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# JUSTICE FOR THE 'MAD'

On the Lack of Inclusion of 'Invisible Illnesses'

## ABSTRACT

*Mental disorders: living with it is a challenge in and of itself. But life with a mental illness is made even more difficult by systematic injustice sufferers have long faced. Political philosophy can give us an example of how to organise our societies, but often fails to address the struggles of the mentally ill. Can we find a politically philosophical theory that can explain how we should address problems regarding the 'mad'?*

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## Introduction

### *Once Upon a Marginalised Group*

*“Corridor, corridor, floor, corridor, corridor, door. It keeps going, some doors have a red X on them. We don’t open the doors with an X. Those are bad. Sometimes there is a crowd, shouting, sometimes whispering. They whisper I can’t do stuff, or they yell I messed up. Sometimes I’m all alone. Sometimes... I am being chased.”*<sup>1</sup> Mental disorders: living with it is a challenge in and of itself. Just like most disorders and illnesses, treatment is necessary to ultimately be able to live a decent life. Treatment can be long or short, depending on when a disorder is diagnosed, but it is never easy. Sometimes, sufferers will only learn coping methods and never be able to completely rid themselves of their disorder, such as is the case with autism. Other times sufferers will have to be medicated for life, which could be necessary for cases of bipolar disorder or variants of schizophrenia.

However, unlike many of those with other illnesses and disorders, those with mental disorders face more than just difficulties of their ailments. While people with other conditions may face similar injustices as well, systematic injustice is in particular a problem for the mentally ill because of how often this group has been understated, forgotten and misrepresented. For example, in the film ‘Split’<sup>2</sup> by M. Night Shyamalan in which a person with multiple personalities, also known as ‘dissociative personality disorder’ (DID), is dehumanised and turned into a monster as the source of the horror-like danger. Many physical handicaps, while also underrepresented in media, are not usually portrayed as (tragic) villains. Their ailments are usually more straightforward in the sense that it is easier to see and understand the actual handicap, making it relatively more straightforward to deal with in policy making. Mental illnesses, though diagnosable, are different for every patient even if they have the same disorder and therefore are difficult to empathise with and accommodate. This lack of clarity grows fear. People with mental disorders structurally face injustices, in two ways, practically and theoretically. The practical problem lies in structural societal injustices such as stigmatisation, inequality of health care and plain discrimination. The theoretical problem lies in the structural lack of representation of their needs and problems in political theory such as Hobbesian social contract theory but also in Rawlsian theory of distributive justice, the latter of which I will focus on. In both ways, those with mental illnesses face problems of *respect* and *redistribution* that, in addition to their condition, affect their ability to lead a humane existence.

The aspect of respect is grounded in the way people with mental disorders are treated with regards to their identity. People with mental illnesses have for millennia faced stigmatisation, stereotyping or/and discrimination due to the way mental disorders alter thinking, emotion and behaviour. Traditionally, the ‘madman’ has been perceived as anything from either a tragic individual dazed by the Gods, to the epitome of irrationality; from a devil worshipper to an animal in need to be caged or put down. Lobotomy, the act of forcefully driving a pin through a person’s prefrontal cortex, was a common procedure particularly in the United States between 1940 and 1960<sup>3</sup>. If the procedure did not outright

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<sup>1</sup> Anonymous describing the visual representation of their mind that they often visit in their night terrors. This person has been diagnosed with Post Traumatic Stress Disorder and Dissociative Identity Disorder.

<sup>2</sup> M. Night Shyamalan, *Split*, Horror, Thriller, 2016.

<sup>3</sup> The Editors of Encyclopaedia Britannica, ‘Lobotomy’, *Encyclopaedia Britannica* (Encyclopædia Britannica, inc, 6 April 2018), <https://www.britannica.com/science/lobotomy>.

kill patients, the procedure left them in a zombie-like state: activity was replaced by inertia, people became emotionally blunted and became very restricted in their intellectual range. Though now controversial, the inventor of the lobotomy was even awarded a Nobel Prize<sup>4</sup>. Thinkers such as Michel Foucault examined mental illness and criticised 20<sup>th</sup> century society for considering mental disorders to an extent a 'deviance' much like criminal activity<sup>5</sup>. Lobotomy and incarceration (or 'sectioning') were a commonly used tool for 'dealing with mental illness' during Foucault's lifetime<sup>6</sup>. One could almost say there was a 'war on madmen' except for the fact that this all was not done out of malice but more out of misunderstanding of what they called 'madness'. The world of that day was convinced lobotomy was a better alternative to madness and incarceration was a means to protect the 'mentally sound' from the mad.

Nowadays, though the dangers of incarceration are less and lobotomy has become illegal, mental illness is still not seen as a 'real' illness<sup>7</sup>. Waiting lists in the Netherlands grow as funding in the mental health sector gets cut and youth mental health care for example gets budgeted out to be handled by municipal governments<sup>8</sup>. There are even some who believe that mental illness is caused by character flaws or that it is a choice to give in to some sort of victim-role<sup>9</sup>. This lack of acknowledgement of their identity as genuinely being sick, lays the foundation of the problem of respect. Although mental disorders are most certainly not a weakness and empathy and kindness are definitely necessities to overcome them, we still live in a society that values strength in suppression of emotion<sup>10</sup>. People fear their showing emotion will put them in a position of vulnerability, which they answer by striving for pure reason, detached from emotion. Mental disorders though are thought the prime example of irrationality, of emotionality. Not only is caring for and about someone with a mental disorder a risk, but the object of affection, this person, is also the embodiment of this very risk. The fear that grew in times when madness was related to demon worshipping still lingers because of this fear of emotionality next to the fear of the unknown. Besides it being difficult to admit to oneself one needs psychological help, there is also perpetual fear between the mentally ill and the mentally healthy<sup>11</sup>. This fear perpetuates stigmatisation and self-stigmatisation, furthering the problem of respect for the mentally ill. The problem of respect then is a mixture of both a lack of acknowledgement and unjustified prejudices and stigmatisation.

<sup>4</sup> 'António Egas Moniz (1874–1955): Lobotomy Pioneer and Nobel Laureate', US National Library of Medicine, accessed 1 June 2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4291941/>.

<sup>5</sup> Michel Foucault, *Madness and Civilization. A History of Insanity in the Age of Reason*, Vintage Books (New York: Random House, 1965).

<sup>6</sup> Margarita Tartakovsky, 'The Surprising History of the Lobotomy', *Psych Central* (blog), accessed 6 January 2018, <https://psychcentral.com/blog/the-surprising-history-of-the-lobotomy/>.

<sup>7</sup> J. Rabkin, 'Public Attitudes Toward Mental Illness: A Review of the Literature', *Schizophrenia Bulletin* 1, no. 10 (1 September 1974): 9–33, <https://doi.org/10.1093/schbul/1.10.9>.

<sup>8</sup> Ingmar Vriesema, "'Jeugdpsychiatrie bij gemeente is fout'", accessed 18 February 2018, <https://www.nrc.nl/nieuws/2018/02/15/jeugdpsychiatrie-bij-gemeente-is-fout-a1592308>.

<sup>9</sup> Rabkin, 'Public Attitudes Toward Mental Illness'.

<sup>10</sup> Sara Ahmed, *The Cultural Politics of Emotion* (New York: Routledge, 2004).

<sup>11</sup> Nicolas Rüsçh, Matthias C. Angermeyer, and Patrick W. Corrigan, 'Mental Illness Stigma: Concepts, Consequences, and Initiatives to Reduce Stigma', *European Psychiatry* 20, no. 8 (December 2005): 529–39, <https://doi.org/10.1016/j.eurpsy.2005.04.004>; A. C. Watson et al., 'Self-Stigma in People With Mental Illness', *Schizophrenia Bulletin* 33, no. 6 (27 October 2006): 1312–18, <https://doi.org/10.1093/schbul/sbl076>.

The aspect of redistribution flows out of the problem of respect. To the extent that mental illness is not considered a 'real' illness and because it receives stigma, there is a certain aversion towards dedicating too many resources to mental healthcare. Real illnesses require direct attention; 'fake' ones do not. Hence the waiting lists mentioned above: the possibly cancerous cyst in somebody's armpit is in general seen as a greater danger to that person's life than auto mutilation and suicidal tendencies<sup>12</sup>. To solve the problem of redistribution society and its leaders need an example within political philosophy. One of the most respected theories on justice of distribution of resources, the *Theory of Justice* by John Rawls, could serve as such an example were it to include the interests of the mentally ill. In this book Rawls describes a thought experiment and principles of justice through which not only achievement is rewarded but the less fortunate are also cared for. These less fortunate could have been unlucky in the 'natural lottery' and because of this were born with less (useful) talents. Rawls claimed that under the 'veil of ignorance', in the 'original position', we would wish for a society in which these people were also cared for through redistribution of goods. Everyone wants to have a good life, and under the veil of ignorance nobody will know their place within society, so everybody will choose a state in which the least well-off will be as well as possible.

This sounds promising considering that would also mean that we, as a society, should care for our sick and offer them care and opportunities to recover, no matter the sickness. In order for everyone to have the same freedoms in accordance to the principles of justice decided on in the original position, people also would need to be able to cease these freedoms. These ideals of equality of opportunity are held dear within many welfare states and justify many rules and policies: we like individuals to be able to make free and informed choices but we do not like them to die prematurely of starvation or sickness because of circumstances, even if they were the ones getting themselves in that situation. That is why even if somebody falls ill from lung cancer due to their own choice to smoke, they are still given treatment.

However, not all is as well as it seems as I hinted at before: even within this just and 'inclusive' theory, there are flaws, amongst which excluding factors. Exclusion on its own is not unjust per se, there are many reasons as to why somebody might exclude a certain demographic. The issue lies in the following. Rawls had two conditions, two moral powers needed for citizenship and representation in the original position that are not as inclusive as the principles that follow appear: "a capacity for a sense of justice and for a conception of the good."<sup>13</sup> Many of those with mental disorders have trouble with these conditions. Some heavily mentally ill or mentally impaired individuals may not even have the two moral powers at all and in extreme cases they may never be fully cured from these conditions. Not only does the original position therefore exclude all the severely disabled or sick to a degree, at least until they recover, because they cannot partake in society. It also excludes those with certain severe mental disabilities because they may lack these moral powers. Rawls' original position, then, is very dependent on the empathy of the participants and their capability to know what these excluded groups of people need.

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<sup>12</sup> John Campo, 'It's Time to Recognize Mental Health as Essential to Physical Health', *STAT*, 31 May 2017, <https://www.statnews.com/2017/05/31/mental-health-medicine/>.

<sup>13</sup> John Rawls, *Political Liberalism*, Expanded ed, Columbia Classics in Philosophy (New York: Columbia University Press, 2005). P. 19

Despite these flaws, we can still infer that based on social-liberal and egalitarian principles it is desirable for an employer to, for example, give an employee leeway in their working hours if they suffer from a disease such as glandular fever or even cancer. We also require our state to, directly or indirectly, provide these sickly people with the health care they need. If somebody enters a doctor's office with a broken leg, they will immediately be sent to a hospital for medical treatment. Our society and state should work in harmony, hand in hand, to guarantee a speedy recovery when it comes to physical ailments. In practice, these customs seem very effective when it comes to ailments visible or easily tested for, however our policy and societal rules lack heavily when it comes to 'madness'. For some reason, many tend to find it natural for 'physical ailments' to be treated as soon as possible and with the utmost understanding from employers and environment. Yet, when it comes to mental illnesses, some do not even believe in the existence of these illnesses or disabilities. Social-liberalism put into practice thus has not yet been able to provide justice for those suffering from these illnesses. The *Theory* was a good attempt at distributive justice, which why Martha Nussbaum attempts to first alter the *Theory of Justice* by adding a large sum of empathy and love in order to solve the issues it has with the (mentally) disabled. Nevertheless, she believes that even with her alterations the *Theory* cannot be made inclusive enough for this group of people. This is why she offers an alternative in the form of the 'Capabilities Approach'<sup>14</sup>. Richard Cureton disagrees with Nussbaum that the *Theory* is unsalvageable and even proposes we interpret it less strongly. Should we do so, he claims that Rawls' principles are in fact inclusive enough to ensure justice for the (mentally) disabled as well.

Although I asked myself: "what does justice require with regard to the mentally ill?", this is much too big of a research question, for now. My main research question for this thesis therefore shall be whether the Rawlsian approach to distributive justice is adequate in dealing with the specific problems of people with mental disorders. In my first chapter I will explain what 'madness' or mental illness is, why people with a mental illness require particular attention and why people with a mental illness are a specific problem of justice. I will also speak of the duality of the problems of respect and redistribution. In chapter II I will go deeper into the *Theory of Justice* as it is one of the most prominent and admired political theories on just distribution of our times. I will investigate the Rawlsian stance on the mentally ill and why they are excluded from his 'Justice as Fairness'. This is necessary to understand our duties towards the mentally ill and what their rights should be. By chapter three we will have established the issues regarding Rawlsian distributive justice and attempt to 'repair' it with the help of Martha Nussbaum. However, as we will discover, repairing it will be impossible and an alternative will have to be found. Because Rawls does not think of the handicapped as a problem for justice at all, they are not represented. We will therefore explore Nussbaum's capabilities approach as an alternative to this form of distributive justice and hope to solve the problem of redistribution that way. Finally, in chapter IV, we will still hear Richard Cureton's the defence to Nussbaum's critique of the Rawlsian approach. My speculation however is that Cureton's defence will not be enough to make the Rawlsian approach more adequate.

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<sup>14</sup> Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, The Tanner Lectures on Human Values (Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 2007).

## Chapter I *On 'Madness'*

In this chapter I will explain what 'madness' or mental illness is, why people with a mental illness are a group that is particularly in need of special attention and why mental illness is a problem of justice. Though 'madness' is a far from desirable term to use, I still feel a need to use it for both societal and historical purposes. Mental illness as a concept is relatively new but has existed probably for as long as man lived, we simply had little understanding of it and named it 'madness'. But first: what exactly is mental illness?

Mental illness is a health condition that involves changes in thought, emotion, behaviour or a multitude of these<sup>15</sup>. The term 'mental' might be misleading as it does not mean these illnesses require a 'change of mind' but often have deep rooted and even neurological effects. These types of illnesses are associated with distress and/or difficulties in functioning in social, work or family endeavours. There is a wide variety of mental disorders as described in the *Diagnostic and Statistical Manual of Mental Disorders (V)* ranging from neurodevelopmental disorders such as autism to dissociative disorders, schizophrenia spectrum and other psychotic disorders to the more common depressive disorders and anxiety disorders. Not only is there a large list of possible mental disorders, but every case may differ in terms of severity and treatability. No matter how severe the disorder, it will without a doubt have effects on a sufferer's life in terms of participation and/or a humane existence. Some disorders are fully inheritable, others only partially with experiences in life playing a large role on whether or not an individual develops a certain disorder and again others are fully dependent on personal experiences. One in four people<sup>16</sup> will suffer from a mental illness at some time in their life. Everyone, for example, has the potential to develop post-traumatic stress disorder if they experience trauma. Whether they develop it or not has mostly to do with the support of a strong and stable social network<sup>17</sup>. Never, however, is a mental disorder a sign of weak character or lack of willpower, as certain parts of the population tend to believe<sup>18</sup>.

Mental illness is a medical condition like any other, such as diabetes, heart disease or cancer. The problem is that it is not perceived as such. I shall elaborate on this statement more further into this chapter, for now let us make clear that every time I will speak of 'madness', mental illness or mental disorder, I mean the health condition as defined above. In this I mean to encompass the wide variety of disorders as is described in *DSM-V*. Though other groups of disabled are in need of representation as well, I will dwell little on other handicaps. Just like the mentally ill, all people with handicaps to a degree face stigmatisation and discrimination. However, the stigma on the mentally ill has a deeper and even more complex history, and has more severe consequences. Suffering from a mental disorder by

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<sup>15</sup> American Psychiatric Association, 'What Is Mental Illness?', Psychiatry.org, accessed 14 June 2018, <https://www.psychiatry.org/patients-families/what-is-mental-illness>.

<sup>16</sup> Weltgesundheitsorganisation, ed., *Mental Health: New Understanding, New Hope*, repr, The World Health Report 2001 (Geneva: World Health Organization, 2002). P. 19

<sup>17</sup> After trauma it is important people are not only given space to recompose themselves, such as time away from work, but also have trusted individuals to confide to.

<sup>18</sup> Sandra Dietrich et al., 'The Relationship Between Public Causal Beliefs and Social Distance Toward Mentally Ill People', *Australian & New Zealand Journal of Psychiatry* 38, no. 5 (May 2004): 348–54, <https://doi.org/10.1080/j.1440-1614.2004.01363.x>. P. 353



itself is complex enough without the stigma and consequences resulting from that. Society is unjust to the mentally ill, in the rest of this chapter I will explain how exactly and why. Additionally, in terms of political theory this group is almost completely forgotten. We will immerse ourselves into the latter problem more in chapter II, firstly we will dwell upon stigma and its origin.

### The Concept of Stigma

Before we speak of madness, it is necessary to explain the difference between large scale stigma and simple prejudice in order to understand the exact issue there is with the former. It is only human to distinguish 'us' from 'them'. The process of distinguishing groups is natural and is something that we evolved to do over time<sup>19</sup>. That is how we can distinguish people that will likely become our friends from those that may harm us. Everyone does this no matter how hard we try not to: we distinguish somebody with a darker skin colour from a person with a lighter one; we distinguish feminine people from masculine people. Our brain is programmed to do this instinctively, but the reactions that follow are more within our control. If we are taught that people with tattoos and piercings will harm us, it will lead us to have more aggressive or fearful emotional reactions when we see such a person. If we are taught that these people are just like us but with permanent accessories, we will likely respond in a more neutral manner. However, no matter what we are taught, we will still distinguish other people as different from 'us'. Even if one is part of the tattooed and piercing group, one will likely still distinguish themselves different from more heavily tattooed people for example. This instinctual demarcation helps humans distinguish potential ally from potential foe.

There is nothing wrong with recognising a different individual from oneself and recognising features that would fit them in a certain category by itself. Though one could certainly call such judgements 'prejudice', making this distinction alone is not yet stigmatising. Stigma occurs when a certain consensus of negative perception is reached within a (more dominant<sup>20</sup>) group against another group<sup>21</sup>. Demarcation of entire groups requires a heavy oversimplification to a stereotype that may be harmful. We see this happen in matters involving racism, but we also see this happen with mental health. The 'mentally healthy' tend to have a conception of a 'mentally ill person' that is violent, unpredictable and scary<sup>22</sup>. Stigmatisation is more than prejudice and stereotyping, it requires the stigmatising group to have social, economic and political power over the stigmatised group<sup>23</sup>. Though untrue, the convictions that come with these stereotypes lead to many cases of discrimination, such as denial of employment and (public) exclusion<sup>24</sup>. True stigmatisation can therefore only happen if a large group upholds these stereotypes which

<sup>19</sup> Rüsche, Angermeyer, and Corrigan, 'Mental Illness Stigma'. P. 530 & 531

<sup>20</sup> In terms of both social-economic and political status: in India a large group of 'casteless' is stigmatised by a small elite for example.

<sup>21</sup> Interpretation of Rüsche, Angermeyer, and Corrigan, 'Mental Illness Stigma'.

<sup>22</sup> Mentally ill people are in fact far more likely to be the victims of violence than to be violent (without provocation). "Myths & Causes." Psychosis | Canadian Mental Health Association. May 23, 1970. Accessed May 15, 2018. <http://www.cmhaff.ca/myths-causes>.

<sup>23</sup> Rüsche, Angermeyer, and Corrigan, 'Mental Illness Stigma'. P. 531

<sup>24</sup> Allison Abrams, 'The Catastrophic Effects of Mental Health Stigma', *Psychology Today*, 25 May 2017, <https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201705/the-catastrophic-effects-mental-health-stigma>.



leads to large consequences for the stigmatised group. To summarise: stigmatisation happens if a large scale group holds up stereotypes that follow from prejudice and actively discriminate against the stigmatised group. Though mentally ill people are not the only ones stigmatised, they are a very vulnerable group that has been stigmatised for centuries as we will come to understand in the next subsection. Our question here is not whether stigmatising is wrong. If making other human beings unjustly suffer is wrong, then stigmatising clearly is, whether one is aware they are doing it or not. But where does the stigmatisation of the mentally ill come from? It is important we understand the nature of this particular stigma to know why it lingered until the modern day.

### A History of Marginalisation

Traditionally, being 'mad' has always been seen as something wholly different from another disability such as a missing limb. Madmen were not seen as ill, but as cursed or even deviant. Despite this however, madmen were not always perceived as fully negative and a high level of creativity and genius was sometimes even credited to them. In this section I wish to give a history and an explanation to the stigma and fear that still surrounds the mentally ill and others with invisible illnesses that appear to be 'between the ears' with the help of Michel Foucault. In *Madness and Civilization*, Foucault analyses the role of madness in Western society. Foucault begins by telling us about the end of leprosy in Europe and explains how madness was ought to become a 'replacement' for this disease at the end of the Middle Ages. Foucault refers to the so called 'Ship of Fools', a fictitious imagery as first described by Plato and depicted much more in Medieval art and literature, a ship that was filled by the insane on a path to the discovery of some sort of promised land. This imagery alone would bring about not only wild tales of it actually existing, similarly to ships that disposed of Lepers on islands, but also brought about discomfort about madness. The sea and the insane it carried away were symbolic for the purging of society from these madmen. Further imagery associating madness with dark secrets and apocalyptic visions began gaining importance alongside the 'Ship of Fools', making society associate madness with 'evil', witchcraft and demonic worship.

That all changed when, in the seventeenth century, madness was 'tamed' and placed at the centre of the world. Foucault speaks of a 'Great Confinement' in which madness was shut away from the world along a wide variety of other 'social deviants'<sup>25</sup>. Madhouses became places of power over these people; they were not hospitals or any other place with the means or intention to treat these people. The confinement itself was presented as a necessity and a means to discipline these deviants<sup>26</sup>. Foucault argues attitudes towards madmen and deviance through economic ideas, ideas of labour and how a city should function. The confining of deviance became the equivalent of the confinement of criminals by the police: madmen had as little place in a city as criminals. Just like criminals obstruct order by breaking the law, these deviants obstructed the natural order by being incapable of doing work and sometimes obstructing those who were. By taking deviants and madmen away from these cities and confining them, they were set apart from the world that valued

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<sup>25</sup>Social deviancy is the committing of any taboo, so amongst those social deviants confined along the 'madmen' were persons such as homosexuals, frequent adulterers and rapists. However, most if not all of these deviances were at some point in history also attributed to mental illness.

<sup>26</sup> Also caused by the enlightenment and development of the medical world, through which a minuscule duty to 'care' for these 'madmen' was created.

work. The theme of animalistic tendencies became a central point to the confinement of madness: madmen were like wild beasts that obstructed the order of society and needed to be caged, for the protection of themselves but mostly that of others.

With this theme came also the theme of passions: it was believed they united body and soul and that it was through them that madness occurred. This discourse, also called 'delirium', essentially defines madness as it was in that time. Madness is the result of a departure from the path of *reason* onto the path of emotions and passions. While both are to some degree important, madmen had lost the balance between them and within this discourse, dreams played an important part. This 'classical' conception of madness knew four key themes: melancholia/mania and hysteria/hypochondria. They eventually became part of not only moral but also medical debates and it is because of this that madness eventually became acknowledged as *mental illness*. With it, cures and treatments for several parts of madness came about and society started to attempt to heal madness. The madman was slowly given a place and altered people's relations and sentiments, but fear around madness and confinement still persisted.

In the nineteenth century the attitude towards confinement changed: it became frowned upon and attempts were made to reintroduce the confined back into society. The previous acts of confinement became seen as an act that represents economic benefit weighing higher than humanitarian concerns. People started to feel a need to define madness separately from other deviances, and thus the asylum replaced the house of confinement. However, in an asylum the madman was still an outcast, perhaps even more so. Their keepers would repeatedly try to call upon morality and act on their feelings of guilt and their conscience. A new form of the patient-doctor relation was developed, cumulating in Sigmund Freud's theories on psychoanalysis. Madness could be cured, but by the end of the nineteenth century it became seen as moral degeneracy. Therefore, despite its acknowledgement as a *mental illness*, people suffering from madness and their families were still blamed for said madness. The predominant conviction was: one can avoid madness and if madness occurs then the sufferer is to blame.

Throughout his work, Foucault emphasises that madness is not a natural, eternal and unchanging thing, but is dependent on society's perception of those who are different, those who *deviate* from the norm. Many variables such as economic growth, cultural development and intellectual development are responsible for the interpretation of madness and how it is experienced. Before the end of leprosy, madness was just part of the world like any other deviance, but in the nineteenth century it became rather a both mental and moral ailment. Foucault interprets madness as something that is placed within a certain cultural space within society: what shape this space takes and what this does to the madman, depends on society. But what consequences does this historical discourse have and what does it tell us about the (in)justice towards the mentally ill? What does that mean for modern day marginalisation of the 'mad'?

### Respect and Redistribution

As described in the previous section, madness/mental illness was for a long time seen as a departure from reason and something that a person can avoid if one tries hard enough. The stigma that originated so long ago still lingers today. Modern marginalisation is mainly based on these old convictions and stereotypes, but for some part also due to simple fear of the unknown. Due to this modern marginalisation people with mental illness face injustice in terms of both *respect* and *redistribution*. The aspect of respect is grounded in the way they

are treated with regards to their identity. People with mental disorders have long faced stigma and disdain from those without them, as discussed before. Especially if the illnesses heavily alter their behaviour from what is considered 'normal' they are at risk of mistreatment. Though in some ways it is natural to be afraid of what one does not know, behaving outside convention should, especially in cases in which a person has little control over their behaviour, not be a justification for mistreatment<sup>27</sup>. Though still some people think this behaviour is completely within the sufferer's control, it is in truth not. It was not too long ago that this minority faced constant (physical) threat of shunning, institutionalisation or even lobotomy amongst other things<sup>28</sup>. Even today there are some who believe that mental illness is caused by a lack of willpower to resist it, or that it may even be a choice to 'behave madly'<sup>29</sup>. "Unlike physical illness, which makes most people sympathetic, mental illness tends to repel most people."<sup>30</sup> It is unfair to treat somebody badly for behaviour they cannot help, and if somebody cannot help it they need to be treated accordingly. This treatment has to be of such nature that it leaves a person fully functioning and with the ability to lead a decent life<sup>31</sup>.

"Mental patients have for years been regarded with more distaste and less sympathy than virtually any other disabled group in our society, and in fact their handicaps are partly attributable to public attitudes of rejection and avoidance."<sup>32</sup> It may not be a surprise then that the subject of mental illness remains a taboo even to those who suffer from it<sup>33</sup>. Not only is it often harrowing to admit one is in need of psychological aid, but society can also be ignorant of what it means to be mentally ill<sup>34</sup>. Though obviously some people are more understanding than others, it says nothing about society wide acceptance. If more than half of people questioned agree that women who have been treated at mental health centres should be trusted as babysitters, does that for example mean there is public acceptance? If another 62% disagrees that every mental health institution needs to be surrounded by large fences and guards, does that mean people are accepting? More than half of the people questioned believe this, but does that say anything about public consensus?<sup>35</sup> The fact remains that there is fear on both sides, between both mental health patients and the

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<sup>27</sup> 'Mistreatment' such as bullying, (sexual) harassment, violence and exclusion.

<sup>28</sup> Though lobotomy in particular was not used out of malice, as doctors genuinely believed the situation of patients would improve through it, it was certainly something generally feared because of the consequences it had on patients.

<sup>29</sup> The amount of people with this conviction is difficult to measure, many sources given by psychiatrists rely on experiences from patients in how both they themselves used to think and their environment reacts when they tell them about their struggles. In Rabkin, 'Public Attitudes Toward Mental Illness'. P. 18 & 19, Judith Rabkin concludes her review of several studies that explore attitudes towards mental health and describes how the 'correct' things to think has gone from the 'moral model' of thinking about mental illness to the 'medical model' of thinking of it like a disease. However, former mental health patients are still treated with a lot less trust and good will even after they have been declared cured.

<sup>30</sup> Rabkin. P. 18

<sup>31</sup> Which, if lobotomy were used, would be impossible as it leaves the patient heavily impaired.

<sup>32</sup> Rabkin, 'Public Attitudes Toward Mental Illness'. P. 10

<sup>33</sup> Caused by 'self-stigma' as described in: Rüscher, Angermeyer, and Corrigan, 'Mental Illness Stigma'.

<sup>34</sup> As also described by Rabkin, even if society would consider mental illness an illness like any other, still there would be doubt on whether people could potentially be cured. The stigma of mental illness therefore often stays on former patients as they are believed to be 'incurable' and permanently changed.

<sup>35</sup> Rabkin, 'Public Attitudes Toward Mental Illness'. P. 19

'healthier' population<sup>36</sup>. On one hand sufferers from mental illness fear the hatred and mistreatment of other members of society, sometimes with good reason. On the other hand the rest of the population knows too little about the many mental health problems to be able to not only understand it but to feel comfortable with it. This is to evidence the unacceptance of society towards the mentally ill and to illustrate some reasons for self-stigmatisation. Both the unacceptance of the mentally ill by society and by the mentally ill themselves form another part of the problem of respect.

The problem of respect therefore lies in both the mistreatment of the mentally ill based on old beliefs and the sheer unacceptance of them as a part of society. Both are rooted in ignorance and fear of the unknown. How do we expect the general population to know enough for there to be acceptance? Education might be a solution as it might not only allow sufferers to acknowledge and recognise their own symptoms but it could also help their environment recognise and understand their alternate behaviour. To a degree, some rudimentary education and information on myths and facts about mental health might help, but it will not eradicate all fear. Fear of what we do not understand itself might never fully go away, but education can certainly be a step towards heavily reducing stigma and lifting some of the prejudice that exists towards sufferers from invisible diseases. Furthermore, recognition and acceptance, or respect, also depends on representation, something that frequently goes wrong in political theory. Political theory should be a guiding hand in figuring out how to fit minority groups into society. This makes the problems of respect and redistribution tied: without acknowledgement and respect for the mentally ill as its own group, there is little reason to represent them in theories of fair distribution. Hardly any of the major political theories I have come across include this group of vulnerable individuals, almost as if they are simply forgotten. I will elaborate more on this in the section 'Critiques on the Theory of Justice' of chapter II. For now, let us look at the results of political convictions and how the overlooking of sufferers of mental illnesses has impacted just distribution within society.

The aspect of redistribution is found not only in policies and the way we design our society, but also on political theory: that which inspires political systems. Political theory often is a reflection of its time, and as it stands now not many political theories take into account the handicapped, let alone the mentally ill as a separate and perhaps even more vulnerable group. The factor of political theory will be explained in the next chapter, this chapter I will speak about just distribution within society as I know it. After all, without an example from political theory, societies very well could still form their own policy on how to treat these groups. Visible handicaps, though not easy to live with either, are regarded with more sympathy and often provided with a lot more auxiliary facilities than those with medical problems that are harder to measure<sup>37</sup>. There is a wide range of facilities for the blind and the deaf, but little is altered in society for those who suffer from post-traumatic stress disorder. A person with a fractured leg is sent to a hospital immediately, but someone with 'a fractured mind' has to wait a good few months for aid. As it is, in the Netherlands, to take an example of a welfare state I am familiar with, people with grave mental illnesses sometimes have to wait over a year for help. This is for a large part a result of budget cuts in

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<sup>36</sup> Self-stigma and self-prejudice is also part of the problem of why mental health patients fear 'coming out' to others about their problems. Watson et al., 'Self-Stigma in People With Mental Illness'.

<sup>37</sup> Rabkin, 'Public Attitudes Toward Mental Illness'. P. 18 & 19

the mental health sector<sup>38</sup>. Even if these people finally receive their (mental) healthcare, it is no guarantee the therapist might be a good match, requiring the patient to return to the waiting list. In the meantime, many mentally ill people find themselves unable to work due to their symptoms and the expectations and demands of employment, and therefore end up on unemployment benefits and without many feasible opportunities for self-development.<sup>39</sup>

This is only one of many examples that show society is simply not built to accommodate people with invisible illnesses, especially mental illnesses. Other examples of society's inability to accommodate the mentally ill may include: emotional support animals<sup>40</sup> not being allowed certain places or even allowed to live in certain homes; many companies and governmental institutions requiring clients to call for appointments, queries and other business<sup>41</sup>; educational institutions having attendance requirements; and landlords evicting 'difficult' and 'disorderly' tenants. Life without the appropriate help, therefore, appears extremely difficult or even sometimes impossible. The appropriate help is also extremely difficult to get or takes a ridiculous amount of time to arrive<sup>42</sup>. Many claim health care has become too expensive to provide aid for 'extreme cases', and it is true that health care is extremely expensive<sup>43</sup>. The claim is however defended with an example of a person with an extremely rare disease that takes millions to cure or simply treat, and mental illnesses are far from rare. Again: one in four people will likely suffer from a mental disorder at some point in their lives, and conditions like Alzheimer's and autism are a well-known and growing problem in Western societies. As more 'confused individuals' roam the streets every day<sup>44</sup>, with 94% of homeless showing signs of a psychiatric disorder<sup>45</sup>, the value of mental healthcare needs to be drastically reevaluated. Mental health care drastically needs improvement in terms of capability to function faster and more facilities need to be put into

<sup>38</sup> KASSA, 'Verontrustende Signalen over Lange Wachtlijden in de Ggz', 20-09-2014, accessed 18 April 2018, <https://kassa.bnnvara.nl/nieuws/verontrustende-signalen-over-lange-wachtlijden-in-de-ggz>.

<sup>39</sup> Charlotte Huisman and Pieter Hotse Smit, 'Een Op de Drie Bijstandsgerechtigden Ontvangt Psychische Zorg', *De Volkskrant*, 6 September 2017, sec. Wetenschap, <https://www.volkskrant.nl/wetenschap/een-op-de-drie-bijstandsgerechtigden-ontvangt-psychische-zorg~a4515123/>.

<sup>40</sup> An emotional support animal is an animal that a doctor or other professional such as a therapist has deemed to benefit an individual with a disability. Certain ESA will cuddle up to their owners when they have a panic attack or simply calm an autistic owner when they have to interact with others, other ESAs will go as far as to prevent their owners from performing auto-mutilation.

<sup>41</sup> Some people with a mental illness become so anxious of calling, the thought alone makes their hearts throb and palms sweat.

<sup>42</sup> A person with a broken leg is either helped immediately or within a few hours, a person with an anxiety disorder could be waiting up to 16 weeks for help. The rarer the disorder and the more intense the treatment needed, the longer the waiting list can become. People suffering from multiple complex disorders have been known to have to wait up to a year or longer in rare cases. 'Wachtlijden in de GGZ' (Nederlandse Zorgautoriteit, December 2017), <https://www.nvgzp.nl/wp-content/uploads/2017/12/voortgangsrapportage-wachtlijden-in-de-ggz.pdf>. P. 42

<sup>43</sup> Health care is often not only made expensive by salaries of specialist but especially by the pharmaceutical industry, which places patents on the medication and medical technologies they develop in order to drive up the prices. This is a well-known problem that has only been increasing over time and across the world: Sarah Bosely, Why do new medicines cost so much, and what can we do about it?, 4 September 2018, <https://www.theguardian.com/news/2018/apr/09/why-do-new-medicines-cost-so-much-and-what-can-we-do-about-it>.

<sup>44</sup> Corline van Everdingen, 'VERWARDE MENSEN OP STRAAT' (Leger des Heils, 31 January 2016), <https://vng.nl/files/vng/publicaties/2016/20160131-aanjaagteampmvg-rapport-verwarde-mensen-op-sstraat.pdf>.

<sup>45</sup> van Everdingen. P. 6

place to make living with a mental illness somehow a little more bearable. The numbers that arise from the current situation are daunting, as every year 1871 people commit suicide in the Netherlands<sup>46</sup>. Deaths like this are as much a death from illness as is a death from spreading cancer: the mental illness grew too much to bear.

Although people with physical handicaps have received certain measures to facilitate their living a decent life, the mentally ill have received little in terms of distribution. In order to solve to problem of redistribution it is therefore necessary for there to be a political theory that can explain how to apply just distribution in a way that includes the needs of the mentally ill. Mental illness therefore firstly needs to be respected as a disease like any other, and secondly the means mental disorder sufferers need to get well need to be funded. The problems of respect and redistribution are connected in that redistribution cannot happen until there is a certain degree of respect in which mental disorders are acknowledged like other disorders and illnesses. Political theories can set an example of how to solve these issues of respect and redistribution.

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<sup>46</sup> "Aantal Zelfdodingen in Nederland Nog Nooit Zo Hoog." June 30, 2016. NOS. Accessed May 22, 2018. <https://nos.nl/artikel/2114388-aantal-zelfdodingen-in-nederland-nog-nooit-zo-hoog.html>.



## Chapter II

### *A Theory of Injustice?*

One still much respected and referenced political theory in terms of socially just distribution of goods within society is Rawls' *A Theory of Justice*. However, justice for those with mental disorders involves more than redistribution of primary goods and the rule of the difference principle as Rawls wanted. Rawls explains in the Theory that he will not account for those with 'a taste for an expensive lifestyle', but those with mental illnesses do not choose to have expensive 'lifestyles'. Care is expensive, but it is necessary. Mental health patients do not eat caviar and drink champagne all day and burn through their resources that way. They simply need more care, time and space than a 'mentally healthy' person would to be a functional, free and equal citizen. Martha Nussbaum proposes a way of distribution of resources not based what primary goods somebody should have, but on what capabilities people should have. All distribution that happens is all aimed at enabling people to use their capabilities, so those impaired and gravely in need of care will get more resources than those with a simple 'expensive taste'. I will elaborate further on her method in the following chapter, in the section titled 'A Theory of Capabilities'. First, we will discuss the severe lack of representation within the *Theory of Justice* for the mentally ill and see how it is possible that even within Rawls' *Theory*, this group is almost completely omitted.

In this chapter I will delve deeper into one of the more prominent and admired political theories of today. To understand what our duties are towards the mentally ill and what their rights should be, we need to understand our own duties and rights towards one another within the context of a society. A manner of discovering this is by means of the social contract. The social contract is a thought experiment used by political philosophers to answer questions relating to justice and our obligations to each other. Political philosophers using the social contract thought experiment can be divided up into contractarians and contractualists. Contractarians such as Hobbes and Rousseau, try to answer the questions of what justice entails and what reasons we have to respect rights and duties. To answer these questions, they picture a 'state of nature' in which man is free without a society to live in and deliberate on the reasons for entering into society. They explain both what exactly our rights and duties are and why one ought to comply with these through the social contract. Contractualists on the other hand are those political philosophers who only try to explain and identify our rights and obligations. Rawls, being one of them, does not utilise a hypothetical 'state of nature'. Instead he tries to create a (also hypothetical) fully 'neutral state' in which natural rights do not play any part. John Rawls' version of the social contract is presented in his book *A Theory of Justice* and is about trying to solve the problem of 'distributive justice'. In this, he defends that equality and liberty are not mutually exclusive and in fact are both needed. The solution to the problem of distributive justice he calls 'justice as fairness'. It is his prominent theory that we will delve into.



### Justice as Fairness

Rawls' theory departs from an 'original position' in which hypothetical representatives of citizens subject themselves to a 'veil of ignorance'. Under this veil, nobody will know what their position within society will be. They could be born into a poor family, be born with certain talents or be a member of a certain ethnic group. The only knowledge these representatives are supposed to have is basic knowledge on how a society functions. These deliberators discuss and decide the basic institutions that divide rights and duties and how their society (state) should be designed. The veil of ignorance is needed in order to reach a fair compromise between the different interests of the parties involved. Without the veil, one might choose whatever makes them only better off, without much thought about another person. The original position creates a situation of impartiality through the veil of ignorance. Therefore, in the original position people would choose those principles in which the worst-off would be best off given the situation, by means of reasonable compromise and safeguard. This is also called 'maximin': make things so that even if one gets the worst possible outcome, that outcome is the best possible one. That, according to Rawls, would not necessarily mean there would be absolute equality of primary goods, as it is possible that a society functions better and is wealthier if there are differences between people. It is a type of efficiency from which society profits overall.

Rawls explains that through rational deliberation two main principles would come into existence. The first principle is one of liberty and states: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."<sup>47</sup> By that Rawls means everybody should be given as much liberty as possible *as long as it does not infringe upon the equal liberty of another*. Liberty however does not only mean the liberty of speech, from harm or liberty of religious and political beliefs, but also the liberty to learn and develop oneself. Not all liberties though are 'basic liberties' – those liberties essential to be able to live a fulfilling life. Liberties not considered basic are such liberties as the right to particular kinds of property such as means of production and the liberty of contract as understood in laissez-faire theory amongst others. Thus, these liberties are not protected by the priority of the first principle<sup>48</sup>.

The second principle entails that "[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>49</sup> For help in explaining this principle, Rawls split it up into two principles: the 'Difference Principle' and the 'Fair Equal Opportunities Principle'. The Difference Principle is the principle that inequality is justified if it benefits the least advantaged. This principle is focussed only on primary goods, not wealth alone. Wealth would be a so called 'social primary good' but is only one of the social bases of self-respect and liberties from the first principle. 'Natural primary goods' are not subjected to the Difference Principle; this includes talents, health and intelligence. The fact that people have different talents and abilities can be used to improve society as a whole. Citizens have to consider the distribution of talents as a common asset that can benefit all. Those citizens luckier in the 'natural lottery' are free to use their endowments to make themselves better

<sup>47</sup> John Rawls, *A Theory of Justice*, Rev. ed (Cambridge, Mass: Belknap Press of Harvard University Press, 1999). P. 53

<sup>48</sup> Rawls. P. 54

<sup>49</sup> Rawls. P. 266

off, as long as in the process they help those worse off. It could occur that through having a particular good 'natural primary good', one gains a lot of 'social primary goods' through for example a high-paying job. Redistribution is then expected by for example contributing to society through tax and charity. Additionally, Rawls also claims these primary goods must in one way or another be preserved for the following generations, imposing some sort of 'fairness for the future'. Rawls therefore demands some form of sustainability from a just state, possibly even an environmental one in the form of the 'Just Savings Principle'.

Lastly, the Fair Equal Opportunities Principle is perhaps the simpler one: it states that everybody must have equal access to 'offices and positions' that give access to these unequal portions of primary goods. Think of equal access to learning opportunities and career opportunities (given one has the right qualifications). This means one should enjoy freedom from socio-economic class systems and discrimination based on gender, ethnicity, sexuality or religious beliefs. Although some Western countries do have basic human rights in place and ensure the basic survival of their people through taxes and benefits, the welfare state cannot truly ensure fair and equal opportunities for everyone. Rawls openly rejected the welfare state as welfare-state capitalism leaves economic power to a small and very rich elite. The welfare state leaves large economic decisions to be made by the free market, which generates socio-economic power for the rich. Because of this rich elite has a lot of socio-economic power, there is not enough resources left to ensure equal chances to influence politics. This lack of political influence by the general population generates a situation in which there are not enough equal opportunities of employment and education, leading to a disillusioned lower class. Only the rich can afford to allow their children to study for example, perpetuating this socio-economic class system<sup>50</sup>. Thus, welfare states are inherently unjust in that they do not ensure enough equality through liberties and still uphold socio-economic class systems.<sup>51</sup>

With these principles, Rawls creates a harmony between socialism and liberalism. They are liberal in that it considers freedom as the highest good (first principle) but it is also socialist in that it tries to achieve a certain level equality of social primary goods without taking away from people's freedom (difference principle). Though this equality would perhaps more appropriately be called 'egalitarian', it is most certainly to a degree also socialist. It leaves just enough power to the state to ensure fair and equal distribution whilst still allowing enough personal liberty to pursue one's own idea of the good life. Rawls' social-liberal view differs from other social contract theories in that he does not presuppose any 'natural rights'. His theory is based on liberty, but a liberty that is accessible to everyone no matter their predisposition. However, Rawls has some demands for not only the hypothetical representatives within the original position but also for the citizens they should represent that may pose problems.

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<sup>50</sup> Though the student loans given by countries such as the Netherlands are still fairly manageable, this is not the same for welfare states such as the United Kingdom where tuition alone may cost up to £9,250 a year. Even with loans in place, there are families who simply cannot afford to allow their children to study.

<sup>51</sup> John Rawls and Erin Kelly, *Justice as Fairness: A Restatement* (Cambridge, Mass: Harvard University Press, 2001). P. 137 – 140

### Free and Equal Persons

According to Rawls, as described in *Justice as Fairness* (his revision of the *Theory*), the parties in the original position are representatives of citizen as free persons. In paragraph 7 titled 'The Idea of Free and Equal Persons'<sup>52</sup> Rawls describes not only these hypothetical representatives but also the citizens they represent. "Justice as fairness regards citizens as engaged in social cooperation, and hence as fully capable of doing so, and this over a complete life."<sup>53</sup> In order to do this, persons need to have 'the two moral powers' which are: "a capacity for a sense of justice and for a conception of the good."<sup>54</sup> The two moral powers allow citizens to be free and equal persons, and Rawls believes this is a necessity to be a citizen. The former moral power entails a capacity to understand, apply and act from certain principles of political justice that emphasise fair terms of social collaboration. The latter is the capacity to have, reflect on and rationally pursue a conception of the good life. What this good life is remains up for the individual to decide, but Rawls' main point appears to be that a person has to have goals and ambitions in life. The possession of these moral powers is essential according to Rawls because not only do they turn people in free and equal persons that partake in the aforementioned social cooperation. They also bring people to honour the fair terms of society for their own sake.

Now, the problem in these terms and conditions lies in several layers of them. First there is a problem of citizenship: even though the original position is purely hypothetical, Rawls does state that every citizen, every free and equal person must have possession over these moral powers over a complete life. Secondly there is a problem of representation in that the mentally ill cannot be (accurately) represented. Let us first discuss the former. Notice the words '*complete life*': depending on what those mean exactly we could be facing a whole different layer of problems. For the time being, let us assume '*complete life*' means 'a whole life on average'. A citizen does not always have to be in the (full) possession of the two moral powers, but for the largest part of their lives they do. It is implied in my first chapter that some people with mental disorders to a degree lack what some would call 'rationality': mental disorders after all can affect not only people's emotions but also their thinking patterns and behaviour. Considering that a disproportionate amount of emotion and illogical thinking is typically considered irrational, we can also deduce their illness makes it hard for them to uphold both 'a capacity for a sense of justice' and a 'conception of the good' they actively pursue. Therefore this excludes people with serious cognitive disabilities and/or more permanent mental disorders from being 'free and equal persons' altogether. A chronically depressed person might not see the point of having goals and ambitions in life and a heavily autistic person might find it extremely hard to understand fair terms of social collaboration<sup>55</sup>. To people with these handicaps, the focus often lies on living day-by-day, on simply surviving to the next day. One could see 'getting better' or 'simply getting up in the morning' as a goal or ambition, but is it a goal towards living a good life or simply a matter of survival? Even so, social collaboration might be the last thing this group thinks about. Those

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<sup>52</sup> Rawls and Kelly, *Justice as fairness*. P. 18

<sup>53</sup> Rawls and Kelly. P. 18

<sup>54</sup> Rawls, *Political Liberalism*. P. 19

<sup>55</sup> Autistic people are definitely able to distinguish fair terms of social collaboration, but only if they are learnt. The problem with autism is that it impairs the sufferer in the ability to read social queues and mannerisms and to recognise emotion on another individual's face. The distinguishing of these fair terms is then more logical than intuitional as is to most people, especially (assuming) the citizens of the Theory of Justice.

who permanently have to struggle with mental disorders would in this case not be citizens, but those who temporarily suffer from them could still be in this scenario.

What if we understood '*complete life*' differently now? What if it means to have access to these two moral powers over an *entire (adult) life*? Let us for the sake of this scenario simply assume one needs permanent possession of the two moral powers. First of all, this would be impossible if one is to include the child phase of a person's life as children are often times too underdeveloped to have full access to the moral powers. We could reasonably exclude the child phase as in most societies one only becomes a 'citizen' once one reaches a certain age. The complete life would then include a person's life as a citizen: from 18 years on until death. This is still problematic as many people start to suffer from dementia or Alzheimer's disease as they get older. Should we then also exclude the 'senior phase' from the '*complete life*'? Even if we did that, adult citizens go through burnouts and depression just as much as teens, perhaps even more. Repeating once more: one in four people is likely to suffer from a mental disorder at some point in their lives. Excluding the possibility that people could suffer from much worse mental illnesses over the span of their adult lives, severely impairing their access to the moral powers, even the less severe mental illnesses can dwindle a person's judgement and capacity enough to stop them from being 'free and equal persons'. Basically, people who are handicapped in such a way that it impairs their access to the Rawlsian moral powers are either temporarily excluded from citizenship or completely, depending on how a '*complete life*' is interpreted.

Because the representatives only represent citizens, people who are excluded from citizenship are also not represented in the original position at all. This would also imply that children are not represented in the original position, but children belong to parents and their parents are represented. Furthermore, children will later become citizens, even if these children are, for example, orphans. Children are always citizens in development - potential citizens who need rights such as good education in order to become effective ones. Consequently, their needs should still be accounted for within the original position. Adults with mental disorders on the other hand do perhaps have parents, but are ought to claim their own rights. Adults are supposed to represent themselves unless a degree of autonomy is taken from them. People with severe cognitive disabilities such as the Down syndrome can be appointed a guardian if need be, but even that is only in extreme cases<sup>56</sup>. We would not want to treat the mentally ill as if they were children, that is patronising and paternalistic and completely against the first principle. The first principle protects people's basic rights and liberties and has full priority over any economic liberties. These liberties include: liberty of conscience and freedom of association, freedom of speech and liberty of the person, the right to vote, etc. To lose autonomy means to lose (some of) these freedoms. Mentally ill deserve autonomy just as much as a regularly ill person. To Rawls though, the mentally ill are not citizens and one could wonder if the first principle even applies to non-citizens. So either; they are not represented at all because they are not citizens (for the time being); or they are represented as if they were similar to children. Some mentally ill do have the potential to become citizens again, and in this way could be covered within the original

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<sup>56</sup> Though in many cases a degree of care is necessary for people living with Down syndrome, it is certainly possible for such an individual to have a full and independent life of work, independent living and even marriage. They also have democratic rights such as the right to vote. 'What Is Down Syndrome?', National Down Syndrome Society, accessed 30 May 2018, <https://www.ndss.org/about-down-syndrome/down-syndrome/>.

position, but what about those who will never have complete possession of the two moral powers (again)?

Rawls' conditions for citizenship, though similar to the ones for his representatives, are not exactly the same. The representatives of all the citizens combined in the original position need to also be 'rational' aside from the full access to the two moral powers *over a complete life*. "...the parties are rational in that they can rank their final ends consistently; they deliberate guided by such principles [...] so that [...] more rather than less of those ends can be fulfilled."<sup>57</sup> These ends are goals and ambitions in the sense of the conception of the good life formally discussed. This brings a whole different demand into the game that needs to be reflected upon: one can indeed be reasonable and have access to the moral powers without being fully rational. Rawls would argue that the veil of ignorance necessarily makes one reasonable as it takes away prejudices and any other preconceptions about society besides that basic knowledge necessary to shape principles of just distribution. However, now he is also demanding rationality out of the hypothetical representatives, excluding those who are not. The fact that these representatives are only part of a thought experiment makes this worse. Why are the moral powers and rationality relevant to derive just principles from? Rawlsians say because justice requires a moral background and the implicit ideas of impartiality and citizenship to be both plausible and acceptable. The matter of who is rational and who is not is always a debate. Mentally ill already are not represented as they are not citizens, and because of this cannot be a representative either. Added the extra weight of rationality, a large array of cognitive disabilities and perhaps even intelligence levels is excluded. The representatives, though rational, are therefore a small elite of rational mentally sound citizens. I personally do not accept the exclusion of the mentally ill from this thought experiment as acceptable and plausible.

The mentally ill are consequently a forgotten and overlooked group within the concept of justice as fairness as proposed by Rawls. This is in agreement with Martha Nussbaum's critique on Rawls.

### Critique of the Handicaps

In *Frontiers of Justice*, Martha Nussbaum writes about Rawls' theory with sympathy but finds that she must criticise him on some very problematic shortcomings. Rawls' theory is meant to develop principles for a fair distribution of basic goods within society. However, Nussbaum criticises that his theory does not take into account the handicapped amongst two other groups. None of these groups of individuals are involved in the forming of the social contract because Rawlsian social contract assumes more or less equal reasoning abilities and full possession of 'two moral powers'. This way, the social contract is thought to lead to equal benefit for all parties involved. The parties mentioned by Nussbaum, however, have too little to offer to be able to negotiate in the 'original position'. Moreover, not all of them are able to express their interests. Nussbaum believes the parties in the original position would have too little empathy to be able to imagine the needs of these groups, as they are oblivious specific love and kinship. They may know that they exist, but without the context of actually experiencing them for or through another person it is a mighty challenge to relate to them. Thus, within the original position it would be difficult to establish a just society that also addresses the needs of these other parties. It is even a matter whether the representatives within the original position would represent the mentally ill at all.

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<sup>57</sup> Rawls and Kelly, *Justice as Fairness*. P. 87

Nussbaum proposes that once society has been justified through the original position, an individual society could still decide how it wants to treat the aforementioned groups, but this makes their position much frailer. As explained in chapter I, society's biases further difficult fair distribution for excluded groups. Rawls argues reasonable human beings would always act through the compromise of the maximin method, yet Nussbaum argues this view of humanity is a rather selfish one: it appears as though the only reason people are willing to maximin is to guarantee a failsafe in case they are worst off. If people are inherently selfish, why would they spend extra resources for the well-being of these 'outcasts'? Most contract theories assume the parties shaping the contract are the parties who later will be subjected to said contract. Rawls does make a distinction between the contracting parties and citizens. However, in the original position the parties serve as ideal examples for these citizens and base their moral principles on this. The parties within the original position therefore are direct representations of the citizens that will later inhabit the just state shaped by it. The particular group of handicapped we focused on, as mentioned before, is not even considered a group of equal citizens but stands outside citizenship. Mental handicaps are therefore never represented, but according to Nussbaum the contracting parties have not enough empathy to wholly represent the physically handicapped either, given the information they have underneath the veil of ignorance.

Of course, these parties have no idea of what layer in society they will end up in, but considering they only represent citizens, they can hypothetically only become citizens. It is therefore plausible they at the very least will not have mental disorders. Rawls attempts to solve this problem of representation within the margins of his theory, by pointing out we make laws against the abuse of animals despite them not being people. As I have explained before however making these laws post thought experiment is not effective at all. According to Nussbaum these problems can only partially be solved if one would choose to stick to the *Theory of Justice*. Furthermore, Rawls even goes as far as to suggest that those who cannot understand justice are perhaps not owed any (strict) justice. "While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity."<sup>58</sup> The language used by Rawls in this quote can be interpreted as harmful to say the least: by referring to these subjects lacking the capacity for a sense of justice as 'creatures' he is almost distinguishing them from (creatures equal to) people. Perhaps Rawls was thinking more of animals and heavily morally deranged delinquents, but his words hold some heavier implications, especially considered he already distinguished a rather large group of people from being 'free and equal persons'. Despite distinguishing people lacking the capacity for a sense of justice as 'creatures' other than citizens, he does not say that 'everything goes'. As stated before: animals and children have rights. People lacking this capacity would therefore still have some rights, simply not as many rights as citizens.

Children for example, though (partially) lacking this capacity as well, have the potential of obtaining this sense of justice when they grow up. They are not equal to a regular citizen, but are given rights through their parents' citizenship and their potential to become a citizen. However, those who are mentally impaired, such as mentally handicapped people or the mentally ill, may have trouble maintaining this 'capacity for a sense of justice'

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<sup>58</sup> Rawls, *A Theory of Justice*. Page 512.



or even lack it altogether in the case of sociopaths or psychopaths<sup>59</sup>. By not acknowledging certain minorities as equal persons, as subjects being owed full justice, they can very well become a vulnerable minority. Now, Rawls would never justify the mistreatment of any minority in this manner, but it does indicate a lack of understanding for those not as privileged as to be considered full citizens. More importantly, it cannot appropriately address the problem of justice the mentally ill pose for his theory. Not allowing certain people to be citizens (in case of psychopaths for example) could be seen as a necessary move, but we cannot treat them the same as children either. Some changes in the way these people are treated are plausible but not to the extent Rawls makes out. Perhaps, because those lacking a 'capacity for a sense of justice' cannot participate or contribute in a certain way within society, Rawls is convinced that some form of partial justice would suffice for these groupings. Even if we reject Nussbaum's interpretation that the veil of ignorance is needed to not make people selfish, the reason this particular social contract is plausible should be a reasonable compromise. Taking away rights from a marginalised and frail group where perhaps they are due more rights is not reasonable to me. If anything, to counter their peculiar position they should perhaps be owed more rights and fewer duties. Martha Nussbaum agrees and thinks that with her theory a more inclusive theory can be built. This theory is not focussed solely on division of primary goods or resources, but on capabilities.

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<sup>59</sup> Nobody is diagnosed as either of this, instead the manual for diagnosing psychological conditions (DSM-V) speaks of an 'antisocial personality disorder' (ASP disorder). People suffering from this condition display antisocial behaviour and generally show indifference towards moral or legal standards. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, 2013, <http://www.slv.vic.gov.au/eb/ebRedirect.php?id=1811753>.



## Chapter III

### *The Capabilities Approach*

As we established in the previous chapter, neither the *Theory of Justice* nor Rawls' later revisions of his justice as fairness theory can appropriately address the justice problem in relation to the mentally ill. Worse still, Rawls does not seem to think that the handicapped, in particular the 'mad'/mentally ill, pose a justice problem at all. Those with mental disorders are not considered citizens at all and therefore are not represented as it is. Rawls' is a problem of both recognition and because of that redistribution: because he does not acknowledge them, he fails to propose a manner in which this group can be accounted for in terms of just distribution. This shows how recognition and redistribution are ultimately tied together and how it is difficult to realise one without realising the other. To be able to guarantee just distribution for a particular group of marginalised people, they must first be acknowledged as part of a (hypothetical) society. In the *Theory of Justice* they are simply not there, they do not exist to Rawls. Even if they did exist, they would end up being in the same position as children which is a degrading position for an adult to be in and is an infringement on their autonomy. Additionally, even if the mentally ill would be able to be represented within the original position, there is always the problem of empathy. Whoever, who has not dealt with mental illness themselves, has enough empathy to be able understand the needs of the mentally ill?

In this chapter I will first discuss Martha Nussbaum's attempt at altering justice as fairness in such a manner that justice for this frail group can be created. She will address the problem of empathy Rawls has as was discussed in the previous chapter, providing a 'tweak' to the veil of ignorance she finds necessary. Later I will give her alternative to Rawls' 'justice as fairness' theory.

#### A Theory of Love

The problem of handicapped in most contract theories is that their contribution to society is less than their cost. Though Rawls does not uphold a strict proportionality conception of reciprocity, his theory too is lacking in the aspect of (mental) disabilities. There is such a large difference between the handicapped and the parties in the 'original position' that even if the intention was there to represent all of them, the representatives would not be able to do so. Therefore the interests of mentally ill people are not sufficiently accounted for in the resulting principles of justice. Rawlsian social contract is not acceptable if this is the case. The parties must be equal and oblivious of their position within society, the parties must therefore not know they are handicapped or not be handicapped at all and, in both cases, imagine what a handicapped person's needs would be. Moreover, those lacking in the two moral powers cannot be considered 'free and equal persons' and therefore not citizens either. With mentally handicapped and the mentally ill the question is whether they have these moral powers, or have a sufficient grasp of them. Additionally, Nussbaum defends the claim that Rawls assumes the parties in the original position always act in favour of their own interests. Those who cannot be represented in the original position will therefore always be excluded. This is all because of Rawls' belief that society is nothing but a joint venture for mutual benefit. Can somebody enter in a cooperative venture if they cannot advantage the others, especially if they are at risk even of disadvantaging the others due to their needs?

This is why Nussbaum proposes a different assumption to justify the transition from state of nature to state than 'self-interest' or the maximin method. She suggests people act out of their involvement in their communities, out of empathy. Empathy is something that is extremely lacking within the original position, as the representatives have to be oblivious even to specific love. She claims her assumption is no more controversial than the assumption that people act selfishly. She proposes we assume people leave the state of nature because they choose for shared interests and a shared community life. This offers a different perspective on and an explanation as to how society values caregivers who look after their handicapped and ill relatives<sup>60</sup>. Love and care within family life are considered 'natural traits' that fall outside the social contract in Rawls' theory. These 'natural traits' under Rawls would typically fall under the 'private sphere' that is 'irrelevant' to the workings of a state. However, if everyone was purely self-interested, caregivers would not go out of their way and sometimes risk burnouts for these persons but would call upon certain institutes of the state to provide similar care<sup>61</sup>. Furthermore, Rawls sees empathy as something that would bias the parties in the original position, but Nussbaum disagrees. People do not leave the state of nature for mutual advantage, but because they cannot imagine living a good life without shared ends and a shared life<sup>62</sup>. Knowing what it is to love and have empathy are as necessary as knowing the basics of society. Knowing of the existence of love is not enough. The veil of ignorance may therefore not obscure (the object of) these feelings.

Through putting emphasis on this aspect of (family) life, Nussbaum discards Rawls' distinction between the public and private realms and points out these feelings are shaped by social circumstances: the private realm is in fact inseparable from the public one, they just appear to be different. If everyone is altruistic and caring, then whether or not one cares for a relative is fully dependent on social circumstances such as having living relatives in need of care. Additionally, something 'private' as caregiving in practice flows into the 'public realm' as it can dramatically alter behaviour, schedule and capacity of a caregiver. Caregiving should very much have public support.

The simplest solution to the lack of representation appears to still be to not inform the parties behind the 'veil of ignorance' on whether they will be handicapped or otherwise impaired or not. Nussbaum gives three reasons why Rawls refrained from doing this. First, Rawls' state functions on the notion that primary goods, including natural predisposition, would should be equally divided unless it benefits the worse-off. Yet determining who are the worst-off becomes more difficult when considering the handicapped because handicaps are so varied: a person missing a leg could lead a very fulfilling life with only some constraints in movement, but a person with severe learning disabilities will never live out their dream of becoming a doctor, severely impairing their opportunities and 'plan of life'. Secondly, the parties know general facts about the world and know that in designing the public space, in practice, handicapped may not always have been taken into account. It is hard to design a public space that is to accommodate all handicaps. Lastly, handicaps and mental illnesses are outside the norm and it would not just be difficult to determine their

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<sup>60</sup> Through this interpretation the good life of another becomes part of one's own goal towards a good life. Society would therefore see it as 'natural' for a mother to look after her handicapped child. Nussbaum, *Frontiers of Justice*. Chapter 3, P. 158

<sup>61</sup> Caregivers are often under such stress with both their caregiving tasks and careers and personal life that they run the risk of getting burnt out. Nussbaum. P. 170

<sup>62</sup> Nussbaum. P. 158

rights and duties, but also to add the justification of this to the principles. Handicapped are not per se lacking in primary goods, but they are certainly worse off. Thus, distributing primary goods in a Rawlsian manner is not enough to gain justice for the handicapped, let alone the mentally ill.

### Justice as Capabilities

The capabilities approach, originally developed by Amartya Sen, is an alternative to the general welfare economics. Sen brings together a set of ideas that were previously excluded from talks of welfare and economics, or in Rawls' case, just distribution. The focus of this approach lies on what individuals manage to do, not necessarily on rights and duties. In assessing capabilities, Sen argued to look at the following: the significance of real freedoms in the light of someone's advantage; the individual differences in the ability to use resources as investment in valuable activities; the varied nature of certain activities increasing happiness; an equilibrium of material and non-materialistic factors when evaluating welfare; and concern for fair distribution of opportunity. Though Sen did defend there were such a thing as basic capabilities, he always refused to offer a list of what these were<sup>63</sup>. Martha Nussbaum later helped to further develop this theory philosophically and actually provided a list of basic capabilities for every human being. Capabilities to Nussbaum are essentially 'substantive freedoms'. Therefore somebody in poverty is 'capabilities-deprived' in the sense that due to their poverty, they have no freedom to pursue their conception of the good life. Nussbaum's capabilities are basic as without one or a multitude of these capabilities, living a decent life is made extremely difficult.

Thus, Nussbaum suggests measuring both the quality of life and justice on a '*distribution of capabilities*' instead of primary goods such as income, talents, intelligence etc. The capabilities approach assumes that 'human dignity' is based on whether people can do what they dream of doing and be who they wish to be. Human dignity does not rest on having a lot of property or having specific abilities and talents and is a value that cannot be seen independently from the capabilities. It is about everyone deserving an *equal amount* of basic capabilities that they can decide what to do with, whether it is fulfilling a dream or otherwise. Like human rights, every human being gets exactly the same amount of capabilities. Though these capabilities would be necessary for achieving somebody's conception of the good life, Nussbaum does not offer a clear definition of what the good life is, as it can be different for everyone. The list of capabilities is fixed; no one gets more or less. The only individualisation that happens is if people have other 'endowment-issues' that limit their capabilities, not if they have different (unattainable) dreams. Some conditions for fully possessing these capabilities must thereby be equally distributed whereas for others these resources are already sufficiently present. Imagine a person is born blind; they are still owed education and the means to living their own life. To have access to the capabilities stated below some adaptations must be made to their direct environment. Be it as it may, this person will still have the same capabilities.

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<sup>63</sup> Nussbaum. P. 70

Nussbaum proposes the following ten capabilities as summarised below<sup>64</sup>:

1. Life: the ability to live a dignified life of a normal length
2. Bodily health: enjoyment of physical health which includes nutrition, shelter and reproductive health
3. Bodily integrity: the ability to move freely, to be free from violence and assault and to have the ability to sexual satisfaction
4. Senses, imagination and thought: appropriate education, freedom of thought, speech, religion and self-expression
5. Emotion: attachment to others, to care about and love another
6. Practical reasons: frame goals and ambitions and to plan one's own life
7. Affiliation:
  - a. Interpersonal: the ability to live with and towards another
  - b. Public: self-respect and non-humiliation
8. Other species: relations to animals, plants and the world of nature
9. Play: sensory stimulation, to be able to laugh and enjoy one's own life
10. Control over One's Environment:
  - a. Political: active citizenship and rights to political participation
  - b. Material: protection of property rights and employment rights

Using these capabilities instead of primary goods, Nussbaum proposes a manner of just distribution drastically different from Rawls. Rights, duties and resources are still divided, but these resources or 'social primary goods' are not the main focus. People simply need to get enough of certain resources in order to be enabled in their 'substantial freedoms'. Nussbaum chose capabilities rather than talents or natural goods because all that society needs to do then is providing the means for seizing these freedoms. Think of the provision of good education that is accessible for all layers of the population, think of the enforcement of human rights. The only time extra attention would have to be paid to an individual would be if it were impossible to provide access to one of the capabilities because of for example a severe disease or handicap: this individual would be unable to fully utilise the capability of bodily health. However, the state is ought to do however much possible to enable this severely sick individual, as long as it does not drain resources away from other individuals in need. She defends that not only would a state be more stable and less complex through usage of capabilities, but it would also be more just: by using the capabilities approach the handicapped and (mentally) ill can finally be accounted for.

### Empathy and Recognition

The presupposition that people will always act out of self-interest and self-preservation is no more likely than the presupposition that people act out in involvement with their community and social environment, out of altruism. Nussbaum suggests that the assumption of selfish individualism perhaps is a Western bias: "...Western societies, dominated as they typically are by economic motives and considerations of efficiency, how much more might we expect of human beings in a society that truly supported the human capabilities of all citizens, and devised a system of education to reproduce these values over

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<sup>64</sup> Nussbaum; Martha Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism.', *Political Theory* 20, no. 2 (1992): 202–46.

time.”<sup>65</sup> Nussbaum is positive that we, Westerners, might be able to create new values for ourselves that prioritise more altruism and care. The inclusion of the disabled within the social contract appears to increase justice, but it raises questions as to what is needed to convince the parties in the ‘original position’ to adapt their society to this relatively small group. Even when taking capabilities into account, it will be incredibly difficult and perhaps even impossible in some cases to offer the same chances to the disabled and mentally ill as to non-disabled healthy individuals.

Moreover there is the question of how much empathy is enough empathy to make a scheme like Nussbaum’s work. Because the representatives are stripped away from every bias including specific love, Rawls’ original position is lacking in empathy and love to work for especially those who will not be represented. One could wonder if these representatives will be able to maximise effectively at all without access to any form of empathy under the veil of ignorance. Rawls asks for the representatives to take on a mind-set of almost pure rationality, stripping away any emotion that might make those representatives stand up for those less fortunate. To create a system of fair distribution of primary goods, is reason alone truly enough? And even if we would assume Nussbaum’s theory is a better alternative, how would the state have to exactly enable people’s capabilities? Perhaps the state’s support would be an individual approach as it is now, where people have to reach out for help if they are limited in their capabilities. However, some people cannot or are afraid to reach out of help, even if it is state help.

Practicalities aside, the capabilities approach does seem like it gives a better answer to the problems of respect and redistribution. The capabilities approach can defend why one is due more resources than another. At the same time it still guarantees distributive justice as whether or not somebody is capability-deprived can differ per individual. Nussbaum has no demands for being allowed to have capabilities, as Rawls does for citizenship, and therefore acknowledges and respects the mentally ill the same as all other humans. The individualism offered here might just be the recognition people with mental disorders need. Recognition sets the first step towards respect and Nussbaum’s theory also allows for the problem of redistribution to be solved in the process as well. The practicality of the approach is perhaps not entirely relevant here, what is relevant is that it does what the *Theory of Justice* cannot: include the handicapped. In the eyes of the capabilities approach even those without the two moral powers, even children, are due these capabilities, and it is the state’s duty to provide the appropriate resources to enable them to have access to these freedoms.

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<sup>65</sup> Nussbaum, *Frontiers of Justice*. P. 157 - 158

## Chapter IV

### *The Rawlsian Response*

Although in the previous chapter Martha Nussbaum appeared successful in achieving what Rawls could not achieve, there are some that do see value in the Rawlsian principles for the mentally ill and handicapped. Rawls, as we saw, appears to have no answers for the problem of respect and representation and the added problem of empathy. Adam Cureton defends that the disabled certainly have a place within the *Theory of Justice* and that criticisms based on it are to be blamed on a too strong interpretation of certain statements made in it. He addresses concerns of both Martha Nussbaum on this topic, stating they interpret Rawls too strongly. With his interpretation, the 'weaker' reading, he argues Rawlsian society still is sufficiently just for the handicapped, including the mentally ill. His defence is aimed at Nussbaum's general critiques on how the handicapped in general are excluded, and therefore he focusses himself on the handicapped in general as well. Yet, my reasoning on the exclusion of the mentally ill from Rawlsian justice theory is heavily supported by Nussbaum's general critique. For the sake of Cureton's defence, the next section will focus only on handicaps in general. Later I will evaluate whether his defence holds up, especially when considering people with mental disorders.

#### Weak versus Strong

In *Essays in Philosophy*<sup>66</sup> Adam Cureton describes the critiques many have on Rawls on the subject of the disabled in general. He defends that this criticism is for a big part a misinterpretation of Rawls. He asks us to attempt to distinguish a Rawlsian approach from the 'limited enterprise' that is the *Theory of Justice*: there is more than one way to apply the principles established in the original position. Cureton argues that Rawls intended for the thought experiment of the original position to keep being consulted with new information on the different societies it is applied to. Depending on a particular society, some principles of justice might be applied slightly different. "There his explicit aim is to find principles of justice, which are to govern the basic structures of a closed, well-ordered society that exists under reasonably [favourable] conditions, that would be chosen by parties in the original position from among a small set of traditional conceptions of justice. Once we develop a conception of justice for a society like that, Rawlsians hope we can make certain revisions to find principles of justice for a society like ours."<sup>67</sup> New information about new structures of societies means more information that can be retained under the veil of ignorance, and small alterations to the principles that follow from the thought experiment.

He says the principles established in the *Theory*, the ones establishing the cooperative venture of mutual advantage, are to be understood as minimal conditions for society to exist. They form a basis for just distribution that needs to be expanded on. When we look around us, we can already see systems of social cooperation in place with disabled people in them. For a society to satisfy circumstances of justice there is no need to assume it is maximally efficient for everyone who takes part in that system of cooperation or for everyone to make a positive contribution. Cureton focusses his defence on explaining both

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<sup>66</sup> Adam Cureton, 'A Rawlsian Perspective on Justice for the Disabled', *Essays in Philosophy*, Philosophy of Disability, 9, no. 1 (January 2008).

<sup>67</sup> Cureton. Abstract on P. 1 of the article.



the 'equality condition' and the 'plan of life condition' Rawls makes for citizenship, also known as the two moral powers, which are often read too strongly. The goal of Rawls was to create this system of just social cooperation, not to create a group of elite citizens apart from others. He asks himself if there is any sort of disabled that would make social cooperation within society impossible. The only thing that could possibly happen is them running the system dry with the need for extraordinary resources. The only reason to partially exclude the disabled then would be to safeguard the rest of society. Moreover, the circumstances of justice that Rawls proposes leave an open question of whether society is actually required to respond to such extreme demands of redistribution.

Nussbaum claims Rawls excludes people whose mental and physical powers are unequal to those of 'normal human beings' from his description of circumstances of justice. Cureton states that though that may be true, in order for a society to satisfy these circumstances it is not necessary to assume it is fully efficient. We do not have to assume that everyone who partakes in the system of cooperation is without disabilities or is a positive contribution to this collaboration either. The equality condition does not qualify as a circumstance of justice if it is interpreted as strongly as critics do. It is clearly possible to have people with physical and mental powers that highly differ from the average member of society still partake in social cooperation. Because is no reason to think people with disabilities make a system of social cooperation impossible or unnecessary, the equality condition can also be satisfied by societies that include such people. Cureton emphasises Rawls' statement that capacities of citizens need to be comparable in that nobody can dominate the rest. It suggests that the equality condition was not made to exclude the weaker but to stop people who have exceptionally good physical and mental abilities to take over, to create an elite. A system of social cooperation like Rawls wanted is impossible if such an elite exists. No part of the Justice as Fairness theory or Rawlsian perspective, Cureton adds, depends on the strict condition of equality. "In addition, even if Rawls' limited project does assume that justice applies only in societies where citizens fall within a relatively strict range of physical and mental ability, since nothing essential depends on this assumption, we should change that feature of Rawls' view when trying to find principles of justice for a society more like ours."<sup>68</sup>

Now whether a situation counts as a circumstance for justice depends on whether social cooperation can be possible and necessary in societies in which that situation cannot sustain itself. This is where the plan of life condition comes into play, which can be split into two: citizens are supposed to have a plan of life that they strive for or otherwise have a conception of the good. This is one of the parts Nussbaum criticises Rawls on as well, as the plan of life is a factor that excludes the handicapped. Cureton states the plan guarantees that people have different goals that direct them towards the necessity for social cooperation. Citizens all need resources, therefore a compromise on who gets what needs to be made. Because some individuals with handicaps do not possess a conception of the good or a capacity for one, Rawls to some does seem to suggest these people are not owed strict justice. The strong reading of Rawls suggests he requires everybody to have a conception of the good, the weaker reading only requires *most* citizens to have a plan of life. Cureton favours the weaker reading which does not exclude the handicapped. The plan however is still a condition necessary for the Rawlsian social cooperation, just not for everyone who partakes in the collaboration.

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<sup>68</sup> Cureton. P. 8



The strong reading of Rawls that requires everyone to have a conception of the good is not a circumstance of justice: systems of cooperation can still be mutually beneficial even when some members lack this conception. Just as long as there are people making demands of the resources of society, perhaps some even for these people, it is possible. Cureton addresses that Rawls himself also thought these types of society are possible: just as we make provisions to take care of children, we can make provisions for this group of handicapped. Martha Nussbaum objects by saying that it is illogical to reason within the original position that there will be people that will contribute far less than most to the well-being of the group. If the goal is to make a cooperative arrangement of mutual advantage, then people will congregate with other people with whom they expect to benefit. It would be illogical to include those whose expensive attention without contribution will depress the level of society's well-being as a whole<sup>69</sup>. Cureton defends this problem rests on a misinterpretation of Rawls and how he uses the concept of mutual advantage. A collaboration is mutually advantageous for a group if they are better off in the group than alone. When Rawls describes society as a cooperative venture of mutual advantage, he means that cooperation makes everyone in it better off than they would if there were no such venture. Additionally, when Rawls explains his difference principle, he still calls it a principle of mutual benefit because even though the best off are ought to contribute, they still realise that the well-being of each is dependent on this social cooperation. The difference principle, then, does not make the best off any worse off than they would have been on their own; on the contrary, they are best off because they are within a society. Disabled people are therefore most certainly citizens.

As for the critique on the representatives in the thought experiment of the original position, Cureton states that the veil of ignorance is meant to prevent the participants from knowing how well they fare in the natural lottery. Therefore to him it seems only reasonable that they would not know if the people they represent are disabled or not. They also have general knowledge of the functioning of the world and society, so they know of accident and misfortune that may otherwise cause members of society to suffer. The parties would therefore definitely ensure as many primary goods as possible for all their beneficiaries, including the handicapped. From this, they will choose principles of justice that also apply to the disabled. Any more specific questions about what treatment and care society must provide for them are best addressed at a later stage. Even in a legislative stage the participants should be asked to imagine themselves under the veil of ignorance once more, these people will now simply know more relevant general economic and social facts about their particular society. With this, Cureton believes the Rawlsian ideal of legislators will have enough information to create inclusive rules and laws that include the disabled.

### The Right Reading

Because of this reasoning, Cureton does not think handicapped are necessarily excluded from being citizens, just from being representatives and does not see that as entirely a bad thing. If we accept his 'weaker reading', as long as *most* people within a society have a conception of the good and have a plan of life, society can still be a cooperation of mutual benefit. However, Cureton still goes as far as to interpret the representatives within the thought experiment of the original position as 'moderately

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<sup>69</sup> Cureton. P. 9

selfish'<sup>70</sup>. Even if the selfishness is only 'moderate', that only makes Martha Nussbaum's claims about empathy stronger: because they are selfish they will pursue as much of the primary goods for themselves as possible. Other Rawlsians disagree with this view of humanity: they state Rawls uses the assumption of self-interest only to predict the result that is the maximin method. He does not assume that people are intrinsically self-interested; nor can the people in the original position be as they have been robbed of any knowledge of what their own particular interests are. If the result is the maximin method however Nussbaum still believes that still implies a degree of selfishness.

Cureton does pose the hypothetical representatives do also represent the severely (mentally) handicapped and people with mental disorders, but these people cannot be representatives themselves. Even with the veil of ignorance, they will therefore not have a specific need to establish principles of justice that include this group. It requires a level of empathy the people under the veil of ignorance cannot have according to Nussbaum. Though he addressed parts of her concerns, Cureton still fails to recognise the part that is heavily lacking feelings of specific love. The veil of ignorance takes away all bias, so how can the representatives ever be empathic enough?

Moreover, even if we were to accept this weaker reading, Cureton still suggest that people with heavy impairments need similar provisions to those of children. As discussed before, this thought is paternalistic and patronising. Therefore, not only does he fail to address the problem of representation (and through that of redistribution), but he does not at all address the problem of empathy. He believes the 'duty' the representatives have to represent this marginalised people is enough to represent them successfully. Unfortunately, it is not. One could also wonder whether his 'weaker reading' is the right one. If Rawls meant to explain his theory the way Cureton would, then why did he explain it the way it is written in the *Theory of Justice* and *Justice as Fairness*? Furthermore, for this theory to address the problems of the mentally ill, they will have to be at the mercy of ideal legislators. Can we put as much faith in legislators as to apply the original position once more after the establishment of society? Personally, it appears best to have a theory that includes the handicapped and mentally ill from the very beginning, such as the capabilities approach.

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<sup>70</sup> Cureton. P. 6

## Conclusion

So, what does justice require with regard to those with mental disorders? Or rather: is the Rawlsian approach to distributive justice adequate in dealing with the specific problems of people with mental disorders?

In my first chapter I started by explaining what 'madness' or mental illness is. However, despite the help of the DSM-V and mental health professionals, there is still a lot of misguided prejudice against people with mental disorders. This prejudice expresses itself through stigma they have faced over centuries at least and stigma they still face. The widespread stigma shows itself through the issues relating to respect and redistribution I spoke about. Ultimately, these two problems are connected in that redistribution cannot happen until there is a certain degree of respect in which mental disorders are acknowledged like other disorders and illnesses. This is exactly the reason why people with mental disorders require are a justice-specific problem. There cannot be fair distribution that includes this group without acknowledgement and representation, and this is exactly what is lacking in many political theories tackling distributive justice. Political philosophy is an example to society and its leaders, and if political philosophy fails to address or even acknowledge the problems this group faces, we perhaps cannot even expect society to. There is a lot of (internet) activism calling for the acknowledgement of mental illness as regular illnesses<sup>71</sup>. However, teens and young adults' outrage alone is not enough at the moment. Fully solving the problems of respect and redistribution requires a theory of distributive justice that can serve as an example in policy making. One that can explain why handicapped and in particular the mentally ill need extra resources and why it would be justified to grant them.

In chapter II I took the *Theory of Justice*, one of the most prominent and admired political theories on just distribution of our times, and evaluated if the abovementioned problems could be solved through its principles. The Rawlsian stance on the mentally ill is one that has to be learnt through the interpretation of his conditions for citizenship and participation in the hypothetical 'original position'. People with mental disorders and their challenges in fulfilling these conditions are completely overlooked in it and that is why they are excluded from his 'Justice as Fairness'. It is necessary to understand our duties towards the mentally ill and what their rights should be, but the *Theory* and its revision fail to do this. Most if not all mental health patients struggle to fully possess the two moral powers Rawls speaks about, if they can possess (either of) them at all. Whether it is the ability to 'cooperate' in the social venture that is society, as Cureton explained it, or the ability to pursue a plan of the good life, it can both be very difficult if illness is within the mind. This excludes (most) mentally ill from being considered citizens in Rawlsian theory, and therefore also excludes them from being represented. However, if they do have the two moral powers, Rawls also demands rationality from the representatives in the hypothetical original position. Rationality interpreted in the way most do stands in opposition with 'madness' and disproportionate emotional states: madness is the classical epitome of irrationality. Mentally ill will therefore never be able to represent themselves or other mentally ill within the

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<sup>71</sup> Examples: John Campo, 'It's Time to Recognize Mental Health as Essential to Physical Health'. "News about #MentalHealthMatters on Twitter." Twitter. June 06, 2018. Accessed June 15, 2018. <https://twitter.com/search?q=#MentalHealthMatters&src=tyah>.

original position. This therefore makes them very dependent on the empathy and knowledge of these representatives to protect their interests.

In chapter three we made an attempt to 'repair' the problems with Rawlsian distributive justice with the help of Martha Nussbaum. Empathy is something that is difficult if not impossible to feel if one does not have love. Assuming the mentally ill are actually represented, the representatives in the original position could try to be empathic enough to protect their interests, but they are too oblivious to. Under the veil of ignorance the representatives do know love exists in general, but do not have any knowledge of specific love themselves. Rawls feared specific love would make them biased, but Nussbaum believes that exactly this would be necessary to allow the amount of empathy needed for this endeavour. Nussbaum therefore proposes a change in the reasoning Rawls gives to leave the state of nature, not to pursue a structure of mutual benefit, but out of people's interest in each other's well-being. If people are genuinely interested in how the other is doing, this would defend the representatives actually defending the interests of the 'weaker' citizens. However, the mentally ill are often not even citizens to Rawls, and it is unsure if empathy alone will be enough to create just and fair principles of distribution that disabled are included in. We therefore need an alternative to justice as fairness.

The capabilities approach, as we have seen, does not start its justification from the need for fair distribution. Fair distribution is something that follows from the establishment of capabilities. Though Sen never gave a full list of basic capabilities, Nussbaum does and through this list we can explain why certain people are due more resources than others. The mentally ill will have many limitations to their capabilities and are 'capabilities deprived'. The state has an interest in the well-being of its citizens, and has therefore a duty to provide the resources to enable this mentally ill individual in the exercise of these capabilities. Though in *Frontiers of Justice* Nussbaum speaks of handicapped in general, this theory is one that can also be used for people with mental disorders. The acknowledgement of mentally ill as capabilities deprived is acknowledgement of mental illness as any other illness. Thus, because their need for more resources can be explained through the capabilities approach, the problem of redistribution is solved. The problem of respect relating to stigma is for a part solved by the aforementioned acknowledgement, but will require additional education of the population to be fully solved. However, I believe this is also justifiable through the capabilities approach: public stigma and disrespect is a capability deprivation on its own. The only foreseeable challenge that remains is self-stigma and the fear to ask for the help of others. I believe that overcoming self-stigma is a matter of time as Nussbaumian society lets go of the stigma imposed on them before. Capabilities, substantive freedoms, are people's rights, enabling the capabilities deprived as much as possible is the state's duty.

In chapter IV, although the alternative Nussbaum proposes solves our question, we still explored the response of Richard Cureton, a Rawlsian. His claim is that both mine and Nussbaum's reading of Rawls is 'too strong' or even harsh. He proposes we follow his 'weaker' reading and asks us to 'go easy on Rawls' because his work is but 'a limited project'. Cureton claims handicapped are not necessarily excluded from being citizens, just from being representatives and does not see that as entirely a bad thing. According to this 'weaker reading', as long as *most* people within a society have a conception of the good and have a plan of life, society can still be a cooperation of mutual benefit. However, Cureton still interprets the representatives within the thought experiment of the original position as selfish as Nussbaum did. This leads to the same problem Nussbaum pointed out: if they are selfish they will pursue as much of the primary goods for themselves as possible. Even if it is

true the (mentally) handicapped are represented, they are still not representatives themselves, making this group dependant on the mercy of the representatives. There is no specific need for the representatives to establish principles of justice that include them besides some sort of love for justice. Effectively establishing principles of justice that include the mentally ill would require the representatives to have specific feelings of love, which they do not. Additionally, even if we were to accept this weaker reading, Cureton suggest heavily handicapped be treated similarly to children. This paternalistic thought only amplifies the problem of respect as it degrades the mental patient to a person without any autonomy. As if they were a childlike adult whose butt needs to be wiped and needs to be fed. This is downright degrading and disrespectful. Because of this issue and the fact that the representatives cannot effectively represent the mentally ill, Cureton also fails to address the problem of redistribution, just like Rawls has.

Justice with respect to people with mental disorders requires we abandon the *Theory of Justice* as a prime example of distributive justice. Our example should lie in Nussbaum's capabilities approach as to how to obtain this justice we are seeking. It gives us answers to both the problems: that of respect and of redistribution. The type of sickness that causes somebody to become capabilities deprived is irrelevant for distribution of resources, giving a solution to the problem of redistribution. This also subsequently acknowledges mental illness as equal to other illness leading to recognition. Finally, stigma, prejudice and discrimination in itself are a cause of capability depravity and need to therefore be combatted too. This theory explains why the state should involve itself in fighting stigma, whilst giving a solution to the problem of respect too. After all, acknowledgement through resource allocation is the first and foremost step towards respect. Furthermore, the capabilities approach is simple and does not deal with exceptions to rules it sets, unlike justice as fairness. Though a method of application of the capabilities approach is not given, making that method up for interpretation, it does exemplify what *should* be. The end goal, equal access to the basic capabilities to everyone, is clear and so far the only way to truly include people with mental disorders in distributive justice. Justice with regards to the mentally ill therefore requires implementation of the capabilities approach.

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