequences that hinder the options of people with mental illness” (p. 481). In both cases of intentional and unintentional restrictions of opportunities, Corrigan as well as many others, link this to the occurrence of stigma.

91 Within feminist philosophy, there has been attention brought to the issue of stigma and psychiatric illness. For example in Angela K. Thachuk’s “Stigma and the politics of biomedical models of mental illness” in International Journal of Feminist Approaches to Bioethics, Vol. 4, No. 1, Special Issue: Feminist Perspectives on Ethics in Psychiatry, Thachuk offers a feminist analysis of the biomedical model of disability in relation to psychiatric illnesses and stigma. She identifies three ways that stigma limits health-care access, (1) lack of seeking treatment, (2) lack of quality of care once diagnosis is disclosed to physician, (3) underfunding and lack of services for persons with mental health issues (p. 141-2).
discrimination. If stigma is not addressed, then justice as fairness will face difficulty being realized.

4.3.2 Stigma, Two Models of Disability and Two Principles of Justice

Stigma, as a form of discrimination which can lead to shunning, exclusion or punishment based on negative perceptions of a group, has different effects on different models of disability. Different models of disability have different sensitivities to the effects of stigma. And the biomedical model perpetuates some of these negative effects. Next, I will show that although the biomedical model of disability may be successful in some cases of disability, it is not in the case of mental illness.

In one way, stigma could be addressed from the biomedical model of disability somewhat successfully. For example, Sartorius, Byrne, & Smith (2003) suggest that when medical treatments for diseases become available this helps lessen associated stigma. Sartorius et. al provide examples of once stigmatized diseases becoming less stigmatized due to their shift in public perception. For example, when diseases such as HIV/AIDS or small pox were viewed as a medical condition which can be controlled or eliminated through medical treatment, stigmatized beliefs and behaviors diminished. Public awareness campaigns focused on describing these illnesses as having treatments reduced stigma and thus improved treatment outcomes and quality of life for those persons with these diseases.
Contrary to the cases of the biomedical model’s ability to reduce stigma in the case of HIV/AIDS and small pox, other theorists claim that a biomedical model of disability could exacerbate issues of stigma. Unlike cases of HIV/AIDS or small pox where some stigmatized beliefs were decreased by seeing them as medical issues to be cured, this approach does not always work for mental disorders. The biomedical model advocates for the restoration of normal functioning which promotes primarily pharmacological interventions. However, this approach leads to unintended results with stigma. For example, Corrigan claims that

antistigma programs solely reflecting the medical perspective may have unintended consequences (Corrigan, Watson, Byrne, & Davis, 2004). The public may view mental illness as a genetic condition from which the person does not recover (Phelan, Cruz, Rojas, & Reiff, 2002). It might suggest the harm caused by stigma has greater impact on the mental health system rather than the person with mental illness. It might foster pity rather than parity. It places responsibility for the stigma on the person with mental illness rather than where it belongs—on the public.92

The unintended consequence of viewing mental illness as a biological or genetic condition is that unless there are certain medical advancements, then these individuals cannot be ‘cured’. And without a cure, labeling these individuals as beyond the aid of modern medicine places fluctuating-reciprocating persons in a position where policy makers and health care providers may view them as not capable of being cooperative members of society. In these cases, persons with mental illnesses may be viewed as individuals who cannot have their underlying biological functioning corrected, and as such are viewed with “pity rather than parity”. Attitudes of pity rather than parity which lead to the lack of opportunities such as barriers to employment, are formal,

92 p. 621, Corrigan, How Stigma Interferes with Mental Health Care.
institutionalized examples of stigma. The barrier to employment is that fluctuating-reciprocating persons are not viewed as possible employees due to their medical status. And this unintended consequence from the use of the biomedical model of disability is especially harmful in the case of fluctuating-reciprocating persons. Next, I will provide a new model for fluctuating-reciprocating persons whose aim is to address institutionalized stigma, in combination with a discussion of barriers to care for persons with severe and persistent mental illnesses.

A new model for fluctuating-reciprocating persons

In the beginning of 4.3, I argued that I will address the way that stigma limits opportunities, resources, and social recognition. As I have just shown, stigma under the medical model limits access to employment opportunities in the case of mental disorder. I have argued that fluctuating-reciprocating persons experience a form of discrimination, namely stigma, due to their mental status. Analogies that I have used compare the exclusion of individuals like Mary from the workforce is as problematic as the exclusion of Bridget from the workforce merely because she has a visual impairment. At this point, I hope that I have shown that barriers which prevent individuals from developing their own conception of the good, acting on it, revising it, and also developing a sense of justice, based on an arbitrary fact about a person, such as your mental status, is a grave moral wrong.

Solving this barrier to participation, I argue, must occur in several steps. First, instead of depending on the biomedical model of disability, we ought to look to a social model of
disability. Second, the version of the social model of disability that I develop will use a hybrid account of disorder. This hybrid account of disorder dismisses the naturalist assumption made by Daniels in the use of the biomedical model of disability. Third, since I am no longer using the biomedical model of disability, I am not depending on Daniels’s account of the person which is derived from that account. Instead, I argue for a political conception of the person which was initially discussed by Rawls before Rawls’s endorsement of Daniels’s extension of the principle of fair equality of opportunity in *Political Liberalism*.

Michael Oliver introduced the distinction between impairments and disability. This distinction led to the development of the social model of disability. This model claims that disabilities and impairments are not the same. Impairments are issues with underlying biological or pathological functioning. Disabilities are situations wherein society excludes individuals based on their impairments. In Oliver’s case, he focused primarily on physical impairments; however, I am extending his account to those cases of mental impairments in the case of fluctuating-reciprocating persons.

The appeal of the social model of disability is that it can address discrimination against individuals based on arbitrary facts about their bodies. Missing a limb, according to Oliver, is not a legitimate basis for exclusion from participation in society, i.e. accessing education, employment, voting, public transportation, etc. I argue that individuals who fall under the category of fluctuating-reciprocating persons can have the impairment/disability distinction applied to their case.
Again, this is focusing on the case of someone like Mary who has a mental impairment. She has audio and visual hallucinations. However, Mary’s identity is not only her impairment. Mary has desires, interests, talents, and passion for life. She has a desire to be a part of society. When individuals are reduced to their impairment alone, and are told that society cannot accommodate them, their impairment has become a disability. And this stigmatizing process is a form of discrimination. The reason that this discrimination continues in the case of fluctuating-reciprocating persons is for two reasons: the use of the biomedical model of disability and of the person combined with stigmatized beliefs and behaviors.

The medical model of disability, and even Daniels’s own extension of it, work together to promote these stigmatizing attitudes towards individuals like Mary. As I have shown, equating mental illness with a problem with biological functioning alone is not enough to address stigma. The examples I provided were from Corrigan.

However, Daniels’s account is more complex than just the biomedical model alone because Daniels adds in some normative considerations. Even though he does this, his account does not go far enough to address the barriers to participation that fluctuating-reciprocating persons face. Daniels’s account, as noted by Amundsen, merely assumes that species-typical functioning supports normal opportunity. In Daniels’s account, the problem I have identified is the use of the naturalist assumption. I further argued that Daniels’s account relies heavily on pharmacological interventions for persons with

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93 I cited this earlier in my discussion of Daniels. Ron Amundson in “Against Normal Functioning,” Studies in History and Philosophy of Biological and Biomedical Sciences, Vol. 31, No 1, p. 46.
mental illnesses, in part due to his commitment to the medical model of disability. And this model of intervention does not adequately address stigma.

Daniels uses the naturalist assumption as the “uncontroversial baseline” (*Just Health Care*, p. 31) to develop his concept of a health care need. I, however, contend that this baseline is controversial because of how it excludes discussion of value judgements regarding diseases. Where the value judgments belong, as I will argue next, is informed by Wakefield’s harmful disorder view. As I have shown, such as in the case studies discussed by Beecher, individuals with forms of schizophrenia can live without permanent use of anti-psychotics. In some cases, individuals may require the use of anti-psychotics over an extended period of time, but what studies in social epidemiology have shown is that longer and better health care outcomes correlate to close feelings of trust, low levels of stress, and commitment from the community. And this leads me to a rejection of Daniels’s model of the person as well as his model of disability.

A person’s normal opportunity can be protected once they are restored to species-typical functioning. However, opportunity in terms of health care outcomes, as well as an individual’s ability to develop their two moral powers can be protected with other models as well. We must change two things. First, the distinction between impairment and disability must be recognized. Second, the idea of species-typical functioning as being normal should not be assumed. Instead, the assumption that should be made is a
hybrid view of disorders, instead of Daniels’s definition of disability.94

The first step is complete. However, since I am rejecting the account of the person which is associated with the biomedical model of disability, I will replace this account of the person with a political, not biological conception. I am doing this because the social model itself, I think, is not strong enough on its own without a more developed conception of the person.

The model of the person I choose to use is Rawls’s political conception of the person. This is the conception of the person that Rawls develops when he thinks about for whom the two principles of justice are being designed. This is the model of the person that allows for Rawls’s development of the two moral powers. This model of the person begins, as Rawls points out, not from a biological account, but rather an account which focuses on a conception of the person who is capable of thought, deliberation, and responsibility.95

**Rawls’s model of the person**

In Chapter 1, I outlined Rawls’s model of the person. The idealizing assumption that I focused on is ‘what assumptions do the parties in the original position make about the kind of person for whom the principles are designed’? (Chapter 1, Section: Model of the

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94 I am deliberately shifting from discussions of ‘disability’ to discussions of ‘impairments’ and ‘disorders’ because they can better handle the issue of stigma. And so, I am bringing together Oliver’s social model of disability with Wakefield’s harmful dysfunction account of disorders.

95 The conception of the person is “one that begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility” (fn. 20, p. 18, *Political Liberalism*).
Person). Chapter 1 focused on Rawls’s model of the person as it relates to his ideas of reciprocity and social cooperation.

A person is a normative, moral conception which Rawls “adapt[s] to a political conception of justice and not a comprehensive doctrine” (Political Liberalism, fn. 20, p. 18). The normative conception of the person “is to be distinguished from an account of human nature given by natural science and social theory and it has a different role in justice as fairness” (Political Liberalism, fn. 20, p. 18). The moral conception of the person is “one that begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility” (Political Liberalism, fn. 20, p. 18). A person is a citizen in Rawls’s technical sense of the term when they are capable of being “a normal and fully cooperating member of society over a complete life” (p. 18). Persons are equal in the Rawlsian sense. This conception of equality serves as the basis for reciprocity. As Rawls states, “only those who can give justice are owed justice” (A Theory of Justice, (1999), p. 446).

The idealizing assumptions that Rawls makes in Political Liberalism about the type of people for which the principles are designed limits the scope of who can be a fully and

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96 In Political Liberalism, “as understood in justice as fairness, reciprocity is a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world. This brings out the further point that reciprocity is a relation between citizens in a well-ordered society expressed by its public political conception of justice. Hence the two principles of justice with the difference principle, with its implicit reference to equal division as a benchmark, formulate an idea of reciprocity between citizens” (p. 17).
normally cooperating person. Rawls does not claim here that all persons with mental disorders (Political Liberalism, p. 20) are excluded from being cooperating members of society. Only those persons with mental or physical disorders who cannot cooperate are not a part of the idealizing assumption of the person. In other words, some individuals who have mental or physical disorders can be cooperative members of society. And, I argue that those individuals are fluctuating-reciprocating persons.

I draw on the political conception of the person in contrast to biological based conceptions of the person. I argue that Rawls’s political conception of the person is an inclusive conception as it relates to the scope of justice. Requirements for the political conception of the person focus on how persons can interact with each other through a system of fair cooperation instead of identifying certain biological characteristics about personhood.

An important implication of allowing citizens to set, revise, and pursue their own conception of the good, and to also protect their own institutional identity is that (a) having an institutional identity and (b) having this identity recognized by other citizens is a crucial way in which citizens engage with each other. If other citizens fail to recognize each other’s institutional identities, then this could be problematic on several levels. First, it would undermine a citizen’s ability to develop their own capacity for a sense of justice. Second, it could lead to situations wherein citizens are not viewed as equals in Rawls’s technical sense. Third, it could lead to situations wherein paternalism is not applied appropriately, such as in my discussion in Chapter 3.
However, in the case of fluctuating-reciprocating persons, there is a great risk of losing this political identity. That is, they are at great risk of not being recognized by other citizens as persons who are capable of developing and acting on the two moral powers.

**Social model of disability, harmful dysfunction account of disorder, and Rawls’s political conception of the person**

I contest the view that health care needs can be met through an extension of the principle of fair equality of opportunity with the use of the biomedical model of disability and the naturalist assumption. Instead, health care needs for fluctuating-reciprocating persons can be met through an application of the social model of disability in conjunction with the harmful dysfunction account of disorder with Rawls’s political conception of the person.

Let’s return to the case of Mary. Under my account Mary still has a mild form of schizophrenia. Her brain does not function in ways that other brains function and so in this way she has an impairment. When Mary expresses that she has a desire to work and employers refuse to hire her because she cannot explain the gaps in her work history without disclosing her mental status, Mary’s impairment becomes stigmatized. Under the harmful dysfunction account of disorder, Mary’s schizophrenia can be viewed as a mental disorder not merely because of her underlying issue of impairment, but also because it causes her a significant harm. Her mental status prevents her from being hired.
Stigmatized beliefs regarding individuals with mental illness prevent Mary from gaining employment. Further, these beliefs also significantly hinder her ability to develop a sense of trust and experience a low amount of stress in her own community. Since Mary is excluded from the workforce, the way that her health care needs can be met are through public assistance programs that focus on pharmacological interventions. When Mary complains that this is unfair, she is met with the following response ‘society has provided the basic medical care required to raise you as best we can to the level of normal functioning through restoration of species-typical functioning. Until science improves, this is the best we can do for you.’ Social and political institutions exclude Mary.

She is a person who has the capacity to develop her two moral powers, she also has the right as a potential cooperating citizen to protect her own institutional identity. What I mean by this is that when policy makers reduce what an individual is based on their biological functioning, instead of their capacity to develop the two moral powers, they do not have their institutional identity protected. Ignoring someone’s institutional identity undermines a person’s capacity to develop their two moral powers.

4.4 Conclusion
Fluctuating-reciprocating persons have higher-order interests which they use to develop their two moral powers and to pursue their conception of the good. However, prejudicial beliefs about persons with mental impairments leads to them being stigmatized. In
some cases, this may be due to the fact that these individuals require medical intervention. However, lack of access to care, to political participation, to employment, to housing, is not a necessary result of their impairments. The lack of access to these opportunities is due to society treating their difference as a disability.

Further, and most importantly what follows from these implications is that fluctuating-reciprocating persons who belong under the political conception of the person can now claim that their opportunity has been unfairly and unjustly limited due both the direct and indirect effects of negative stereotypical beliefs which lead to prejudicial actions through institutions.

**Concluding Remarks**

My primary research question was “what do we morally and politically owe to persons with severe and persistent mental illnesses?” To answer this question, I began with a discussion of the role of Rawlsian reciprocity and social cooperation in Chapter 1. Chapter 1 examines the limit of Rawlsian reciprocity and social cooperation for persons with limited development and use of their two moral powers. Chapter 1 ends with two examples regarding how Rawls’s use of reciprocity may need further clarification for the non-standard cases of individuals who lack their moral powers.

In Chapter 2, I examine how persons who lack their two moral powers in differing ways could be included under a Rawlsian scope. One way to include these individuals is
through the appropriate application of paternalism. Second, in Chapter 2, I examine ways that Rawls’s theory has been extended to include persons who have temporarily lost their ability to develop and to act on their two moral powers. The second part of Chapter 2 identifies the strengths and weaknesses of Norman Daniels’s extension of the principle of fair equality of opportunity to the protection of health care needs. Chapter 2 ends with the questions regarding the application of Daniels’s framework of normal functioning and protection of normal opportunity to all cases of disability. I argue that his view while successful for some cases may not be applicable to more difficult cases.

Chapter 3 examines cases of individuals who I have classified as non-reciprocating persons. Non-reciprocating persons are individuals who lack the capacity to develop their two moral powers, and thus may require the appropriate application of paternalism as established in Chapter 2. After clarifying when paternalism can and ought to be applied for non-reciprocating persons, I examine the concepts of reciprocity introduced in Chapter 1. Namely, I look at objections against Rawls’s view of reciprocity which serve as the incorrect basis for disability critiques against his view.

Chapter 4 builds on the view of reciprocity defended in the second part of Chapter 3. Chapter 4 also re-introduces the concerns from the end of Chapter 2 regarding Daniels’s extension of the principle of fair equality of opportunity with special concern to cases of fluctuating-reciprocating persons. Ultimately, I argue that while Daniels’s extension may be fruitful in some cases of disability, when looking at cases of mental disease, the biomedical model of disability may cause negative social effects for these individuals. I
then argue that another conception of the person, closer to Rawls’s initial view, could be used to address the unjust exclusion of fluctuating persons from developing their two moral powers.
References


Classifications of Intellectual Disability Severity. Committee to Evaluate the Supplemental Security Income Disability Program for Children with Mental Disorders; Board on the Health of Select Populations; Board on Children, Youth, and Families; Institute of Medicine; Division of Behavioral and Social Sciences and Education; The National Academies of Sciences, Engineering, and Medicine; Boat TF, Wu JT, editors. Washington (DC): National Academies Press (US); 2015 Oct 28

