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# **RAWLS AND HEALTH CARE**



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May 2007**

**This thesis is presented in partial completion of the the  
Honors Program in Philosophy.**

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Advisor

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## INTRODUCTION

“Political philosophy now must either work within Rawls’s theory or explain why not.”  
Robert Nozick<sup>1</sup>

John Rawls’s *A Theory of Justice* (1971), his first major work articulating his theory of justice as fairness, was immediately recognized as a fundamental contribution to political philosophy in the twentieth century. Working within the tradition established by previous philosophers such as Kant and Locke, Rawls employed the contract theory approach. Taking it to a higher order of abstraction, he sought to determine not what the structure of social organization would be, but what the principles which governed social institutions would be under a hypothetical contracting situation. Rawls uses this contract theory approach to construct a society in which the morally irrelevant contingencies of nature and social arrangements are mitigated by principles of justice which govern the basic institutions of society.

A common observation has been that Rawls left out any discussion of health care and how it might fit into his conception of a just society. Several philosophers have articulated expansions of the theory to account for health care. In the chapters that follow I will continue this tradition and consider how justice as fairness might be expanded to account for just health care allocation. In doing so, I hope to answer a particularly strong critique of the theory brought up by Amartya Sen and Martha Nussbaum, and to argue for a broadened conception of health care which takes into account the complex causal relationship between society and human health.

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<sup>1</sup> Nozick, Robert. *Anarchy, State and Utopia*. Oxford: Blackwell, 1974, 183.

The first chapter is dedicated to a full exposition of Rawls's theory. The starting point of the theory is the conception of justice as fairness. With this basic premise secured, Rawls develops a hypothetical contracting situation, called the original position, in which individuals are unaware of their particular physical and psychological characteristics. This particular mental state is called the veil of ignorance. Although they do not know their particular values, they are conceived as mutually disinterested, that is, they are neither envious nor benevolent. They are fundamentally concerned with furthering their own purpose.

Contractors in the original position are concerned with developing principles of justice that will govern the basic social institutions of society. These institutions, in turn, determine the distribution of the basic goods of society, or primary goods: those goods which are necessary for carrying out all ends, regardless of their content. The primary goods are as follows: rights and liberties, powers and opportunities, income and wealth and the social bases of self-respect. To that end, individuals behind the veil of ignorance agree to two principles of justice. First, individuals are guaranteed maximum liberty consistent with like liberty for others. Second, social and economic inequalities are justified only if they benefit the least well-off in society.

The second section of the first chapter discusses in further detail the concept of primary goods and the role they play in society as envisioned by Rawls. Rawls explicitly offers the primary goods as an alternative to utilitarian methods of evaluating equality. The primary goods, along with the principles of justice, make these comparisons both easier and more accurate by reducing the scope of interpersonal comparisons and removing the need to make quantitative judgments about personal welfare.

In the final section of this chapter, I present Amartya Sen and Martha Nussbaum's critique of justice as fairness. Sen and Nussbaum question Rawls's use of the primary goods as the measure of equality. They point out that individuals vary in their ability to make use of the primary goods and so instead of using *means* to achieving one's ends, ability to *carry out* basic human functions should be used as the evaluative tool. The most prevalent and poignant examples that Sen and Nussbaum use to illustrate that equal shares of primary goods vary in value among individuals are examples having to do with health and health care. While Rawls accounts for these variations, his reply fails to consider the specific issue of medical needs. Sen and Nussbaum provide an important argument why a social system concerned with justice should provide basic health care. Without this provision, individuals' ability to make use of their share of primary goods may vary widely due to different medical needs which are beyond their control.

Rawls does not directly take up the issue of health care in his own work, but he leaves it an open question as to how this might be done. If Rawls's theory can be used to support an account of just health care distribution, then he will be able to escape the important criticism raised by Sen and Nussbaum.

Chapter 2 is dedicated to examining how the issue of health care allocation can be approached from the Rawlsian perspective. There are several reasons to argue that justice as fairness is not properly applied to health care. These arguments are considered and subsequently rejected, resulting in the conclusion that justice as fairness can be expanded to account for health care while maintaining the integrity of its basic features. The second and final section of Chapter 2 discusses previous attempts to do just that. Several philosophers have offered interesting, but ultimately inadequate, Rawlsian accounts of



health care. There is a need, therefore, for a new articulation of how Rawls's principles can be applied to the issue of health care, which is what I provide in Chapter 3.

In Chapter 3 I argue that the most defensible and appealing approach is to expand the list of primary goods to include health care itself. The list of primary goods which Rawls provides is admittedly flexible; Rawls himself offers several examples of possible additions to the list. Furthermore, health care as a primary good fits soundly within the purpose of the theory itself, and within the bounds of the definition of primary goods. Finally, adding health care as a primary good respects the limitations Rawls imposes on additions to the list.

The next section leads to the conclusion that a Rawlsian conception of health care is a *broadened* conception of health care, which I call *the social bases of health*. There is growing precedent for understanding health care as a good which extends beyond the provision of medical care itself and into other aspects of society. As a reflection of this, several prominent philosophers have widened their definition of health care. Moreover, Rawls's theory supports a broadened conception of healthcare.

The final section of Chapter 3 considers two important social bases of health, namely, education and environmental policy. Education has been shown to be a determinant of individual health, both directly and indirectly. Similarly, the status of the environment in which we live has both immediate and long-term effects on our health. In order to account for this, health policy must be expanded to include efforts to make education and environmental policy accord with our goals for human health.

While there are important and challenging questions to be answered regarding the specific distribution and funding of health care services, I will largely avoid them here.

There is a large and growing consensus, based on the notion that every human life is inherently valuable, that every individual deserves access to basic medical care. Illness and disease, which can be largely mitigated by access to adequate health care, represent significant hindrances to many activities associated with normal life such as keeping a job, caring for children, and having free time to spend with loved ones.

What I point out here is that even prior to the explicit provision of medical care, society, its structure and policies, can have significant impacts on the health of individuals. A society that is concerned with providing adequate and egalitarian health care to its citizens must recognize the effect that its policies and structure have on individuals' health.

## CHAPTER 1

### I. Rawls's theory of justice as fairness

The primary purpose of Rawls's theory is to present a complete account of justice that will form the moral foundation of the basic structure of society. Working within the framework of social contract theory, previously employed by philosophers including Locke, Rousseau, and Kant, Rawls takes this methodology to a higher order of abstraction, and in doing so, exhibits the wide applicability of the method itself. In doing so, Rawls provides an argument against classic utilitarianism, which Rawls points out has become the commonly accepted theory of modern social justice theory. In presenting his own theory of social justice, Rawls hopes to simultaneously expose the failures of utilitarianism and present an alternative theory.

With these purposes in mind, Rawls limits the scope of his considerations in two ways. First, he is concerned with justice only as it relates to the basic structure of society. He is not developing a moral theory which can be used to make moral decisions in any situation, but one which applies to the specific question of how society will be ordered to distribute the primary social goods. Second, he considers only the principles of justice which would function in a well-ordered society. He defines a well-ordered society as one in which "everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions generally satisfy and are generally known to satisfy these principles."<sup>1</sup>

Rawls's theory of justice is generated from his conception of justice as fairness. It is from this starting point that the methodological strategy of the social contract theory is applied: if we grant Rawls starting assumption that justice is best understood as fairness,

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<sup>1</sup> Rawls, John. *A Theory of Justice*. Cambridge: Harvard University Press, 1971, 5.

then, whatever principles of justice are developed from a fundamentally fair decision-making process must be, *by definition* just. So, Rawls first defines this fair starting position and then asks, under these conditions, what principles will individuals agree on to ensure that the basic structure of society is just?

Society is constituted by individuals who each have their own conception of the good; they are understood as both having their own rational life plan, and the ability to amend this life plan. While there are a variety of conceptions of the good that an individual in society may support, “the assumption is that though men’s rational plans do have different ends, they nevertheless all require for their execution certain primary goods, natural and social.”<sup>2</sup> That is, certain primary goods are universally understood to be necessary for carrying out any plan, regardless of its content. The set of primary goods contains both natural and social primary goods. The natural primary goods include health and intelligence. Because their distribution is not directly determined by society, Rawls excludes them from considerations of social justice. Social goods are those primary goods which are at the disposition of society and are listed as “rights and liberties, powers and opportunities, income and wealth.”<sup>3</sup> Having set aside the natural primary goods, I will from now on use the general term primary goods in reference to primary social goods.

Rawls also includes the social bases of self-respect as primary goods. According to his definition, self-respect includes “a person’s sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out” and implies “a confidence in one’s ability, so far as it is within one’s power, to fulfill one’s

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<sup>2</sup> Rawls, *A Theory of Justice*, 55.

<sup>3</sup> *Ibid.*, 62.

intentions.”<sup>4</sup> Understood in this way, it is plausible that self-respect be included among the primary social goods: the fulfillment of individual conceptions of the good cannot be carried out without at least a minimal recognition that that conception of the good is worthwhile.

The complete list of primary goods and explanations of their necessity for carrying out one’s life plans are as follows:

(i) The basic liberties (freedom of thought and liberty of conscience, etc.) are the background institutions necessary for the development and exercise of the capacity to decide upon and revise, and rationally to pursue, a conception of the good. Similarly, these liberties allow for the development and exercise of the sense of right and justice under political and social conditions that are free; (ii) Freedom of movement and free choice of occupation against a background of diverse opportunities are required for the pursuit of final ends as well as to give effect to a decision to revise and change them, if one so desires; (iii) Powers and prerogatives of offices of responsibility are needed to give scope to various self-governing and social capacities of the self; (iv) Income and wealth, understood broadly as they must be, are all-purpose means (having an exchange value) for achieving directly or indirectly a wide range of ends, whatever they happen to be; (v) the social bases of self-respect are those aspects of basic institutions that are normally essential if citizens are to have a lively sense of their own worth as moral persons and to be able to realize their highest-order interests and advance their ends with self-confidence.<sup>5</sup>

The primary focus of the theory is the basic structure of society, the system by which these primary goods are distributed. Specifically, it is the basic social institutions which directly distribute the primary goods and it is these institutions to which the principles of justice are applied. To determine these principles of justice, Rawls proposes a hypothetical contracting situation called the original position. In the original position, individuals are presumed to be both rational and looking out for their best interests. Additionally, it is assumed that “they do know...that they prefer more rather than less

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<sup>4</sup> Rawls, *A Theory of Justice*, 440.

<sup>5</sup> Rawls, John. "Social Unity and Primary Goods." *Utilitarianism and Beyond*. Ed. Amartya Sen and Williams Bernard. Cambridge: Cambridge UP 1982, 166f.

primary goods. And this information is sufficient for them to know how to advance their interests.”<sup>6</sup> Beyond these basic assumptions, individuals are conceived as existing behind what Rawls terms a “veil of ignorance” which precludes any knowledge of particular contingencies such as race, social status, age, and gender. Rawls explains:

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does he know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.<sup>7</sup>

Rawls excludes this knowledge on the basis that natural contingencies are morally irrelevant; no one has a stronger moral entitlement to more social goods simply on the basis of natural characteristics over which they have no control. These constraints ensure that in determining the principles of justice, individuals cannot advance their own particular ends. Because of this fundamentally fair structure, the principles determined within the original position are by definition just.

With the constraints of the original position in place, deliberation about what the best system of distribution would be begin from a hypothetical starting point in which all goods are distributed evenly. Parties in the original position have no reason for agreeing to anything less than an equal share; and as rational people they have reason to seek more rather than less primary goods. Rawls writes,

Everyone has similar rights and duties, and income and wealth are evenly shared. This state of affairs provides a benchmark for judging improvements. If certain inequalities of wealth and organizational power would make everyone better off than in this hypothetical starting position, then they accord with the general conception.<sup>8</sup>

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<sup>6</sup> Rawls, *Theory of Justice*, 93.

<sup>7</sup> *Ibid.*, 12.

<sup>8</sup> Rawls, *Theory of Justice*, 62

Under the constraints of the original position, and from the starting point of equal distribution of goods, individuals determine the principles of justice which will govern the institutions of society. The effectiveness of these principles is judged based on the same starting position: any deviance from basic equality must be justified.

Having set up the original position, Rawls goes on to consider which principles of justice individuals in this situation would choose to form the basic foundation of justice in society. Once established, the principles of justice facilitate choosing among various social arrangements. These arrangements in turn determine how advantages and disadvantages and rights and duties will be distributed. As presented by Rawls, the two principles of justice that would be agreed upon in the original position are:

1. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
2. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.<sup>9</sup>

The first principle, then, establishes basic liberties for all. These are defined as political liberty, freedom of speech and assembly, liberty of conscience and freedom of thought. That individuals would agree to equal liberty for all, at least as a starting point, is for Rawls intuitively obvious. Parties in the original position are both singly concerned for their own well-being and, because of the veil of ignorance, unable to give themselves special advantage based on their own particular tastes and traits; under these conditions they can be reasonably assumed to establish equal distribution of the primary social goods. Equal distribution applied to the basic liberties yields the first principle.

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<sup>9</sup> Rawls, Charles Fried, Amartya Sen, Thoman C. Schelling. *Liberty, Equality, and Law*, ed. S. McMurrin. Cambridge: Cambridge University Press, 1987, 5.

To the extent that certain inequalities in income and wealth may be to the advantage of everyone, a system of distribution of the primary goods of income and wealth must be established; the second principle ensures that this system is just. With this principle in mind, Rawls defines the difference principle which states that in the original position only inequalities which benefit the least well off would be agreed upon. The principle is implicitly presented in contrast to utilitarianism which is indifferent to who benefits in a system of distribution so long as the sum of all benefits is maximized. To defend this idea, Rawls relies on the rational faculties of the contracting individuals: without knowledge of their own position, individuals would seek to maximize their own worst-case-scenario, or minimum position. Rawls calls this the *maximin* rule.

An important feature of the two principles of justice is that they are hierarchical. The first principle must be fulfilled in order for the second principle to be considered just. The distribution of wealth and income, and the hierarchies of authority, cannot jeopardize either the basic liberties or equality of opportunity. This hierarchy is supported by the constraints of the original position. While particular conceptions of the good may correspond to different valuations of liberty, “the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course. The veil of ignorance forces them to abstract from the particulars of their plans of life, thereby leading to this conclusion.”<sup>10</sup>

## **II. The primary goods as the basis of equality**

In justice as fairness, primary goods serve two purposes. First, primary goods and the institutions which distribute them are the *subjects of justice*: it is to these parts of the social structure which the principles of justice are applied. Second, primary goods serve

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<sup>10</sup> Rawls, *Theory of Justice*, 543.



as the *basis for making interpersonal comparisons* about welfare. Determining how well-off individuals in a society are is important in any theory of social justice and particularly important in justice as fairness because of the difference principle, which implies that the welfare of individuals who are the least well-off carries more weight than the welfare of others. In order to apply this principle, there must be some way to distinguish the least well-off in society.

Furthermore, Rawls's use of the primary goods as the basis of evaluating justice claims serves his purpose of pointing out some of the problems with utilitarianism. Under utilitarian principles, utilities, typically understood as fulfillment of a mental state such as pleasure or desire, are the relevant variables for justice considerations. Justice is attained by maximizing the summation of these utilities. In the context of making judgments about individual well-being, then, it is clear that utilitarianism requires two things. First, making comparisons between distributive systems requires that the sum of individual utilities be determined. There must then, be some scheme for making quantitative evaluations of individual utility. Second, because utility is understood broadly, individual welfare must be determined across all measures.

While judging individual welfare is inherently inaccurate and difficult, using primary goods as a measure of equality within the constructs of the principles of justice avoids these requirements of utilitarianism specifically, and facilitates interpersonal welfare judgments generally. First, because of the difference principle, which states that inequalities are justified only if they benefit the least well off, there is no need to make quantitative claims about the well-being of individuals. So long as "better" and "worse" can be identified, the difference principle holds. Rawls explains,

The difference principle then, asks less of our judgments of welfare. We never have to calculate a sum of advantages involving a cardinal measure. While qualitative interpersonal comparisons are made in finding the bottom position, for the rest the ordinal judgments of one representative man suffice.<sup>11</sup>

That is, once the least well off group has been identified, its specific welfare needs alone need be considered, and the quantitative evaluation of other's welfare is not necessary.

Furthermore, it is not necessary to use the comprehensive list of primary goods to determine individual well-being. Recall that the primary goods are listed as: the basic liberties, freedom of movement and free choice of occupation from a diverse range of opportunities, powers and prerogatives of offices of responsibilities, income and wealth, and self-respect. Drawing on several aspects of the theory, Rawls narrows the primary goods to be considered for interpersonal comparisons to income and wealth only.

The basic rights and liberties are set aside because of the lexical ranking of the two principles of justice. The first principle establishes equal rights and basic liberties for all. This principle must be fulfilled before the second principle, which allows inequalities if they benefit the least well off, is applied. Rawls argues that the more favorable our economic situation is, the more important freedom to pursue our individual ends becomes. He grants that before a certain level of economic security has been attained, individuals may temporarily give up individual freedoms in order to reach that level of wealth. But, supposing that a minimum economic level has been reached, individuals in the original position "will not exchange a lesser liberty for an improvement in their economic well-being."<sup>12</sup> Thus it is not necessary to consider the amount of rights or freedom that an individual has when making a judgment about their level of well-being: all individuals are understood as having the basic rights and liberties.

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<sup>11</sup> Rawls, *Theory of Justice*, 92.

<sup>12</sup> Rawls, *Theory of Justice*, 542.

Rawls further reduces the scope of the question by removing the third primary good from interpersonal comparison. This is based on the assertion that power and responsibility associated with institutional offices and positions of authority are largely correlated to income and wealth. That is, those individuals with the least income and wealth are likely to have the least power within the societal structure.<sup>13</sup> Finally, with little explanation Rawls sets the social bases of self-respect aside in order to determine who the least well-off in society is.

The theory of justice as fairness facilitates making objective claims about the relative well-being of individuals based on the primary goods. Detailed, quantitative comparisons are rendered unnecessary by the difference principle, which only requires that the least well-off be identified. In addition, because of the priority of liberty and the rough association between the powers and prerogatives of offices of responsibility and income and wealth, an individual's share of income and wealth serves as a reasonable measure of her well-being.

A final note about the primary goods is that they provide an answer to the question: What "are the kinds of claims which it is appropriate for citizens to make when questions of justice arise?"<sup>14</sup> Furthermore, how can this understanding be reached when individuals hold a plurality of sometimes incommensurable conceptions of the good? Individuals come to this common understanding because of their two basic powers: the capacity for a sense of justice, and the capacity to conceive of and pursue a conception of the good. Primary goods are all-purpose means for pursuing a conception of the good, so individuals in the original position who do not yet know their conception

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<sup>13</sup> While the following chapter will take issue with this claim, I will let it stand for the purpose of this discussion.

<sup>14</sup> Rawls, "Social Unity and Primary Goods", 161.

of the good agree to them as the basis for making justice claims. The primary goods, then, define those claims which are appropriate to make with respect to justice.

### III. An Alternative approach for evaluating equality

Since the publication of *A Theory of Justice*, Rawls's theory of justice as fairness has been the subject of critique. One of the most fruitful lines of critique questions Rawls's use of shares of primary goods as the primary basis for judging equality. In particular, Amartya Sen has offered an alternative basis for making judgments about equality which he claims more accurately and justly accounts for the actual well-being of individuals in society. Sen argues that the equality of actual freedoms, what he calls *capabilities*, should be the goal of political society because individuals' abilities to convert primary goods into actual well-being differ. Measuring welfare simply on the basis of shares of primary goods, he claims, results in unacceptable inequality with respect to the actual freedoms that individuals enjoy. Martha Nussbaum supports this "capabilities approach" and has further articulated it. She claims that there are a set of basic human functions which constitute a fully human life. A society which does not guarantee the freedom to carry-out each of these functions is unjust.

Sen has questioned whether shares of primary goods are the best measures of individual welfare. Sen argues that *actual* freedoms, what he terms "capabilities," not *means* to freedom are what should be the primary justice concern. His challenge is "if we are interested in freedom, is it adequate to concentrate on the *means* to freedom, rather than on the *extent* of the freedom that a person actually has?"<sup>15</sup>

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<sup>15</sup> Sen, Amartya. "Justice: Means versus Freedoms." *Philosophy and Public Affairs* 19 (1990): 111-121, 115.

As an alternative to Rawls's means-based approach, Sen has articulated his own proposal for evaluating equality, which has been termed "the capabilities approach." In general, Sen argues that basic human functionings are what determine individual well-being, and that societies concerned with justice should seek to maximize individual capabilities, or freedoms to achieve certain functionings. Functionings, Sen writes, "can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality, etc., to more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on."<sup>16</sup> A person's well-being is dependent on the functionings they achieve. Similarly, a person's well-being is dependent on their *capability* to, or freedom to exercise, a function. Furthermore, having a broad capabilities set, or having the ability to carry out a variety of functions, has intrinsic value in so far as the act of choosing among the various functions in a set "may be a valuable part of living, and a life of genuine choice with serious options may be seen to be—for that reason—richer."<sup>17</sup>

Martha Nussbaum has further articulated Sen's capabilities approach. She frames the pertinent question of justice with regards to social well-being as, "What are the functions without which (meaning, without the availability of which) we would regard a life as not, or not fully, human?"<sup>18</sup> In response to this question, Nussbaum claims that there is a set of common human functions. In line with Sen, Nussbaum argues that the central goal of political systems should be maximizing the capabilities of citizens to perform these various functions. Beyond the provision of these *capabilities*, individuals must be free to make their own choices about which *functions* they wish to pursue.

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<sup>16</sup> Sen, Amartya. *Inequality Reexamined*. Cambridge, MA: Harvard University Press, 1992, 39.

<sup>17</sup> Sen, *Inequality Reexamined*, 41.

<sup>18</sup> Nussbaum, Martha. *Sex and Social Justice*. New York: Oxford University Press, 1999, 39.

Nussbaum further articulates her claim that a fully human life is one in which individuals have the opportunity to pursue a variety of functions by listing those functions which she considers to be central to human existence. Setting aside the others, two functions on Nussbaum's list are of particular importance to this paper: "Life – Being able to live to the end of a human life of normal length; not dying prematurely or before one's life is so reduced as to be not worth living" and "Bodily health and integrity – Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter."<sup>19</sup> These particular functions accord with Sen's description of the "elementary" functionings above.

Both Sen and Nussbaum offer the capabilities approach in contrast to Rawls's primary goods approach. In their views, the primary focus of justice in society should be individual freedoms. Because primary goods are converted into freedoms more efficiently by some than others, another measure, namely, capabilities to achieve functions should be used. Sen writes,

Since the conversion of these primary goods and resources into freedom of choice over alternative combinations of functionings and other achievements may vary from person to person, equality of holdings of primary goods or of resources can go hand in hand with serious inequalities in actual freedoms enjoyed by different persons.<sup>20</sup>

These inequalities in the conversion of primary goods to actual freedoms lead to inequalities which undermine the central goals of a political system which prioritizes liberty.

Sen offers several examples to illustrate how basing equality on primary goods or capabilities can have different outcomes in terms of a person's actual freedom. "A person

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<sup>19</sup> Nussbaum, *Sex and Social Justice*, 41.

<sup>20</sup> Sen, *Inequality Reexamined*, 81.

may have more income and more nutritional intake than another person, but less freedom to live a well-nourished existence because of a higher base metabolic rate, greater vulnerability to parasitic diseases, larger body size, or pregnancy.”<sup>21</sup> In addition, “a person who has a disability can have more primary goods (in the form of income, wealth, liberties, and so on) but less capability (due to handicap).”<sup>22</sup> It is these kinds of considerations, Sen argues, which make evaluations of welfare based on means or goods inadequate.

Rawls responds to this critique of the use of primary goods as the basis for making evaluations of equality in subsequent elaborations of justice as fairness. In response to those who argue that shares of primary goods do not adequately reflect an individual’s well-being, Rawls claims that individuals must be held responsible for their ends. While society is responsible for providing certain goods, there is a division of responsibility for those goods between society and the individuals which constitute it:

Society, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework, while citizens (as individuals) and associations accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation. This division of responsibility relies on the capacity of persons to assume responsibility for their ends and to moderate the claims they make on their social institutions in accordance with the use of primary goods. Citizens’ claims to liberties, opportunities and all-purpose means are made secure from the unreasonable demands of others.”<sup>23</sup>

So, society is responsible for guaranteeing individuals a fair share of primary goods, and individuals are responsible for choosing ends in such a way that they have a reasonable chance of satisfying them under such arrangements. Individuals in the original position

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<sup>21</sup> Sen, “Justice: Means versus Freedoms”, 116.

<sup>22</sup> Sen, *Inequality Reexamined*, 81.

<sup>23</sup> Rawls, “Social Unity and Primary Goods”, 170.

have already agreed that these arrangements are just. There is a common understanding regarding what claims are acceptable in the sphere of political justice: interpersonal justice claims are made based on claims about the primary goods.

Rawls's insistence on holding people responsible for their ends is reasonable in certain circumstances. Consider two men, John and Bob. John has always preferred to drive Jaguars. He attributes a substantial amount of his well-being to being able to drive a Jaguar. Bob drives a Honda and finds that his well-being is not affected by the car he drives. Under Rawls's scheme, the two men must be held accountable for their tastes. John cannot claim that the distribution scheme has done him an injustice because he is not satisfied with what his current share can buy him. The Rawlsian approach attributes John's dissatisfaction with his lot to his inability to adjust his ends given the social resources available to him. Both men have a fair share primary goods. Because these primary goods are by definition neutral with respect to conception of the good, both men have the same opportunity to derive satisfaction from their share.

That individuals should be held responsible for their ends relies on the fact that only certain claims to resources are appropriate in the context of social justice. Under justice as fairness, the primary goods define the kind of claims it is appropriate for citizens to make when questions of political justice arise. Rawls writes, "in effect, the conception of the person and the notion of primary goods simply characterize a special kind of need. It is the primary goods which are *needed* for individuals to carry out their particular conception of the good."<sup>24</sup>

The relevant contrast here is that between entitlements and desires. John is entitled to his fair share of primary goods, but has no claim to more primary goods based

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<sup>24</sup> Rawls, "Social Unity and Primary Goods", 173.



on desires within his control. John should accept the goods allotted to him based on the agreed-upon distribution scheme and adjust his ends according to that allotment. This does not mean that John has to completely abandon his conception of the good, but it may mean that he has to make sacrifices in order to fulfill it. For example, he may have to cut out other expenses in his life in order to finance his luxury cars. This kind of concession is reasonable considering that as a member of society, John has implicitly agreed to the division of responsibility outlined by Rawls.

Despite the applicability of the responsibility reply to questions of taste, such as the car example, Sen's objection that primary goods do not accord with actual freedoms still stands when health care needs are considered. The most poignant examples used to support Sen's critique involve medical needs. Furthermore, Rawls concedes that shares of primary goods fail as a measure of equality when one considers special health and medical needs, and leaves the issue out of his considerations.

Sen and Nussbaum's capabilities approach, then, provides a powerful argument for why a social system concerned with justice should provide basic health care to its citizens. To use Nussbaum's language, a life is not fully human without the capability to carry that life out to its natural end, free from the burden of avoidable illness. A society concerned with maximizing an individual's capabilities, or the functions they are free to pursue, must provide a minimum level of health care to ensure that the basic functions of "life" and "bodily health and integrity" are secured. Considering the specific case of health and medical needs, it is clear that the system which evaluates equality only on the basis of income and wealth results in unacceptable inequalities with respect to people's *actual* freedoms to choose from a variety of life options. This is because it is often

medical needs which create disparities in individuals' ability to utilize their share of means. Mitigating these inequalities requires accounting for health needs.

As mentioned above, Rawls recognizes that his theory doesn't adequately account for inequalities in health. While it is unreasonable to claim that Rawls *should* have included a discussion of health needs in his original articulation of the theory, it is plausible to ask: How could Rawls's theory of justice as fairness be expanded to account for the kind of basic health needs that Sen and Nussbaum show are crucial for achieving equality in society?

## CHAPTER 2

That Rawls largely left health care considerations out of both the original and subsequent articulations of justice as fairness has been noted by multiple political philosophers. This chapter will examine Rawls's treatment of the issue of health and medical care, and possible Rawlsian options for discussing the issue. These options fall under two categories: those which suggest Rawls intentionally, and correctly, left health care considerations out of his theory; and those which support using Rawlsian theory to develop a theory of just health care.

In *A Theory of Justice*, Rawls is virtually silent on the issue of distribution of health care. While he includes income and wealth, and even the social bases of self-respect as basic goods that the basic societal structure must distribute in accordance with the principles of justice, he leaves out any substantial considerations of health, the social bases of health, and health care.

The few places where he does mention issues related to health are cursory. In distinguishing between natural and social primary goods he includes health as a natural good, in virtue of it not being directly under the control of society.<sup>1</sup> In a later discussion of the nature of *public* goods, those goods which are valuable to society as a whole, he mentions inoculation against contagious disease as an example, with little explanation of how a practice such as this would be supported or implemented.<sup>2</sup> Finally, in outlining the features of the social system that will properly uphold his conception of distributive justice he adds: "the government guarantees a social minimum either by family allowances and special payments for sickness and employment, or more systematically

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<sup>1</sup> Rawls, *Theory of Justice*, 62

<sup>2</sup> *Ibid.*, 275.

by such devices as a graded income supplement (or so-called negative income) tax.”<sup>3</sup>

Despite mentioning health, health care and related issues, Rawls fails to explore the further implications of these considerations in his theory.

In *Political Liberalism*, Rawls addresses health care directly, but provides no answers to the question of how health care considerations might be included in his theory. He identifies questions about health care as one of four “problems of extension”. He admits that although he assumes “individuals are normal and fully cooperating members of society over a complete life, and so have the requisite capacities for assuming that role, there is the question of what is owed to those who fail to meet this condition, either temporarily or permanently.”<sup>4</sup> In light of this need, Rawls claims—with little explanation—that justice as fairness can be reasonably extended to cover the problem of setting up the principles of normal health care, but points out that these considerations lay outside the scope of the book.<sup>5</sup>

### **I. Rawls and health care**

The following section considers, and subsequently rejects, three claims that considerations of health care are best left out of justice as fairness. One argument is that the parties in the original position are unaware of their health status, and thus would not include questions about health needs in their deliberations. A second argument claims that the provision of health care is best left to the legislative stage and is therefore not appropriate in a purely theoretical text. Finally, Moskop argues specifically against the claim that the list of primary goods can be expanded to include health care.

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<sup>3</sup> Rawls, *Theory of Justice*, 275.

<sup>4</sup> Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993, 21.

<sup>5</sup> *Ibid.*, 244.

In support of the first line of reasoning, one could point out that the parties in the original position are conceived of as being unaware of their individual physical and mental capacities. Under the veil of ignorance, an individual is denied “any knowledge of his fortune in the distribution of natural assets and abilities.”<sup>6</sup> Furthermore, Rawls reminds us that he has assumed that “while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life.”<sup>7</sup> This argument assumes that because individuals in the original position both have physical and mental capacities which fall in the normal range and are unaware of their own particular physical assets, they would not consider either those who are incapacitated or those who have limited physical abilities. Additionally, proponents of this argument might suggest, the principles of justice are intended to be terms of fair *social* cooperation, and it is therefore reasonable to assume that the main task of the theory is to determine the structure for those who are active social operators.

Despite the constraints of the original position and the scope of the theory, however, it seems unlikely that parties in the original position would fail to consider their own need for health care. This point is best understood in comparison to Rawls’s consideration of the veil of ignorance with respect to individual knowledge of conceptions of the good. In this case, under the veil of ignorance, individuals are not aware of their *particular* conception of the good, but, in virtue of their rationality, recognize their own *capacity* for both forming and revising their own conception of the good. Using parallel reasoning, it must follow that despite being unaware of their own

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<sup>6</sup> Rawls, *Theory of Justice*, 12.

<sup>7</sup> Rawls, *Political Liberalism*, 183.

natural assets, parties in the original position can reasonably be assumed to recognize that discrepancies in physical and mental capacity do in fact exist (just as they are aware that they have some conception of the good), and that these discrepancies may have subsequent effects on their own ability to carry out their conception of the good. Said another way, even under the veil of ignorance, people have some knowledge at their disposal. It is reasonable to assume that they will have a basic understanding of human physical and mental life and its inherent fragility. Furthermore, as Rawls himself admits, even if we grant the assumption that individuals in the original position are fundamentally capable, the issue of variation among individuals will still have to be considered once this assumption is lifted.

A second explanation for Rawls's omission of healthcare considerations is the argument that health care appropriation falls under the large category of issues that are best handled through legislation and are therefore not appropriate topics of theoretical discussion. It is important to note that in the Rawlsian context, the legislative process has a particular meaning which must be kept in mind. As an elaboration of the original position, Rawls offers a four-stage sequence by which the principles of justice are applied. The sequence is modeled after the deliberations surrounding the United States Constitution and involves (1) the construction of a constitution, (2) the legislative stage in which the justice of laws and policies is to be assessed, (3) application of the laws by judges, and (4) application of the laws by citizens. Importantly, the types of knowledge taken away by the veil of ignorance are restored at the third stage.

In *Political Liberalism*, Rawls claims that decisions regarding variations in physical outcomes among individuals can only be dealt with at the legislative stage,

taking into account the incidence of particular physical variations and the cost of remedying them, with the aim of “restoring people by health care so that once again they are fully cooperating members of society.”<sup>8</sup> In *A Theory of Justice*, though, Rawls directly addresses which tasks will be handled at the legislative stage, and it is not clear that making health care decisions would be included. He writes, “The justice of laws and policies is to be assessed from [the legislative] perspective. Proposed bills are judged from the position of a representative legislator who, as always, does not know the particulars about himself.”<sup>9</sup> In later publications, Rawls himself considers the possibility of addressing the case of special health and medical needs at the legislative level, but expresses uncertainty about whether a solution such as this would be acceptable.<sup>10</sup>

While there are features of the process of making decisions about health care which make it appear appropriate for the legislative stage, such as the need to consider the cost and incidence of physical incapacity, they do not require that health care decisions take place in the legislative stage, nor do they preclude their inclusion in the deliberations of the original position. The issue of income and wealth allocation is the central concern of the theory, but like the issue of distributing health care, has certain characteristics which would make this a plausible legislative issue. For example, just as the issue of health care allocation requires the consideration of the specific distribution of both disease and access to care in a society, the issue of income and wealth allocation requires the consideration of the specific distribution of economic variables across a society. Therefore, any claim that health care considerations should be limited to legislation alone because it requires knowledge of particular variables seems implausible

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<sup>8</sup> Rawls, *Political Liberalism*, 184.

<sup>9</sup> Rawls, *Theory of Justice*, 198.

<sup>10</sup> Rawls, “Social unity and primary goods”, 168.

when one considers that income and wealth are among the basic primary goods. Their allocation falls not in the legislative stage, but within the scope of the basic theory.

A third defense of Rawls's exclusion of health care considerations is a response to those who argue that the list of primary goods should be expanded to include health care. In support of his own argument that Rawls's theory cannot be used to support a right to health care, Moskop defends Rawls limited list of primary goods. He claims that Rawls intentionally limits the list of primary goods:

Rawls's doctrine of primary social goods, however, is not meant to include all important social goods. Instead, along with the original position, it functions as a *simplifying device* designed to accomplish at least two tasks. First, it makes possible formulation of a limited number of very general principles of justice by keeping the subject matter of those principles very broad. Second, it allows Rawls to identify the relevant social positions for the purpose of evaluating the social system according to his principles of justice.<sup>11</sup>

In response to the first "task" that Moskop identifies, limiting the primary social goods for the purpose of theoretical simplicity does not hold up to close scrutiny on several fronts. First, in his own explanation of how the primary goods are generated, Rawls makes no reference to the need for simplicity. He instead says that "to identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents".<sup>12</sup>

Furthermore, while Rawls does take pains to make the theory general and widely applicable, he allows for revisions to be made for the sake of consistency. One aspect of his methodological strategy is "reflective equilibrium" whereby the conditions of the original position can be revised to reasonably yield the principles of justice and the

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<sup>11</sup> Moskop, J.C. "Rawlsian justice and a human right to health care." *Journal of Medicine and Philosophy* 8 (1983): 329-338. 333.

<sup>12</sup> Rawls, *Political Liberalism*, 76.



principles of justice can be revised to be the reasonable products of the original position. Rawls's own willingness to be flexible with the terms of the theory renders Moskop's first claim invalid. Finally, it is not obvious that adding health care as a primary social good would necessarily yield a new principle of justice; it is conceivable that distribution of health care could be determined by the two standing principles of justice.

Moskop's second claim regards the identification of the least well-off group, known as the "indexing problem." The indexing problem arises in the context of the difference principle, which states that inequalities must benefit the least well off, and thus requires that social positions be identified and their desirability and status be evaluated. Rawls identifies two methods for defining the least well-off group: choose a particular social position and define all individuals at or below that position as the least well-off group; or choose a particular income level and define all the individuals at or below that position as the least well-off group. Rawls admits a degree of arbitrariness in both methods, but states that either, or a combination of the two, will suffice for his purposes.

As discussed in the previous chapter, Rawls makes a simplification which seems to support Moskop's claim, but the simplification lies on shaky ground. He says that to evaluate the basic structure, representative men will be chosen. He admits that by identifying these individuals by their

Levels of income and wealth, I assume that these primary social goods are sufficiently correlated with those of power and authority to avoid the index problem. That is, I suppose that those with greater political authority, say, or those higher in institutional forms, are in general better off in other respects.<sup>13</sup>

This assumption is not satisfactory. First, in *Political Liberalism* Rawls also recognizes that social positions are determined by factors other than income and wealth, such as sex

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<sup>13</sup> Rawls, *Theory of Justice*, 97.

and race, and allows that those in the original position would understand the difference principle to account for these disadvantages as well. Rawls further complicates the indexing problem by including the social bases of self-respect as a primary social good. It is no more obvious how self-respect considerations will fit into the index of the least-well off than health care considerations.

Furthermore, both Rawls's original simplification and Moskop's use of the indexing problem brings up the question of whether degree of welfare can be measured on one scale in the first place. While Moskop is correct in pointing out that the difference principle requires that the least well-off group be identified, his suggestion that multiple indices are not feasible within the theory is incorrect. It rests on the assumption that the difference principle must be applied universally for all primary social goods. In fact, Rawls already sets rights and liberties apart from difference principle considerations in light of the hierarchy of the two principles of justice. So, universal application of the difference principle to all primary social goods in the same way is not required. That said, it is possible to define a least well-off group with respect to each primary social good, as needed, without any single group being defined with respect to the set of primary social goods taken as a whole.<sup>14</sup>

While there are several possible arguments against the applicability of justice as fairness to health care, each falls apart under close scrutiny. Individuals in the original position are not aware of their particular medical needs, but do have the capacity to foresee the possibility of sickness in their futures. While health care considerations may be appropriate at the legislative stage, that does not exclude them from the basic

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<sup>14</sup> Recall, also, the capabilities approach presented in the preceding chapter which illuminates problems with using Rawls's original list of primary goods as the only measure of well-being.

theoretical deliberations of the original position. Finally, the set of primary goods can be plausibly extended while maintaining their original utility.

## **II. Extending justice as fairness to include health care considerations**

The preceding arguments represent three claims that health care considerations do not belong in Rawls's theory. Others claim that Rawls did not intend to exclude theories of health care distribution as possible extensions of his theory, and so attempts to establish theories of just health care allocation within the framework are both plausible and necessary. This section considers three accounts of how Rawlsian principles could be applied to the issue of health care. Green argues for extending the list of primary goods, DeGrazia claims that health care rights can be grounded in the right to self-respect, and Daniels relies on the relationship between adequate health care and equal opportunity in his account of just health care distribution.

Green suggests that there was simply no room in *A Theory of Justice* for the important and complex issue of health care and other issues of social justice. He suggests that "it may be that his very silence on this issue reflects a deliberate decision to avoid discussion of an important but complicated problem" (Green 113). Working within the Rawlsian framework to develop a theory of just healthcare distribution there are at least two strategies: either the list of primary goods can be extended to include health care, or adequate health care can be shown to be instrumental in enjoying the set of primary goods defined by Rawls.

In his own work, Green employs the first strategy in his analysis of health care and social justice. He formulates this Rawlsian account of health care by posing the question: What would the contracting parties in the original position decide about health

care? He argues that access to health care would be recognized as one of the more important social primary goods: more important than income and wealth and nearly if not as important as the basic liberties themselves. He points out that “disease and ill health interfere with our happiness and undermine our self-confidence and self-respect.”<sup>15</sup> Facing scarcity of resources, Green argues, parties would opt for a principle of equal access to health care and would similarly reject any income-based distribution system because of the primacy of health care needs. Parties would recognize that health care needs are more important than income, and so would chose a distribution scheme based on medical need or actual illness over one which allocates health care resources only in relation to an individual’s income.

Further, he argues, the contractors would not neglect the issue of how extensive health services should be, and in light of this would establish upper and lower bounds of acceptable health services. As a minimum, parties in the original position would agree to provide enough health care “to insure that basic preventative and therapeutic services are rapidly brought within the reach of every member of society.”<sup>16</sup> Beyond this minimum, contractors would determine allocation taking into account the need to maintain the balance of economic needs and other social goods. With these bounds established, it still remains to be determined how health services will be distributed.

Green’s argument identifies the central question for developing a Rawlsian account of just health care distribution: “what would the contractors in the original position decide about health care?” But, as Green himself admits, his account leaves

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<sup>15</sup> Green, R. “Health care and justice in contract theory perspective.” *Ethics in Health Policy*. Ed. Veatch, Robert M. and Roy Branson. Cambridge, Massachusetts: Ballinger Publishing Company, 1976. pp 111-126. 117.

<sup>16</sup> Green, R. “Health care and justice in contract theory perspective”, 121.

several considerations unanswered. For example, a more detailed discussion of what types of services would constitute the lower bounds of care is lacking. Moreover, Green does not show how the health of individuals and health care itself fit into the social structure. Finally, there is no account of whether the Rawlsian approach would affect our current assumptions about health care policy.

The second Rawlsian approach involves establishing access to health care as instrumental for other primary social goods. Two authors have presented theories which follow this line of reasoning: DeGrazia, who grounds a right to health care in self-respect, and Daniels, who relates health care needs to reasonable equality of opportunity.

In his theory, DeGrazia lauds Rawls for showing that self-respect and its necessary bases are needed for enjoying other primary social goods. He examines several cases where lack of self-esteem connected with both poor health and lack of access to health services is shown to be a significant barrier to full participation in society. DeGrazia claims that in each example, adequate access to health care will improve self-respect regardless of whether actual physical health improves. The reasoning in each case is that provision of health services by the basic structure of society indicates to the patient that “society respects him as a person with dignity.”<sup>17</sup>

One example involves a chronically depressed and paranoid schizophrenic who understands that he is sick, but is incapable of holding jobs and has no provider of psychiatric care. He is a burden on his family who has suffered financially because of his illness and is unable to carry-out any of the projects that would have given his life meaning. Having a right to health care and thus receiving the care he needs, in addition to

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<sup>17</sup> DeGrazia, D. “Grounding a right to health care in self-respect and self-esteem.” *Public Affairs Quarterly*, October 1991: 301-318. 305.

improving his illness, would make him feel less like a burden to his family. Furthermore, receiving health care from a public institution would improve his self-respect as he would be aware that society respects him enough to offer him care.

In light of this presumed relationship between self-respect and health care, DeGrazia proposes a two-tier system. Individuals in society are guaranteed care included in the first tier, defined as “reasonable provision of an important basis of self-esteem and self-respect, one that would *do its part* in guaranteeing the appropriate levels of these goods” where appropriate levels of self-esteem and self-respect are understood as enough to allow an individual to enjoy other primary social goods.<sup>18</sup> So, all services which can be shown to improve self-respect are guaranteed to all members of society. Other services which cannot be linked to self-respect would be privately funded.

DeGrazia’s account fails because the causal relationship between receiving publicly funded health care and self-respect that DeGrazia claims exists presupposes that society is the proper distributor of health care. Without this assumption, lack of health care is not necessarily a sign of disrespect, and to include this assumption is to beg the very question at issue, namely whether or not it would be unjust for a society to fail to provide health care. In the case of the paranoid schizophrenic, receiving public care would only result in improved self-respect if there was a public understanding that providing health care was a sign of respect in the first place. While self-respect and its social bases will be a useful theoretical tool later in this paper, these concepts are misapplied in DeGrazia’s theory.

Daniels’ theory of health care follows a parallel line of reasoning, but focuses on the guarantee of equal opportunity. The theory rests on the claim that if our ability to

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<sup>18</sup> DeGrazia, D. “Grounding a right to health care in self-respect and self-esteem”, 305.

function as a “normal” human is impaired, we do not have equal opportunity to determine our own life plans. Daniels, then, defines health care needs as “those things which we need in order to maintain, restore, or provide functional equivalents (where possible) to, normal species functioning.”<sup>19</sup> What follows from this is the claim that health care distribution is properly conceived under a principle of justice which guarantees equal opportunity.

Daniels’ theory is well argued, and offers insights which will be used later in this paper. Despite these strengths, relying on the principle of equal opportunity in Rawls’s theory to determine a theory of just health care distribution has one significant problem, which Daniels himself identifies. That is that Rawls’s conception of equal opportunity applies only to jobs and offices. If we are to tie health care only to guaranteeing equal opportunity understood in this sense, we will have to limit ourselves to the health care needs of those who qualify for jobs and offices. That this leaves out some the most vulnerable populations in society is both clear and unacceptable.

It should be noted that Daniels’s theory was not intended to be applied specifically to the Rawlsian framework. In fact, Daniels claims that his equal opportunities approach can be used to evaluate particular theories of justice in the following way: if a theory of justice claims to value or provide for equality of opportunity, it must also provide health care which restores normal human function to the fullest extent possible. It is as an evaluative tool that Daniels applies his theory of health care distribution to the general political theory of justice as fairness. That Daniels’s account of just health care distribution fails in the Rawlsian context is not a failure of his

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<sup>19</sup> Daniels, Norman. “Health-Care Needs and Distributive Justice.” *Philosophy and Public Affairs* 10 (1981): 146-179. 158.

theory *per se*, but it does not answer the question of how health care considerations are best answered *within the Rawlsian framework*.

In addition to the particular shortcomings of DeGrazia and Daniels's approaches, the general strategy of justifying a right to health care on the basis of a single primary good, be it self-respect or equal opportunity, is problematic. By attaching health care rights to a single primary good, the *types* of health care which both DeGrazia and Daniels' theories support are restricted. This has already been shown in the case of Daniels, who finds that, within the Rawlsian definition of equal opportunity, his theory only justifies providing health care for those individuals who are eligible for jobs and offices. DeGrazia falls into a similar trap. His theory can only be used to justify the provision of health care which can be shown to affect an individual's self-respect. This requirement would be a problematic one to evaluate, and may leave out important medical needs which a society might otherwise agree to compensate for.

This difficulty of arguments which base the right to health care in a specific primary good reveals an important feature of these types of discussions: the particular justification of health care rights that a society relies on determines the *kinds* of health care that are justified. That is, a justification which relies on the narrow construct of a single primary good will be limited to those services which directly affect an individual's ability to acquire that good. Conversely, a justification of health care rights based on broader principles will allow for a broader range of services to be provided. The bottom line is, by limiting itself to arguing that health care is instrumentally valuable for a certain primary good, the basic minimum of care that each theory justifies is limited.



The previous discussions of just health care theory in the Rawlsian context can be divided into two categories: those which argue that Rawls's theory cannot be properly extended to include health care considerations and those which argue that Rawls's theory is particularly useful for these kinds of discussions. The three rejections of Rawlsian accounts of health care distribution have been shown to fail under close scrutiny. Philosophers who have applied Rawls's theory to their own theories have offered valuable insights, but no single account has addressed all of the questions that Rawls's theory brings up. Furthermore, the accounts which rely on the relationship between health care and a particular primary good justify the provision of only an unacceptably narrow set of health services. A new approach is needed.

### CHAPTER 3

Rawls himself does not discuss health care and attempts at expanding his theory to include health care considerations are inadequate. However, to escape the critique raised by Sen and Nussbaum, an acceptable justification for the public provision of health care must be found within Rawls's theory. Recall that Sen and Nussbaum point out that individuals vary in their ability to use means, or the primary goods, to achieve their ends, or conception of the good. Many of these variations arise from specific health needs. In order to mitigate the inequalities that result from variations in individuals' ability to make use of their share of goods, basic health needs must be met.

The most direct and defensible account of health care justice under the Rawlsian framework is to include health care itself as a primary good. Extending the list of primary good is reasonable, because Rawls conceived of the list as flexible and in several places notes that extending them may be necessary. Health care is an appropriate addition to the list because it fits within the larger objectives of the theory and within the definition of primary goods. Furthermore, this approach is preferable to other attempts at determining a system of just health care with Rawls's principles because it allows for an expanded conception of health care, one that will best ensure that the minimum standard of equality in health care is met.

#### **I. Extending the list of primary goods**

The list of primary goods is not fixed. Rawls allows certain variations to the list if certain conditions are met. In *A Theory of Justice* he describes his presentation of the primary goods as "initial" and "provisional."<sup>1</sup> He writes, "It is necessary to include other

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<sup>1</sup> Rawls, *Theory of Justice*, 396.

kinds of primary goods and these raise deeper questions.”<sup>2</sup> Rawls himself offers suggestions for additional primary goods. He writes, “Provided due precautions are taken...we can, if need be, expand the list to include other goods, for example, leisure time, and even certain mental states such as freedom from physical pain.”<sup>3</sup>

Not all goods are appropriately included under the heading “primary goods” and Rawls is clear about the constraints which must be imposed when adding to the list of primary goods. First, the limits of justice as fairness as a *political*, not *comprehensive* conception of justice which can be agreed to by people with various ends must be respected. To that end, the reasonable overlapping consensus which forms the basis of the principles of justice must be maintained.<sup>4</sup> Second, Rawls writes “we must respect the constraints of simplicity and availability of information to which any practicable political conception is subject.”<sup>5</sup> This constraint is presented with very little explanation. Rawls seems to be rejecting the addition of goods which are difficult to evaluate or make interpersonal comparisons about. It is clear, then, that Rawls never intended his original list of primary goods to be exhaustive, and seems to be inviting additions to the list, so long as his concerns are respected.

Before accepting health care as an appropriate addition to the list of primary goods, two questions must be answered. First, does health care fit into the theory as a whole and the original definition of primary goods? And, second, can health care be added while staying within the constraints Rawls imposes on making additions to the list?

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<sup>2</sup> *Ibid.*

<sup>3</sup> Rawls, *Political Liberalism*, 181.

<sup>4</sup> “Overlapping consensus” is a term Rawls introduces in *A Theory of Justice* (387) to describe the idea that while there is no *strict* consensus among the conceptions of the good regarding the principles of justice, there is enough overlap to support the same conclusion.

<sup>5</sup> Rawls, “The Priority of Rights and Ideas of the Good”, 258.

In response to the first question, health care within the larger purpose of the theory. Rawls writes that one of the objectives of justice as fairness is to nullify “the accidents of natural endowment and the contingencies of social circumstance.”<sup>6</sup> Reducing inequalities in health through just health care policy seems particularly important through this lens: health is *both* a natural endowment *and* a contingency of social circumstance.

Furthermore, the distribution of primary goods by the difference principle involves identifying the least well-off members of society. Rawls defines this group as “those who have the lowest index of primary goods when their prospects are viewed *over a complete life*.”<sup>7</sup> “Complete life” can be understood in a number of ways, many of which are related to health. A complete life could mean a life not shortened by premature death. It could also mean a life in which an individual can enjoy their old age. It may also mean a life not hindered by avoidable disease or illness. Each of these understandings of a complete life shows that the notion of primary goods and the least well-off in society is linked to health and health care.

In addition to fitting within the purpose of the theory as a whole, health care coincides with the definition of primary goods, namely, those things which “every rational man is presumed to want.”<sup>8</sup> Recall that while parties in the original position do not know their particular conception of the good, it is assumed that they all need the same basic goods to carry out their ends. Health care coincides with the all-purpose nature of the primary goods, and it is plausible that it would be identified as a primary good by individuals behind the veil of ignorance.

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<sup>6</sup> Rawls, *Theory of Justice*, 15.

<sup>7</sup> Rawls, “Social unity and primary goods”, 164 (emphasis mine).

<sup>8</sup> Rawls, *Theory of Justice*, 62.

Some might object that there are conceivable conceptions of the good which do not recognize the need for health care. An example is the Christian Science community which rejects conventional medicine in favor of prayer. This is an objection which applies to other primary goods, too, and which Rawls considers. Once the veil of ignorance is lifted, it may turn out that individuals do not want certain goods. This has no bearing on the decisions that are made in the original position, however. In the original position people are assumed to want more rather than less primary goods, and, being unaware of their particular conception of the good, do not distinguish among them. The primary goods as a set are recognized as desirable, all-purpose means necessary for furthering all conceptions of the good. Rawls writes, "It is rational for the parties to suppose that they do want a larger share since in any case they are not compelled to accept more if they do not want to, nor does a person suffer from a greater liberty."<sup>9</sup>

In response to the second question, including health care as a primary good respects Rawls's constraints for adding to the list of primary goods. It does not undermine the thin theory of the good because health and health care are universally valuable and would form part of the overlapping consensus. Regarding the second constraint, it is true that making judgments about the distribution of health care involves knowledge of specific information, the "availability" of which may be limited. However, this does not merit excluding health care from the list of primary goods. Other primary goods, particularly self-respect, are also difficult to evaluate on these grounds and may not fit into this constraint. Health care, then, does not further threaten the simplicity and practicality of the concept of primary goods.

Green raises another objection to including health care as a primary good which

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<sup>9</sup> Rawls, *Theory of Justice*, 142f.

must be considered. The basis for adding health care as a primary good, he says, is that no matter what our ends or goals, we need our health, and thus, adequate health care. But, he argues,

For many of us, some of our goals, perhaps even those we feel most important to us, are not necessarily undermined by failing health or disability. Moreover, we can often adjust our goals—and presumably our levels of satisfaction—to fit better without dysfunction or disability. Coping in this way does not necessarily diminish happiness or success in life.<sup>10</sup>

At first glance, this objection looks similar to Rawls's claim that individuals should be held responsible for their ends. Being responsible for one's ends involves adjusting one's needs and satisfaction level based on available resources. But Rawls only claims that individuals should be responsible for that which is under their control. While we *can* adjust our health needs, there is a minimum level of health functioning needed for any life plan. We should not, then, be *expected* to adjust our goals to accommodate any level of health below this minimum level.<sup>11</sup>

Throughout his work, Rawls indicates that the list of primary goods is flexible, provided that additions to the list maintain the neutrality and universality needed to fit within the overlapping consensus. Health care is a reasonable addition to the primary goods because it is a universal need, necessary for carrying out conceptions of the good, regardless of their content. What remains to be considered is what health care itself means in this context.

## **II. The social bases of health – an expanded conception of health care**

The term health care is typically understood to include health services which directly address needs deriving from specific mental and physical illnesses. Thus, the

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<sup>10</sup> Daniels, Norman. "Health-Care Needs and Distributive Justice", 154.

<sup>11</sup> Assuming this level is possible, that is, leaving aside the specific case of severe handicap.

*American Heritage Dictionary* defines health care as “the prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions.”<sup>12</sup> While this is the accepted connotation of the term, there is growing precedence for an expanded conception of health care which recognizes that health is affected by more than merely the amount of medical care an individual receives.

The very definition of health has been broadened to include social welfare. The constitution of the World Health Organization (WHO) states that “health is a complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>13</sup> It should be noted that under this definition, it is not clear that a society could ever ensure the health of all its citizens. Nonetheless, the WHO definition draws attention to the often over-looked relationship between society and health—a relationship that extends beyond the limits of the health profession itself.

According to the *Oxford Illustrated Companion to Medicine*, “health is the domain of physical and mental functioning. The *state* of health is then the degree to which these functions are in equilibrium with the physical, biological, and social environment.”<sup>14</sup> An individual’s health status, then, is defined in terms of the broader context in which that individual exists. Lack of health is attributable both to problems originating in the body itself and those coming from this broader context such as lack of access to safe drinking water.

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<sup>12</sup> “Health care.” *American Heritage Dictionary*. 4<sup>th</sup> ed. 2000. Page 808.

<sup>13</sup> United Nations. World Health Organization. *Constitution of the World Health Organization*. 22 July 1946. 02 Oct. 2006 <[http://policy.who.int/cgi-bin/om\\_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST\\_Constitution](http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST_Constitution)>.

<sup>14</sup> “Health Definitions.” *The Oxford Illustrated Companion to Medicine*. Ed. Stephen Lock, John M. Last, George Dunea. Oxford: Oxford University Press, 2001. 369.

Additionally, other philosophers have noted the need to expand our conception of health care. Norman Daniels, whose theory of health care distribution based on equality of opportunity was discussed in the previous chapter, has proposed a broadened definition of health care needs. They are “those things we need in order to maintain, restore, or provide functional equivalents (where possible) to normal species functioning.”<sup>15</sup> While this definition of health care needs relies on a particularly narrow conception of needs, it provides an important expansion to the traditional notion of health care. These five health care needs are as follows: “adequate nutrition, shelter; sanitary, safe, unpolluted living and working conditions; exercise, rest, and other features of healthy life-styles; preventive, curative and rehabilitative personal medical services; non-medical personal (and social) support services.”<sup>16</sup>

Martha Nussbaum’s capabilities approach also lends support to a broadened conception of health care. Nussbaum notes that the basic human capabilities do not stand alone: the fulfillment of one functioning is not worthwhile unless it is coupled with the fulfillment of others. While she denies that a valuable human life must include all of the basic human capabilities which she lists, it is hard to imagine a valuable life which does not include at least several of them. Nussbaum writes, “The aim of public policy is the production of *combined capabilities*. This means promoting the states of the person by providing the necessary education and care; it also means preparing the environment so that it is favorable for the exercise of practical reason and other major functions.”<sup>17</sup>

Bodily health and integrity is itself a basic human functioning; “preparing the

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<sup>15</sup> Daniels, “Health-Care Needs and Distributive Justice”, 158.

<sup>16</sup> *Ibid.*

<sup>17</sup> Nussbaum, *Sex and Social Justice*, 44.



environment” so that this functioning can be carried-out would require taking into account all aspects of public policy which affect health.

Further support for a broad conception of health care can be found within Rawls’s own work. First, Rawls points out that institutions can be evaluated both independently and within the larger social context in which they exist:

We may also distinguish between a single rule (or group of rules), an institution (or major part thereof), and the basic structure of the social system as a whole. The reason for doing this is that one or several rules of an arrangement may be unjust without the institution itself being so...In appraising institutions we may view them in a wider or narrower context.<sup>18</sup>

Applied to the issue of health and health care, this point becomes clear: to judge the efficacy of a society in minimizing disparities in health only on the basis of its medical institutions would be inadequate. Rather, all factors under the control of society which contribute to health outcomes must be evaluated.

Furthermore, central to Rawls’s conception of justice as fairness is the recognition that the various institutions of society are interconnected. It is the social system as a whole, which is made up of these institutions, to which the principles of justice are applied. He writes,

For us, the primary subject of justice is the basic structure of society, or more exactly, the ways in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. *Taken together as one scheme*, the major institutions define men’s rights and duties and can influence their life-prospects, what they expect to be and how well they can hope to do.<sup>19</sup>

It is the institutional scheme as a whole which is the determinant of justice. Any aspects of the societal structure which affect individual outcomes are governed by the principles of justice.

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<sup>18</sup> Rawls, *Theory of Justice*, 57.

<sup>19</sup> *Ibid.*, 7 (emphasis mine).

Finally, Rawls recognizes that societies are not limited to a finite period, but in fact exist and develop through time. He writes, “The fundamental organizing idea of justice as fairness...is that of society as a fair system of cooperation over time, from one generation to the next.”<sup>20</sup> Generational considerations are also made in the original position. Rawls imagines parties in the original position as representing the claims of their progeny. While they are not required to consider the full life span of society, “their goodwill stretches over at least two generations. Thus representatives from periods adjacent in time have overlapping interests.”<sup>21</sup> Parties are aware that the decisions they make in the original position will affect future generations and take this into account.

This inter-generational conception of society has several implications for health care. First, this aspect of the theory makes clear the need for preventative, not merely restorative or curative, services. A society which has no regard for the future health of its individuals is doing a disservice to future generations who will have to bear the economic and social burdens of a sick older generation. Prevention in this case must be broadly understood. That the parties in the original position are equipped with at least some concern for future generations also supports responsible environmental policies. Because environmental factors affect health, as will be shown in the following section, parties will be concerned with establishing responsible environmental policy for the sake of future generations.

There is good reason to expand the definition of health care to include aspects of the social structure which are not traditionally considered health care. Individual elements of the social structure contribute in an interrelated way to the health of individuals in

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<sup>20</sup> Rawls, *Political Liberalism*, 15.

<sup>21</sup> Rawls, *Theory of Justice*, 28.

society. Furthermore, elements of Rawls's theory of justice as fairness indicate the need to consider the broader implications of the structure of society, including implications on human health. The complex relationship between the structure of society and health can only be accounted for in a distributive scheme which includes a broad understanding of health care. To reflect this, and to avoid confusion, I will from now on refer to this broader conception of health care as *the social bases of health*, borrowing terminology from Rawls's designation of the social bases of self-respect as a primary good. In the following section I will discuss particular aspects of public policy which should be included as social bases of health.

### **III. What are the social bases of health?**

While the social bases of health are numerous, I will in this section focus on two areas of social policy which have a particularly close relationship with the health of a population. First, the education system of a society has the ability to change the health of a population. Policies designed with this in mind will go far in improving overall health. Second, the status of the environment has profound impacts on human health and policies designed to curb pollution and ensure responsible hazardous waste disposal will yield both immediate and long-term health improvements.

*Education* - Education level has been shown by numerous studies to have a direct relationship with health: the more educated an individual is, the less likely she is to suffer from disease. A recent study of the prevalence of HIV infection in Ethiopia showed that HIV prevalence decreases significantly with each increase in education level for both men and women. The authors commented, "Education may influence an individuals' risk for HIV infection directly by providing exposure or access to prevention messages, or

indirectly by facilitating employment opportunities and income.”<sup>22</sup> Other studies have shown significant associations between education level and chronic diseases such as asthma and bronchitis.<sup>23</sup>

Education institutions themselves play an important role in the health of an individual. Schools have unique access to children and with that comes influence on children’s eating and exercise habits which determine long-term health outcomes. The Centers for Disease Control and Prevention have recognized this connection. In a recent report on school health programs they write, “Because schools are the only institutions that can reach nearly all youth, they are in a unique position to improve both the education and health status of people throughout the nation.”<sup>24</sup> Furthermore, children spend a significant portion of their day at school, making school time an important determinant of their level of physical activity and nutrition. Finally, several behaviors which contribute to chronic diseases, including tobacco use and inadequate physical activity, are typically established during childhood and adolescence.

Education policy, then, is an important basis for health which is under the control of society and its governing institutions. Just education policy should include measures which recognize the important role education has in determining health. Because education level is itself related to health, the fundamental component of such a policy should be guaranteeing access to adequate schooling for children of all ages, including post-secondary education. This would mitigate the two ways that education can create

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<sup>22</sup> Bradley, Heather, et.al. "Educational Attainment and HIV Status Among Ethiopian Voluntary Counseling and Testing Clients." *AIDS and Behavior* 2006.

<sup>23</sup> Ellison-Loschmann, Lis, et. al. "Socioeconomic status, asthma, and chronic bronchitis." *European Respiratory Journal*, Jan 2007.

<sup>24</sup> Fisher, Carolyn, et. al. *Building a Healthier Future through School Health Programs*. United States. Centers for Disease Control and Prevention. Aug 2006. January 27, 2007.  
<<http://www.cdc.gov/healthyyouth/publications/pdf/PP-Ch9.pdf>>

disparities in health. First, assuming appropriate guidelines are in place, individuals would receive equal access to education about prevention and healthy living. Second, the inequalities in health which arise from inequalities in pay would be lessened in a society which provided adequate education.

Another feature of education policy which would reflect the relationship between education and health is guidelines for promoting healthy behavior during the time when children are at school. Healthier school meal programs and more time for physical activity are an easy way to improve children's overall exercise and nutrition habits. These policies, if instituted universally for all citizens, would ensure that inequalities in health outcomes determined by education would be minimized.

*Environment* - Another important social basis of health is environmental policy. Many aspects of the structure of society, including its industry, economic structure, and social values, affect the environment in which it exists, and often these effects have a negative impact on the health of its population. The link between health and the environment, and society's responsibility to consider the two together has been firmly established. Peter Whitehouse writes, "bridging medical and ecological ethics must be a critical aspect of the future of health and environmental planning and, in fact, of our species and others."<sup>25</sup> Irresponsible and short-sighted environmental policies have both immediate and long-term effects on the health of individuals.

Among the most wide-spread immediate effects of the environment on our health is air pollution, which is linked to a variety of illnesses. Among the various deleterious effects of exposure to ozone are irritation of the respiratory system, reduced lung

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<sup>25</sup> Whitehouse, Peter G. "The Ecomedical Disconnection Syndrome." *Hastings Center Report*, 29 (1999): 41-44. 41.

function, and inflammation of the lining of the lung.<sup>26</sup> Furthermore, outdoor air pollution has been shown to be responsible for, among other illnesses, adult cardiopulmonary disease and acute respiratory infection.<sup>27</sup>

Exposure to air pollution particularly affects the health of children. A Korean study showed that increased exposure to air pollution increases children's absence from school due to illness. The authors of the study pointed out the importance of school absenteeism as an index. They write that school absence relates "not only to morbidity but also directly to daily activities. School absences may lead to a student's decline in school performance and overall education received."<sup>28</sup>

In focusing only on education and environmental policies in my discussion of particular social bases of health, I do not mean to suggest that these are the only ones. Instead, I used these as examples of how public policy in many areas has a profound effect on the health of populations. A society which hopes to provide even a minimum level of health care, and which intends to distribute that health care justly, must consider the effects of all its policies.

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<sup>26</sup> United States. Environmental Protection Agency. *Smog--Who Does It Hurt?* July 1999. February 27, 2007. <<http://www.airnow.gov/index.cfm?action=health2.index>>.

<sup>27</sup> Cohen, Aaron, et. al. "The Global Burden of Disease Due to Outdoor Air Pollution." *Journal of Toxicology and Environmental Health, Part A* 68 (2005): 1301-1307.

<sup>28</sup> Park, Hyesook, et. al. "Association of Air Pollution with School Absenteeism Due to Illness. *Archives of Pediatric and Adolescent Medicine*, 156 (2002): 1235-1239.

## CONCLUSION

While Rawls does not discuss health care in any of his own work, it is by now clear that his theory is an appropriate tool for investigating this complicated topic. The previous evaluation of health care within the Rawlsian framework reveals important insights into Rawls's theory itself, the structure of political society generally, and the concept of health care.

With respect to Rawls's theory, this analysis reveals the need for an account of health care distribution within justice as fairness. Without this, the theory is vulnerable to the critique raised by Sen and Nussbaum who point out that the primary goods are not the best measure of individual well-being because individuals vary in their ability to use these means to achieve their ends. The most poignant and relevant examples of such variations are the result of specific medical needs that limit the actual portion of the share of goods an individual can utilize.

Another important aspect of Rawls's theory which this analysis reveals is the focus on the basic structure of society. In using the contract theory method, Rawls abstracts his consideration of political society beyond the actual structure of governing bodies. Instead, he looks at the basic structure of society, those institutions which distribute the primary goods. That this structure is just is ensured by principles applied universally to all institutions. This abstracted view of society reminds us that society can be understood as a complete unit, with interrelated parts that together determine the outcomes and well-being of individuals within it.

This insight has important implications for health care. In contemporary political discussion, by examining only particular and non-basic institutions and the policies which

govern them, we often lose sight of the basic structure of society with which Rawls concerns himself. Because of this, strategies for mitigating inequalities in health have been greatly limited. In addition to focusing on the explicit provision of health care by specific institutions within society, we must evaluate social policy on a broader level and ask how it might contribute to inequalities among individuals.

As recent political, economic, and ethical discussions concerning the public provision of health care demonstrate, our society is interested in mitigating inequalities in health. While health status among individuals in a society can never be equal, equal access to basic services will ensure that basic needs are met. Justifications for this kind of equality are widespread and gaining support. Too often overlooked, however, are the effects of other policies on the health of individuals.

Throughout his work, Rawls challenges us to consider how morally irrelevant contingencies, natural and social, can be mitigated. Among the contingencies that can affect individuals' and their ability to achieve their conception of the good over their entire lives are differences in physical and mental health. Any society that is interested in mitigating health inequalities and inequalities in general must consider the complex relationship between health and the broader social structure. Only by taking measures such as ensuring true equality in education and responsible environmental policy can equality in the social bases of health be approached.



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