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Recognizing Justice For Citizens With Cognitive Disabilities

Kacey Brooke Warren

University of Colorado at Boulder, kacey.warren@colorado.edu

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RECOGNIZING JUSTICE FOR CITIZENS WITH COGNITIVE DISABILITIES

by

KACEY BROOKE WARREN

B.A. California State University Sacramento, 2005

M.A. University of Colorado at Boulder, 2008

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This dissertation entitled:
Recognizing Justice For Citizens With Cognitive Disabilities
written by Kacey Brooke Warren
has been approved for the Department of Philosophy

Dr. Alison Jaggar (Chair)

Dr. Eva Kittay

Dr. Celeste Montoya-Kirk

Dr. Alastair Norcross

Dr. Michael Zimmerman

Date _____

The final copy of this thesis has been examined by the signatories, and we
find that both the content and the form meet acceptable presentation standards

Of scholarly work in the above mentioned discipline.

Warren, Kacey Brooke (Ph.D., Philosophy, Department of Philosophy)

“Recognizing Justice For Citizens With Cognitive Disabilities”

A dissertation directed by College Professor of Distinction Alison Jaggar

Citizens with cognitive disabilities represent a growing constituency in Western liberal democratic societies and, indeed, within the globe. There are currently millions of citizens with cognitive disabilities living in the United States alone. Most people will experience cognitive disability as some point in their lives, or at least will know and likely care for someone who does. The question of what justice requires for citizens with cognitive disabilities is citizens therefore a topic that any normatively adequate theory of justice must neither to overlook, nor ignore.

Central to any liberal theory of justice are the values of political equality and liberty and with these the need to provide justification for all those who are subject to the coercive legal and social institutions that the theory specifies. Although undeniably subject to any political regime and, indeed, to any liberal theory of justice intended to govern one, citizens with cognitive disabilities have frequently and without justification been denied equal justice. This, I suggest, marks a lurking bias in the structure of these theories of justice—the extent of which becomes evident only in light of the plausibility that alternative theories of justice can meet a standard of political equality and liberty for citizens with cognitive disabilities.

In light of this I assess four of the most influential contemporary theories of justice: John Rawls’s justice as fairness; Martha Nussbaum’s capabilities approach; Eva Kittay’s connection-

based approach and Axel Honneth's theory of differentiated recognition according to these two standards. My analysis clarifies how in the first three, certain of the theorist's methodological commitments precludes the theory of justice he or she advances from meeting either one or the other or both standards. I conclude that of the four, Axel Honneth's theory of differentiated recognition is the most promising. I then propose an approach to justification in terms of contextual transparency that complements Honneth's theory and has potential for upholding a standard of political equality and the liberal standard of justification.

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1. What Does Justice Require for Citizens with Cognitive Disabilities?

The Need for Moral Analysis.

1.1 Disability and political philosophy

Historically, the issue of cognitive disability has been neglected within philosophical discourse. As Licia Carlson (2010) states, when first inquiring in the late 1980s into what philosophers had to say about individuals with cognitive disability she found “relative silence or worse” (2). The philosophical picture of cognitive disability she encountered included a limited and one-sided characterization of individuals with cognitive disabilities as non-persons whose moral status was likened unquestioningly to that of animals and generally only mentioned in an effort to bolster support for the better treatment of the latter.¹ Cognitive disability is a tricky topic for philosophers. Its very possibility has posed and continues to pose what Licia Carlson (2010) calls a “philosopher’s nightmare,” for its occurrence presents a challenge to the traditional interpretation and the pervasive privileging of rationality in Western philosophical descriptions of the human condition and moral life. As philosophers have increasingly come to recognize, however, cognitive disability is not an anomalous aspect of the human condition; it inevitably characterizes it. This suggests that there might be a lurking bias in the very structure of certain philosophical inquiries, in particular in normative theories of justice that fail to address issues of justice that arise in light of cognitive disability. The extent and precise nature of such a bias, of

¹ As Carlson (2010) describes her encounter in the late 1980s with the philosophical terrain “Plato decreed that ‘defective babies’ should be left to die. Locke and Kant defined those who lack reason as less than human. And most of troubling of all, when I looked for contemporary discussions about this group, most of the references I found were in discussions of animal rights, asking pointedly whether the severely mentally retarded can be distinguished from non-human animals in any meaningful sense” (2).

course, may only become evident in light of alternative theories, which are less biased and acknowledge rather than neglect citizens with cognitive disabilities as well as the issues of justice they may have.

Cognitive disability is certainly not a new phenomenon. For instance, conditions such as deafness (which have historically been associated with intellectual deficiency), epilepsy, and mental retardation were prevalent during antiquity and the subject of medical treatment at Hippocrates' (460-377 B.C.?) medical school on the island of Cos (Winzor, 1997, 84). The term 'cognitive disability,' however, is relatively new. Moreover, contemporary interpretations of the causes of disability have shifted. Historically disabilities were understood to be "pathological" or "tragic" conditions. Today, we now acknowledge that the degree of disability an individual may experience is not merely rooted in some feature of an individual, but can vary depending upon the environment or context in which she finds herself. Today, 'cognitive disability' is an umbrella concept that refers to the class of disabilities including, but not limited to, intellectual and developmental disabilities² (such as Down syndrome, autism, emotional disturbance, learning disorders and severe mental retardation), various forms of dementia, Alzheimer's disease, traumatic brain injury, depression, epilepsy, schizophrenia and post-traumatic stress disorder. Each of these conditions is characterized by an individual's inability to function adequately according to some norm or standard for intellectual functioning. In addition, each is understood (as disability generally is) to be the result of a "lack of fit between the body and the

² According to the AAIDD, intellectual disability is "characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills. This disability originates before the age of 18"(2). Developmental Disabilities are "severe chronic disabilities that can be cognitive, physical, or both. The disabilities appear before the age of 22 and are likely to be life long" (3). See: AAIDD (2008, 2012).

social/physical/attitudinal environment that leads to social limitation or disadvantage” (Goering, 2002, 374).

Cognitive disabilities are quite prevalent and touch the lives of numerous individuals. In the United States alone over 50 million individuals are currently classified as having some level of disability, while 14.3 million are classified as having some level of cognitive disability. Even those who do not currently have a cognitive disability may experience one at some point in their lives (Brault, Matthew W. 2008; US Census Bureau, “Facts For Features,” 2007). Approximately one out of every 110 children has autism in the United States (Center for Disease Control, 2010). One out of every 691 babies is born with Down syndrome—making it the most common genetic condition (National Down Syndrome Society, 2012). The incidence of learning disabilities and emotional disorders is also quite frequent. For instance, roughly eight to ten percent of American school age children are estimated to have learning disabilities (AAIDD, 2008&2012; National Institutes of Health, 2011). Today we also are witnessing a dramatic increase in the overall number of individuals with some form of dementia, including Alzheimer’s disease, which some speculate is a result of increased life expectancy in developed nations. According to the National Institute on Aging, estimates on the number of individuals in the US living with Alzheimer’s may be as high as 5.1 million (National Institute on Aging, 2010). Moreover, people are always going to get cognitive disabilities as a result of injuries, for instance from work, sport, war, car crashes, etc.

As a seemingly inevitable feature of the human condition, cognitive disability raises distinctive and pressing questions of social justice. For instance, what is owed to and by citizens with

cognitive disabilities as well as what is owed to and by those (most often women) who are by custom assigned to care for them? Cognitive disability is not simply a phenomenon that happens to a single or isolated individual. The citizen with cognitive disabilities is almost never the only one who is affected by the condition(s) that contribute to her disablement. The lives of friends, family, care-takers, guardians, social workers, etc., almost inevitably will also be affected. At the very least, the increased levels of dependency associated with certain disabilities renders social assistance imperative to meeting their needs. For example, the cost of caring for an autistic individual over the course of her life is now speculated to be around 3.2 million dollars.³ This figure does not include other costs such as the burdens of time, stress and loss of freedom often experience caretakers experience. Given that life expectancies of individuals with cognitive disabilities have increased dramatically over the years in developed nations the need for care, caretakers, and adequate resources has increased and will likely continue to do so. For instance, while in 1910 a child with Down syndrome had an expected life of 9 years, life expectancies increased with the advent of antibiotics. In 1985, the average life expectancy of a child born with Down syndrome was 25. Today 80 percent of individuals with Down syndrome live at least to the age of 60. There are currently 40,000 families in the United States who have a child with Down syndrome, and 5,000 babies are born every year with Down syndrome (National Down Syndrome Society, 2012).

While certainly no normative theory of justice can address every issue that might be raised, cognitive disability is sufficiently pervasive as well as predictable. Therefore, the question of

³ This includes direct costs as well as indirect costs, such as estimated loss of productivity, (Harvard School of Public Health Press Releases, 2006). See also: Center for Disease Control, 2010.

justice for citizens with cognitive disabilities is one that should not be ignored. Cognitive disability is not an anomalous condition that can be addressed merely as an afterthought, but instead is crucial to the construction of any utopia that claims to be “realistic.” This is the case even for those theories, which are “ideal” in the Rawlsian sense and therefore concern “well-ordered societies.” The focus of this dissertation thus concerns the implications that cognitive disability as a stable feature of the human condition has for normative theories of justice. While the subject of what implications the often gendered nature of caretaking has for normative theories of justice is also pressing, for breadth, I focus my analysis exclusively on the question of justice for citizens with cognitive disabilities. Nevertheless, I do believe many of the concerns caretakers face and challenges the gendered nature of caretaking raises will be alleviated under the sort of approach to justice that I ultimately recommend. This is the sort of approach that makes room for cognitive disability at its core.

1.2 The challenges cognitive disability poses to liberalism

In the wake of John Rawls’s landmark work *A Theory of Justice* (*TJ*, 1971/1999), philosophical theories of justice have taken their focus as the normative assessment of basic institutional structures rather than individual action. Institutional structures, as Rawls expresses, are imperative to any analysis of justice because of their “profound impact on one’s life chances.” Institutional structures both “enable and constrain” individual behavior by constructing the sorts of options that are socially available and acceptable for individual action. Institutional structures are enforced both by state power and social pressure, often with harsh penalties for those who fail to conform. So, for example, as Rawls specifies the political constitution, the legal protection

of freedom of thought and liberty of conscience, competitive markets and private property in the means of production and the monogamous family all exemplify contemporary institutional structures (1999, 9). And their coercive force is perhaps most evident in consideration of the US Constitution, which at one point in time upheld the practice of slavery.

Less obvious to some today, the monogamous family is an institutional structure that functions to limit and enhance individual life chances. By referencing the monogamous family, I do not intend to suggest that most are unaware that having something like a loving, supportive family might increase one's life chances. Instead, when political theorists such as myself speak of the monogamous family as an institutional structure, they are referring to the roles it presumes and assigns to individuals within it as shaping individual life chances. The monogamous family is comprised of a relation between a married couple and their children. Until very recently marriage has been cast in law exclusively as a relation between a man and a woman. In line with this conception, social policies and practices, for instance those concerning adoption, health care and hospital visitation, have been tailored notoriously in a way that denies citizens who participate in same-sex couples similar opportunities and access as citizens who participate in heterosexual couples. In some places the possibility of "queer bashing" still serves as a disincentive for individuals to participate in amorous same-sex relations at all.

Liberal theory is a distinct and rich tradition of Western normative political thought. It is characterized by its emphasis on the core normative values of individual political equality and liberty and with this the belief that coercive power must be justified or justifiable to all those

who are subject to it.⁴ For this reason, justification for the principles of justice that regulate the structure of coercive social institutions is of particular importance for liberal theorists. Of course, it is also of equal interest for citizens with disabilities whose life chances, opportunities, and even abilities may be inhibited or diminished like everyone else's if the principles that govern structural institutions disadvantages them or is biased against them in some way. And today we have reason to believe that social institutions in Western liberal democratic societies are biased against citizens with cognitive disabilities. For instance, Ravi A. Malhotra (2006) notes that in Canada individuals with disabilities are largely excluded from the labor market due to barriers to employment such as inflexible work schedules, inaccessible buildings for those who have certain physical impairments and the widely held belief that individuals with disabilities are both inherently inferior and naturally dependent (71).⁵

Institutional bias is particularly troubling in light of cognitive disability, for as Ian Hacking (2000) argues, humans are the sorts of beings that are in constant and dynamic interaction with their environment. Ideologies and belief systems that function into our conceptions of disability, our classificatory schemes and, in turn, the structure of our social institutions can have a profound influence, therefore, not simply on what options one has, but what one can do and who one can be. Assumptions, for instance, that a certain group of individuals is uneducable will likely lead to attitudes, policies, and practices that inhibit rather enable learning for those

⁴ For an excellent overview of liberalism, human nature and the values of political equality and liberty see Jaggar (1983), in particular chapters 2, 3, 7 and 11.

⁵ Malhotra's observation is drawn from 1996 Canadian Census data.

individuals.⁶ Under other circumstances the same set of individuals may be capable of developing the skills associated with a “normal” level of intellectual functioning.

Within liberal theory, a common response to the need for justification is the development of some version of social contract theory. Social contract theory postulates one type of explanation of the conditions under which and reasons for which all citizens in a liberal state may be thought to have consented to the use of state power. In addition, contract theory also imagines the limits that free and equal individuals would set on state power. Nevertheless, social contract theory does not exhaust the tradition and the need for justification raises general problems for all citizens who are simply born into institutional structures without having participated in any “original compact.”⁷ This is because liberalism’s commitment to equal liberty requires that no coercion is morally permissible without some justification. Contemporary political theorists widely acknowledge the liberal standard of justification, if interpreted as mandating that a theory of justice requires explicit consent by all those who are subject to it, would be too demanding, impractical, and in some cases undesirable. Moreover, early forms of democratic process remind philosophers in particular of the injustice that can come as a result of actual consent under conditions of inequality. Under such conditions any sort of agreement may simply reflect what John Stuart Mill calls a “tyranny of the majority” or an oppressive state in which power and influence simply persuade individuals’ convictions, effectively depriving them of liberty.

⁶ Hacking’s own interest concerns primarily how individuals’ reactions to classification schemes in turn challenges the classification system and creates a need for a new scheme. This is what he refers to as “looping effects in human kinds.” In some cases, however, challenge to the classificatory scheme can take quite a length of time as the long-standing association between being “deaf” and being “dumb” demonstrates (Bradley & Nelson 1997, Edwards 1997).

⁷ Early social contract theorists often referred to the social contract as the “original compact” or initial contract.

In turn, philosophers have developed methods for demonstrating that their preferred theories of justice are *justifiable* rather than *justified*. For instance, in some cases contemporary political philosophers have endorsed forms of tacit, implicit, or hypothetical consent. I will explore two prominent methods of justification further in chapter 3. For the time being, however, I would like to highlight a particularly challenging dilemma liberal theorists face when confronted with the need for justification in light of the existence of individuals with cognitive disabilities.

Given the centrality of the liberal standard of justification to liberal thought, the standard initially seems to exclude citizens with cognitive disabilities who are typically assumed to be “irrational” and therefore incapable of offering consent, comprehending consent, or otherwise being justified to. Still, these individuals remain citizens who hold a claim to equal political consideration and should not be excluded at the outset from the scope of justice. Arbitrarily and without plausible moral justification, excluding citizens with cognitive disabilities from the scope of justice violates the core liberal values of political equality and liberty. Yet, here we are confronted with questions of how the coercive structures to which citizens with cognitive disabilities are subject might be justifiable to them. Are citizens with cognitive disabilities equal subjects of justice, or are they only objects of moral concern, who like children and animals cannot and should not receive the benefits and burdens of full citizenship? Or can they be full citizens or agents of justice with a voice present in the arrangement of the basic social institutions that effect their lives? If so, will citizens with cognitive disabilities be capable of participating under terms that others could reasonably accept?

Some philosophers assume that citizens with cognitive disabilities pose only a burden to

society—that they are only capable of taking and not capable of giving or otherwise participating in symmetrical relations of reciprocity. Yet, we might question whether or not this assumption is warranted and similarly ask do citizens with cognitive disabilities have obligations to as well as entitlements from the state? Over the course of this dissertation I will address these questions.

1.3 Two necessary standards of adequacy for a liberal theory of justice

Although a hallmark of liberal theory is its value of political equality and liberty and therefore its tendency toward inclusiveness and respect for individual difference, the liberal tradition has largely failed to extend justice to citizens with cognitive disabilities. Where it has been discussed at all, historical figures whose works early on helped shape the liberal tradition explicitly denied justice to citizens with cognitive disabilities. For instance, modern political theorists such as Locke and Hume⁸ both thought individuals with cognitive disabilities should not be considered full citizens and instead should be better governed by a principle of charity or in Hume’s words “gentle usage” rather than one of justice (Arneil, 2009).⁹ In his Second Treatise, Locke recommended patriarchal rule for “ideots,” “lunatics,” and “madmen” as they, like children, lacked on his view a sufficient degree of reason and therefore were incapable of both self-governance and governance by consent.¹⁰

⁸ Hume was not a social contract theorist. Yet, his influence on the work of contemporary liberal political theorist John Rawls, is unmistakable.

⁹ See also, Hume, *Treatise*, [III. II.ii]

¹⁰ In [VI.60] of the Second Treatise, Locke states, “But if, through defects that may happen out of the ordinary course of nature, any one comes not to such a degree of reason, wherein he might be supposed capable of knowing the law, and so living within the rules of it, he is *never capable of being a free man*, he is never let loose to the dispose of his own will (because he knows no bounds to it, has not understanding, its proper guide) but is continued under the tuition and government of others, all the time his own understanding is incapable of that charge. And so

Kant's works, following those of Rousseau, associated not simply citizenship but also personhood with the capacity for reason. In Kant's, works the capacity for reason, in a specifically abstract way, is woven so tightly into his understanding of what it means to be a human being that any being that lacks this capacity appears to be subhuman and to have a lesser moral status on his view. Moral obligations are construed on Kant's view, upon the basis of one's having a rational nature. Hence, his treatment of those who do not possess the capacity for abstract rationality would be akin to his treatment of animals who have moral standing only in their relation to rational beings. Some interpreters argue that Kant regarded relatively few individuals met the conditions for personhood. For instance, Charles Mills's (1997) argues that the only beings who appeared to meet conditions for personhood in Kant's eyes were white, male, Europeans (68). Similarly, Mills argues that Rousseau's remarks concerning "natural and non-natural savages" suggest that his conception of personhood was also restricted to the "civilized" white, male, Europeans of his day (69). Likewise as Rousseau's remarks suggest those who do not have a conscious awareness of their freedom or the desire or capacity for self-perfection remain, in his eyes outside of civil society and akin to animals or "beasts" (Rousseau, Second Discourse, [II, i, 17]).

lunatics and ideots are never set free from the government of their parents; children, who are not as yet come unto those years whereat they may have; and innocents which are excluded by a natural defect from ever having; thirdly, madmen, which for the present cannot possibly have the use of right reason to guide themselves, have for their guide, the reason that guideth other men which are tutors over them, to seek and procure their good for them, says Hooker, Eccl. Pol. lib. i. sec. 7. All which seems no more than that duty, which God and nature has laid on man, as well as other creatures, to preserve their offspring, till they can be able to shift for themselves, and will scarce amount to an instance or proof of parents regal authority."

What is evident more or less directly in the case of Locke and Hume and can be gleaned from the work of Kant and Rousseau is that early on in the liberal tradition, entire groups of individuals, including those who we would now recognize as having “cognitive disabilities,” were either explicitly or implicitly assumed to be naturally inferior and therefore denied both political equality as well as liberty. Instead, they were regarded as the objects of charity and any moral consideration given to them at all would be gratuitous or praiseworthy rather than morally obligatory.

Sadly, the history of the treatment of citizens with cognitive disabilities in Western liberal societies suggests a general disposition toward individuals with cognitive disabilities as naturally inferior and thus deserving of the lesser political status afforded to them by these early liberal theorists. Like members of other marginalized social groups, citizens with cognitive disabilities have been denied even the most basic rights, physical integrity being one. Historically, they have been the targets of eugenics policies that supported sterilization without consent; they have been forced into colonies for “rehabilitation” which increasingly came to reflect a life of imprisonment; and during the holocaust, individuals with disabilities of all kinds were among the first subjects of genocide (Kline, 2001; Sheldon, 1999; Silvers, 1998; Stubblefield, 2007, 2010; Trent, 1995; Tyor, 1977). It wasn’t until the advent of the Americans with Disabilities Act of 1990 that suspicion was officially cast (at least in the United States) on the habit of naturalizing and pathologizing disability as perhaps an injustice in itself.

Liberal philosophers have proclaimed equality and liberty for all human beings but in practice they have applied this proclamation only to a limited group of humans (or citizens) with many

others being arbitrarily excluded. In turn, the proclaimed universality has actually been merely partial. In the words of John Rawls:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interest. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice (1999, 3). Political equality is a core value of any normatively adequate liberal theory of justice. It is the starting point, so to speak, for the substantive shaping of the theory of justice. And if Rawls is correct, then it appears that the burden of proof lies on the theorist who wishes to violate it to demonstrate either (a) that we have no better way of dealing with issues of justice, or (b) the injustice is tolerable only in the instance that it is necessary to avoid a greater injustice.

Early liberal theorists restricted the scope of justice to a relatively small constituency, implying that not all were moral equals and that only some (white, male, Europeans) were entitled to equal justice. Moreover, they restricted the context of justification to only those whom they already perceived to be equals. That is, without consideration, they excluded individuals with cognitive disabilities (along with racial minorities and women) from having a voice or even being represented in the process that they saw as crucial to the preservation of individual liberty.

These failures point to two standards by which we may assess the normative adequacy of any contemporary liberal theory of justice. They are as follows¹¹:

The Standard of Presumptive Political Equality. The standard of presumptive political equality implies that the tendency of any theory of justice should be toward the equal treatment of all. It requires of any normatively adequate theory of justice that it give equal basic rights (e.g. certain rights including rights to things like physical integrity or what might be called property of the person and liberty of thought) and equal political consideration to all citizens. Since the presumption must be in favor of equal treatment, the standard implies that a normatively adequate liberal theory of justice must not summarily or in absence of adequate justification exclude certain citizens from the scope of justice; likewise it must not summarily or in absence of adequate justification privilege certain citizens to the neglect or marginalization of others. Meeting the standard of presumptive political equality is thus one way a liberal theory of justice may uphold the commitment to political equality.

The Liberal Standard of Justification. The liberal standard of justification requires that any normatively adequate theory of justice must be justifiable to all those who fall within its scope. The liberal standard of justification is crucial to preserving the equal liberty of individuals who are subject to the coercive effects of a political regime, the institutional structure of which is specified by the theory of justice. Meeting the liberal standard of justification is thus one way

¹¹ These standards resemble something like what Constant (1819) refers to as liberty of the moderns and liberty of the ancients. As Rawls (1999/2005) acknowledges, questions of liberty in terms of basic rights such as property in person, consciousness and thought, and political participation (liberty of the moderns) and questions of political liberties and participation in public life (liberty of the ancients) provide two fundamental axes of analysis for contemporary liberal theories of justice to address (5).

for a liberal theory of justice to upholding the commitment to liberty.

Meeting each of these standards is necessary for a liberal theory of justice to be normatively adequate. However, I do not claim that together they are jointly sufficient. There may be additional standards by which we assess the normative adequacy of a given liberal theory of justice. Nevertheless, I do believe that these two standards are central rather than tangential to determining the normative adequacy of a liberal theory of justice. I will clarify further how we are to assess the normative adequacy of a given liberal theory of justice according to each of these standards in chapters 2 and 3. For now, I turn to elucidating briefly the project I pursue.

1.4 Toward a liberal theory of justice for citizens with cognitive disabilities

The goal of this dissertation is to reflect on how to move toward justice for citizens with cognitive disabilities while remaining loyal to the core liberal values of political equality and liberty. Therefore, my critique is internal to the liberal tradition and the focus of my dissertation methodological rather than substantive. Nevertheless, I recognize that all methodological commitments are value laden. For example, John Rawls's version of the social contract as a hypothetical contract behind a veil of ignorance incorporates such values as impartiality and fairness.

In the dissertation I critically assess what are arguably the four most influential contemporary theories of justice: a resource-distributive approach to justice (justice as fairness) advanced by John Rawls; a capabilities approach to justice advanced by Martha Nussbaum; a connection-

based approach to justice advanced by Eva Kittay; and a recognition-theoretic approach to justice advanced by Axel Honneth. My analysis clarifies how, in most cases, certain of the theorist's methodological commitments preclude the theory of justice in question from meeting either the standard of presumptive political equality or the liberal standard of justification and, in turn, from upholding simultaneously the liberal values of political equality and liberty for citizens with cognitive disabilities. As I will illustrate, these liberal theories of justice do not treat citizens with cognitive disabilities equally. While some do or at least could guarantee basic rights for citizens with cognitive disabilities, most cannot provide for them equal political consideration. Moreover, each theory suffers from inadequate justification and therefore fails to uphold the liberal commitment to equal liberty. In turn, my dissertation points toward a way of expanding the scope of liberal theory that remains true to liberalism's core values and demonstrates the possibility of a more complete and less-biased theory of justice.

2. Political Equality For Citizens With Cognitive Disabilities

2.1 Liberalism and presumptive political equality

In chapter one, I articulated a standard of presumptive political equality as one of two standards by which we may evaluate the normative adequacy of any liberal theory of justice. The standard of presumptive political equality requires that, in absence of justification for doing otherwise, the substantive implications of a normative theory of justice must treat all citizens equally, including citizens with cognitive disabilities. In this chapter, I explore in greater detail what it means for a normative theory of justice to meet a standard of presumptive political equality for cognitive disabilities, which I have suggested includes extending them equal basic rights as well as equal political consideration.

What it would mean for a normative theory of justice to meet the standard of presumptive political equality in terms of extending equal basic rights to citizens with cognitive disabilities is sufficiently clear—the theory must not in absence of justification deny citizens with cognitive disabilities basic rights including, for instance, rights like those to physical integrity, or what might be called property in the person and liberty of thought etc. Instead it must extend these rights to citizens with cognitive disabilities alongside all other citizens. I shall simply note here that while some theories of justice either do or may be capable of extending equal basic rights to certain citizens with cognitive disabilities, in particular those with less pervasive disabilities, others do not and may be not capable of extending equal basic rights to those with pervasive

disability, and still others may not be capable of extending basic rights to citizens with cognitive disabilities at all.

What it would mean for a theory of justice to give equal political consideration to citizens with cognitive disabilities is less obvious than what it would mean for a theory of justice to extend equal basic rights to all citizens with cognitive disabilities. In light of this, I direct the focus of this chapter clarifying the condition of equal political consideration. Specifically, I argue that equal political consideration of citizens with cognitive disabilities requires of a normatively adequate theory of justice that it plausibly address the concerns for equal treatment that citizens with cognitive disabilities will predictably have. Equal political consideration cautions against bias inherent to the structure or the content of normative principles of justice that may otherwise go unnoticed as a special privileging of “normal” individuals, as well as a neglect or marginalization of citizens with cognitive disabilities. In addition to the guarantee of certain basic rights, the concerns for equal treatment I suggest a normatively adequate conception of justice must be able to address include medical impairment, social and political exclusion, and stigmatization.

2.2 What is disability? The social model of disability and the *Americans with Disabilities Act*

Generally speaking, disability is understood in terms of some limitation in individual functioning. “Cognitive disabilities,” are characterized by a limitation in mental, intellectual, or emotional functioning, or adaptive behavior. Historically disability has been interpreted

primarily according to a “medical model,”¹² but in response to activist struggles within the Disabilities Rights Movement (DRM) the current legal definition of disability in the United States (under the *Americans with Disabilities Act* [ADA, 1990]) interprets disability according to what theorists refer to as a “social model.” Where the “medical model” regards disability as a defect of the individual, the “social model” of disability regards disability as the result of a “lack of fit between the body and the social/physical/attitudinal environment that leads to social limitation or disadvantage,” (Goering, 2007, 374). In line with this, the ADA interprets “disability” as contingent upon one’s having, or being perceived as having “impairment.”¹³

Under the ADA while “impairment” might limit an individual’s ability to function in a particular way, certain limitations in functioning that individuals with disabilities experience are more akin to a form of prejudice or discrimination such as racism or sexism. As Anita Silvers (1998) argues, these limitations are constructed or “artificial and remediable, not natural and immutable” (75). For instance, an individual who has spinal impairment may require the use of a wheelchair in order to move. She may experience some limitation in functioning (the inability to walk) as a direct result of the impairment. However, this does not in and of itself preclude the

¹² The medical model has been prominent in Western interpretations of disability since at least the European Enlightenment. See Davis (1997); Winzor (1997).

¹³ Specifically, the ADA (1990) as Amended defines ‘disability’ as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such impairment

The Congressional findings in section 2.7 of the ADA further stipulates that:

Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.

individual from say, voting, where as the location of voting polls in buildings that have doors too small to accommodate a wheelchair would. Likewise, an individual who has Down syndrome may experience certain limitations in functioning due to the genetic condition, but these would not necessarily preclude the individual from performing certain forms of labor, whereas certain policies (about required hours on the job, etc.) or misperceptions about the condition and of the abilities of individuals with Down syndrome might.

The social model of disability is widely acknowledged to improve upon the primarily medical view of disabilities. In turn, legislation like the ADA, which employs the social model of disability, seeks to uphold political equality for citizens with disabilities, including citizens with cognitive disabilities by acknowledging and providing a means for concerns they have that stem from social and political exclusion to be addressed. For instance, given the social understanding of disability, an individual may file a claim under the ADA if she has somehow been wrongfully treated or discriminated against—for example, if she has been denied a job because of the misperception that she will be unable to perform that job as a cause of some perceived impairment. Nevertheless, the social model of disability has recently come under critique by some disability theorists and activists whose criticisms suggest that it is inadequate for clarifying the concerns citizens with cognitive disabilities often have.

Criticisms of the social model of disability stem from what appear to be two opposing ends. On the one hand, critics with post-modernist sympathies argue that the social model of disability simply reifies disability as a medical problem insofar as it presumes impairment to be a necessary condition for disability. This, they suggest, has a “regulating” or “disciplinary” effect

on those who are perceived be disabled. For instance, Shelley Tremain (2001) argues against the social model of disability, suggesting that rather than emphasizing the social construction of disability, legislation that embodies the social model actually entices individuals to perform medical impairment. For instance, Tremain notes that under the UK Disability Allowance Policy individuals are required to fill out detailed questionnaires, documenting the “most minute experiences of pain, disruptions of a menstrual cycle, lapses of fatigue,” etc., in order for the “government bureaucrats” to “get a clear picture of what [they] need” (633). In turn, citizens with disabilities are forced in the process of answering questions to distance themselves from some perceived standard of “normal” biological functioning and associate themselves with deficient functioning or “impairment,” locating the problem back in themselves rather than in the social environment. This has the effect of solidifying rather than obstructing the association between ‘disability’ and ‘medical defect.’ The morally problematic nature of reaffirming disability as a medical problem becomes particularly evident in light of certain disabilities, where the so-called “impairment” in question could be construed in certain circumstances as an asset. In turn, theorists with post-modern sympathies like Tremain reject the use of the concepts “impairment” and “disability” and instead calls for the disabled people’s movement in the UK to “supplant the language of ‘I am’ ... with the language of ‘I want this for us,’” in their quest for social justice (635).

On the other hand, critics with realist sympathies argue that strong interpretations of the social model of disability may move too far from medical discourse to adequately address the question of how citizens with cognitive disabilities should be treated. For instance, Sara Goering (2007) fears that strong interpretations of the social model or indeed, strong social constructionist

interpretations of disability, seem to suggest that if the social environment were improved or designed for equal access then disability would simply go away. At the very least we can see that strong interpretations of the social model are inappropriate for addressing concerns citizens with so-called “severe” or “profound” impairments or “pervasive” disabilities may have, for in these cases medical intervention might be vital for individual life or imperative for augmenting an individual’s quality of life in a given social context. Moreover, even if we grant that role of the context or environment as a factor in constructing disability, whether pervasive or less pervasive, this would not alone eliminate medical need.

Take for instance Audrey King’s (2006) description of the astronaut, which provides a rich picture of how perceptions about disability may be biased and how context may contribute to disability itself:

When you think about it you realize he is in fact, severely disabled. He cannot walk properly unless he wears special boots to keep his feet on the ground in that weightless outer space environment. He can’t feed himself unless he learns to coordinate his hand to mouth movements. He requires specially prepared food. Nobody talks about his bowel and bladder needs but it’s difficult to imagine how he could possibly cope without some special kind of clever collecting device! The astronaut can’t even sustain his body’s need for oxygen. He requires “life support” systems for his very survival. Yet, who would label an astronaut “disabled”, “deficient”, or in need of intensive medical attention? ...

As King notes, most in society would never think to consider the astronaut as disabled. Instead, they associate any deficiencies in functioning he experiences in the environment that is perceived as “hostile, alien, incompatible with life, and definitely not accommodating to the astronaut’s

physiological requirements.”

Yet, surely insofar as he or she is in a “hostile” environment the astronaut *does* have medical needs, and likewise, so too will many individuals with disabilities whose situation is analogous to that of the astronaut. Moreover, for certain citizens with cognitive disabilities who have “profound” impairment or “pervasive” disability, it might even be difficult to imagine an environment in which the condition would not inhibit individual functioning in some way. These issues, in turn, give reason to reaffirm rather than reject the medical model of disability. Indeed, if legislation concerning disability embodies a strong version of the social model it is unclear how medical need might ever arise as a consideration of justice at all. Yet, as Goering (2002) argues the medical model may be appropriate for capturing certain experiences that individuals with disabilities have and, therefore, medical impairment should factor into considerations of what securing political equality for citizens with cognitive disabilities means. Thus, each model contributes ideas important for consideration by an adequate theory of justice.

2.3 Cognitive disability and political equality: three important considerations

Criticisms of the medical and social model reveal that there is not one best way of interpreting the problem or functional limitation associated with disability. Nor is there one best way of interpreting what (if anything) is in need of remedy or correction in order to alleviate the problem. However, it is clear that people’s abilities, what they can do, and who they can be (e.g. whether they can participate as “equals,” whether and, if so, how they are esteemed as “equals” or otherwise regarded as “equals”) will depend to a degree on how we understand the “problem”

and how we structure institutions in light of these understandings. In turn, these criticisms reveal three prominent ways of interpreting the “problem” of disability. In turn they provide us with three dimensions of analysis that I contend should not be reduced to one another in informing the understanding of what equal political consideration for citizens with cognitive disabilities means.¹⁴ These dimensions are medical impairment, social and political exclusion, and stigmatization.

Medical Impairment. Sometimes medical impairment is perceived to be *a* if not *the* primary source of what “disables” an individual or limits the individual’s ability to function in a particular way. Medical impairment (although often interpreted as a defect of the individual) is identifiable in relations—more specifically, in terms of a deviation from some biophysical or psychological norm, and this deviation is considered non-ideal. When medical impairment is understood to characterize (at least in some way) the “problem” of cognitive disability, medical treatment, such as correction or cure is, in turn, regarded as the proper if not necessary response. Indeed, citizens with cognitive disabilities who have medical (cognitive or otherwise) impairments often do have needs involving medical treatments or cures, and in turn, concerns involving how those needs can be met.

For example, let us consider Down syndrome. Symptoms of Down syndrome include delayed and limited intellectual, physical, and emotional development. In addition, Down syndrome is visibly identifiable by certain characteristic markings, which include, low muscle tone at birth,

¹⁴ In this way, my approach to justice for citizens with cognitive disabilities reflects the insights of feminist intersectionality critiques regarding social justice and identity categories. For further discussion of feminist intersectionality and social justice see: Crenshaw (1989, 1991); Garry (2011), Spelman (1988), Zack (2005).

small stature, excess skin around the neck, a single crease in the palm of the hand, wide short hands, short fingers, separated joints between the bones of the skull, and Brushfield spots (white spots on the colored part of the eye). Individuals with Down syndrome experience congenital heart defects, seizures, respiratory and hearing problems, oral infection and periodontal disease, hypotonia, dementia, leukemia, and thyroid conditions at relatively high frequencies. They also more frequently develop Alzheimer's disease as well as depressive symptoms later in life.

Many symptoms of Down syndrome are understood to be the result of an individual's having an extra copy of chromosome 21. Ninety five percent of cases of Down syndrome are understood to be caused by irregular cell division called "nondisjunction," which results in an embryo's having three copies of chromosome 21 as opposed to two (i.e., Trisomy 21), (National Down Syndrome Society, 2012). One percent of the instances of Down syndrome are understood to be caused by non-disjunction of chromosome 21, in some, but not in all of the cell divisions, resulting in some cells containing forty-six chromosomes and some cells containing 47 (46 plus the extra chromosome 21). This is called "mosaicism." Translocation marks the remaining 4 percent of cases. In translocation, during cell division, part of chromosome 21 detaches and attaches to a different chromosome. Most often it reattaches to chromosome 14 (National Institute of Child Health and Human Development, 2012).

Individuals with Down syndrome may need medical treatments; for example, seizure, thyroid, medication and anti-depression medication, may be necessary in order to alleviate the limitations in functioning associated with the condition. They also may need a variety of therapies and care in order to increase functioning. For instance, speech therapy is particularly important for

individuals with Down syndrome who often have trouble communicating as children given that they have low muscle tone and slightly enlarged tongues (National Down Syndrome Society, 2012; National Institute of Child Health and Human Development, 2012). While citizens with Down syndrome might very well benefit from modifications to social policy that facilitate their inclusion, these corrections cannot serve as substitutes for the adequate medical needs citizens with Down syndrome have as a cause of a genetic condition.

Social and Political Exclusion. In some cases it is not medical impairment itself that is regarded as *the*, or even *a* primary factor contributing to the limitation in functioning. As the “social model” of disability mentioned above acknowledges, in certain cases what is regarded as “disabling” and problematic are primarily the social policies, practices, beliefs, and attitudes that structure the social context in ways that impede those who are perceived to have a cognitive impairment from social and or political participation. When social or political exclusion, alteration to the social context inhibits individual functioning, alteration of the social context for instance in terms of social or public policy is necessary for alleviating the “problem.” Indeed, as disability activists have often argued, correcting the social environment is imperative to alleviating challenges citizens with disabilities face in light of an environment that excludes, marginalizes or is in some way biased against them. Therefore it is an issue that is likely of high concern for these individuals.

For example, consider autism spectrum disorders. The term ‘autism’ was first introduced to the English language by Dr. Leo Kanner of John Hopkins University in 1943. Around the same time German scientist Dr. Hans Asperger identified a less pronounced form of Autism. Today, we

know this less profound form as Asperger syndrome. Both autism and Asperger Syndrome are classified more broadly as “autism spectrum disorders” (National Institute of Mental Health, 2010). Autism spectrum disorders are considered developmental disorders that appear within the first years of life. ASDs are characterized by individual difficulty in establishing closeness, difficulty in “conscientious exchange of emotional gestures” (smiles, nods, frowns, etc.), and difficulty in communication, specifically regarding words with emotional content. These difficulties manifest in social interactions where those on the spectrum have trouble forming, participating in, and sustaining relationships. Repetitive behavioral patterns and self-stimulation are also associated with ASDs (Greenspan & Wieder, 2006; AAIDD, 2008).

Though there has been no established genetic cause, a Report of the Surgeon General on Mental Health (n.d.) suggests that structural brain abnormalities associated with ASDs are suspected to be the result of a genetic defect or damage to the central nervous system during fetal development.¹⁵ Yet, in some cases it appears that what may be hindering an individual with an ASD from functioning in a particular way is less a matter of any biophysical or psychological impairment or a “defect” than the social context, which is unaccommodating. At the very least, the source of the disability, in certain cases appears to be “a lack of fit” between the body and the environment. For instance, certain ASDs are also associated in some cases with savant-like qualities. These individuals are often able to focus to an intensity and degree well beyond that of the normal person; they may demonstrate highly specified knowledge and this can contribute to success in life. In it is now speculated that both Isaac Newton and Albert Einstein had Asperger’s Syndrome. According to BBC News (2003), Newton rarely spoke, was ill-tempered, and would

¹⁵ According to this report a search for a genetic link to autism is a high priority.

continue to give lectures to an empty lecture hall on days when all of his students failed to appear.¹⁶ Einstein demonstrated several qualities now known to characterize high-functioning forms of autism. For instance, he did not speak until relatively late, which gave rise to parental concern, and he remained relatively solitary throughout his childhood. As famous autistic author Temple Grandin (2006) notes, Einstein was also known for being an incomprehensible lecturer, which she attributes to his “associative” rather than linguistic thinking.¹⁷ As she relates, Einstein told psychologist and friend Max Wertheimer, “Thoughts did not come in any verbal formulation. I rarely think in words at all. A thought comes, and I try to express it in words afterwards” (212).¹⁸

These cases bring into question the assumption that the only thing, if anything, needing to be addressed in order to achieve political equality in the instance of a cognitive disability is a matter of the person rather than a matter of the environment that the person is in. In such cases, what may be of more importance (or at the very least of equal importance) for citizens with cognitive disability is changing or improving the social environment to eliminate the barriers to social inclusion citizens with cognitive disabilities face and to make it more accommodating of them. What becomes apparent from this dimension of analysis then and indeed from considering either

¹⁶ According to Grandin (2006) Vincent Van Gogh, and Ludwig Wittgenstein are also suspected of having had some form of autism. Wittgenstein did not speak until he was four; he was not a good student, poorly groomed and used overly formal speech—all characteristics of an individual with autistic tendency. Van Gogh was described as an aloof and odd child, and as an adult he demonstrated self-absorption. He also suffered from an epileptic episode, after which his work became more profound. The swirls reflected in his *Starry Night* might reflect visual distortions associated with what autistic individuals often perceive (212-215).

¹⁷ See also: Rupert Isaacson’s film *Horse Boy* (2006), in particular the introductory interview with Temple Grandin; BBC News (2003).

¹⁸ As Grandin (2006) relates, he arrived at the theory of relativity by imagining himself on a beam of light (213).

case, is that an adequate normative theory of justice should not take for granted the social context in which those with “impairments” must operate. For even where medical impairments do evidently contribute (sometimes quite extensively) to the experience of a disability, there are likely modifications that can be made in terms of social policy that would facilitate increased functioning. For example, specialized forms of education that draw on associative thinking may enable individuals with ASDs to increase intellectual functioning where it otherwise might be stunted.¹⁹ Indeed, Martha Nussbaum credits a highly specialized education program for the success of her nephew Arthur who has Asperger’s syndrome (2006, 190). In other cases, mainstreaming students may be beneficial.

Stigma. Lastly, in some cases it is neither medical impairment nor straightforward social and political exclusion that are taken to be primarily responsible for limiting individual functioning. Rather, it is the stigmatization of those who are perceived as having cognitive disability that is taken to be the source of the “problem.” To be sure, stigma could be classified a form of social exclusion. Moreover, it can underpin rationalization for politically exclusionary measures as well. However, stigma is a distinctive form of exclusion that results from the interrelation between individuals’ identities and/or self-concepts and social perceptions and understandings about cognitive disability, including the social categories in which they are embedded. It is this dialectic that gives the thrust to post-modernist criticisms of social categories including “normalcy,” “medical impairment,” and “disability” previously discussed. Stigma calls for a

¹⁹ For instance, the DIR/floortime model (The Developmental Individual Difference Based Relationship Model) for educating children with Autism recommends among other things, “following the child’s lead” in order to understand his/her interests and to facilitate two-way communication and to create an environment in which he/she is challenged. See (Greenspan and Wider, 2006; Interdisciplinary Council on Developmental and Learning Disabilities, 2009).

careful assessment of normative bias implicit in any particular conception of a disability, and in turn, a reevaluation of certain conditions assumed to be disabling.

Since its origin, the term ‘stigma’ has referred to the marking out or distinguishing of individuals in a way that signifies something bad about their moral status. As Goffman (1997) notes, Greeks originally used the term to refer to the literal branding or marking out of certain individuals through the burning or cutting of the flesh so as to identify them as “blemished persons,” such as slaves, criminals, traitors, or prostitutes (203).²⁰ Though today the term ‘stigma’ does not typically refer to the physical branding of individuals, stigma continues to indicate a relationship in which certain individuals are regarded as “normal” and others as “subhuman.” Stigmatization of an individual or members of a social group is often rationalized upon the basis of what Goffman calls a “stigma-theory”—an ideology that accounts for why the trait the individual is perceived as possessing is undesirable and for why others who do not possess that trait are presumably justified in their position of superiority in relation to the individual (1997, 205). While some stigmatized individuals reject stigmatizing assumptions, challenging both the view that they are somehow inferior or burdensome, sometimes noting that there is something wrong with the standard they presumably fail to realize, others internalize them and regard themselves with shame.

From an analysis of stigma we see that medicalizing discourses about cognitive disability and or impairment may constitute mere rationalizations, which function in a variety of ways to limit the life chances, opportunities and abilities of citizens with cognitive disabilities. They do so largely

²⁰ See also Coleman (1997, 219).

by constraining the set of options that are understood, in principle, to be realizable by individuals with cognitive disabilities, and in turn by shaping the set of options that are actually feasible for members of this social group to realize. Moreover, insofar as they are regarded as authoritative, they reinforce the social hierarchy between citizens with cognitive disabilities and “normal” individuals, which rationalizes practical measures that aim to hide, fix, or absolve the aspect of the individual that is regarded as undesirable. In some cases, where “fixing” the individual is either unhelpful or infeasible, eliminating the possibility of a recurrence of the “undesirable” trait is regarded as preferable.

Historically, medicalizing discourses about various forms of mental retardation have underscored eugenics policy aimed not simply at alleviating limitations in functioning, but curtailing the presence of those who have them in the future. For example, during the late eighteenth and early nineteenth centuries “feeble-minded” individuals—the class of low-grade “idiots” and “imbeciles,” including those who we would now classify as having Down syndrome, high-grade “morons” including alcoholics, paupers, prostitutes and criminals—were the targets of the eugenics movement in the United States. Between 1907 and 1932, 30 states passed legislation allowing for the involuntary sterilization of those classified as feeble-minded. In the United States, between 1927 and 1957 over 60,000 involuntary sterilizations were performed on feeble-minded individuals, the slight majority of whom were women, and the majority of whom were poor and “off-white” (or of eastern European descent), (Stubblefield, 2007).²¹

²¹ As Stubblefield (2007) relates eugenicists found the “off-white” population of “feeble-minded” females most disconcerting because of the possibility that they might “pass” as white and spread the disorder through what was thought to be “defective germ-plasm.” For a good example of a study in which this disposition toward “feeble-minded” individuals is evident, see Goddard (1913).

Today, there is a strong push toward genetic engineering in order to reduce the occurrence of people born with certain cognitive disabilities including Down syndrome and ASDs. Although, this push to correct, treat, or cure certain cognitive disabilities is meeting with resistance from the disabled community.²² As Jenny Morris (2001) states:

If we can appreciate that to be an outsider is a gift, we will find that we are disabled only in the eyes of other people, and insofar as we choose to emulate and pursue society's standards and seek its approval... Once we cease to judge ourselves by society's narrow standards we can cease to judge everything and everyone by those same limitations. When we no longer feel comfortable identifying with the aspirations of the normal majority we can transform the imposed role of outsider into the life-enhancing and liberated state of an independent thinking, constantly doubting Outsider who never needs to fight the physical condition but who embraces it. And by doing so ceases to be disabled by it (*cited in Smith 2008*).

In the case of certain ASDs, for example in certain instances of Asperger's syndrome, labeling the individual as medically "impaired" seems clearly imprudent. For in these cases the biophysical or psychological deviation that is supposedly characteristic of a medical impairment and therefore rationalized as deficient may actually be a beneficial attribute. Instead, what might seem more prudent is to revalue the condition, recognizing both advantages and limitations that arise in correlation with it.

²² For instance, Ari Ne-eman (co-founder of the Autistic Self Advocacy Network) cautions against genetic testing because it sends a message that autistic individuals are unwanted. His efforts, instead, promote the acceptance of autistics and neurodiversity. See Kalb, (2009). The ASAD, (2011) web-site is also a helpful resource.

2.4 Meeting the standard of presumptive political equality: equal basic rights and equal political consideration

Citizens with cognitive disabilities are diverse, so diverse that some might reject any account that implies they have a unified set of concerns. I do not intend to claim that citizens with cognitive disabilities all have identical experiences of disability, or similar ideas about what problems they most frequently encounter as a result of being perceived as having a cognitive disability, let alone similar interests across the various other dimensions of their lives. Given the diversity of these individuals, it seems simply imprudent to suggest that there could ever be a single representative for citizens with cognitive disabilities that would accurately characterize the entire group. Nevertheless, what I believe appraisals and criticisms of the social model together highlight are several of the more frequent and important areas of concern that citizens with disabilities, including cognitive disabilities, do have or are likely to have as members of an identifiable social group.

According to Young (2000), a structural social group “is a collection of persons who are similarly positioned in interactive and institutional relations that condition their opportunities and life prospects” (97). Unlike other forms of association that individuals purposefully form and participate in, structural social groups are experienced largely as social pre-givens that, in Young’s words, “emerge from the way people interact” (1990, 46; 2000, 90). As Young (2000) argues

We do not choose the conditions under which we form our identities, and we have no choice but to become ourselves under the conditions that position us in determinate

relations to others. We act in situation, in relation to the meanings, practices, and structural conditions and their interaction into which we are thrown (101).

Descriptively speaking, citizens with cognitive disabilities are generally understood to comprise the social group or the constituency of those who are identifiable²³ in terms of some level of mental, intellectual or emotional functioning or adaptive behavior that is widely acknowledged to be deviant or limited. However, as Young argues, “what makes a group a group is less some set of attributes its members share than the relations in which they stand to others” (90). Thus this “limitation” in mental, intellectual, or emotional functioning or adaptive behavior that is understood to be characteristic of individuals with cognitive disabilities both emerges from and is interpretable within a given social context, and only in relation to other so-called “normal” individuals who appear to function differently. This difference, of course, is generally assigned a normative value of “ideal” in the case of “normalcy” and “non-ideal” in the case of “disability.” What Young’s account of structural social groups allows us to realize is that even if, as Tremain argues, there is no such “thing” as “disability” or “impairment” that exists as a *purely* non-social artifact, there is surely still an identifiable social group of “citizens with disabilities” whose members have concerns that emerge from the social historical context in which they are in, and are likely to be shaped by these relations. Indeed, Tremain (2001) cannot even offer positive recommendations for “disabled peoples” as she does, without acknowledging the fact that there is some group to which the social category extends and that members of this group have a set of concerns she evidently seeks to have addressed. This is why both medical impairment and stigmatization (which often occurs in light of the medicalization of disability) are issues of high

²³ These individuals may self-identify with the social category or be identified in association with the social category by another.

importance for citizens with cognitive disabilities even though they appear to stand in tension with one another.

These three dimensions of analysis or ways of interpreting the “problem” of cognitive disability help to inform us of what concerns citizens with cognitive disabilities are likely to have and, in turn, help to clarify what guaranteeing equal political consideration for citizens with cognitive disabilities means. In light of this I suggest that equal political consideration for citizens with cognitive disabilities requires that a normatively adequate theory of justice plausibly address three distinct concerns for equal treatment that citizens with cognitive disabilities individuals will predictably have. These include:

1. Equal treatment for those who are medically impaired.
2. Equal treatment for those who are socially and politically excluded.
3. Equal treatment for those who are unfairly stigmatized.

Any theory of justice that fails to address these issues falls short of giving equal political consideration to citizens for whom these concerns are central and in turn fails to meet the standard of presumptive political equality.

To be clear, while I assume that any normatively adequate theory of justice must be able to address these concerns, I do not contend that an acceptable normative theory of justice must provide a particular substantive answer to any one of them. For instance, since the notion of medical impairment relies on conceptions of human normalcy that an awareness of stigma challenges, in order to represent the perspective of the citizens with cognitive disabilities a

theory of justice will have to find some means of addressing both issues and a non-arbitrary way of balancing them.

In sum then, the standard of presumptive political equality requires that a normatively adequate theory of justice must be capable of granting equal basic rights to all citizens with cognitive disabilities and it must extend to them equal political consideration by providing some way of responding to the questions of justice citizens with cognitive disabilities are likely to have. Over the course of chapters four, five and six, we will see that while most theories of justice I consider uphold the value of political equality as specified by the standard of presumptive political equality for “normal” citizens, none does so entirely for citizens with cognitive disabilities, and at least one denies them political equality altogether. For now, I turn to discussion of the liberal standard of justification.

3. Liberty and the Liberal Standard of Justification

3.1 The Liberal Standard of Justification: An Interpretation of Equal Liberty

In addition to the upholding the value of political equality, any normatively adequate liberal theory of justice must uphold the value of liberty. In line with the value of liberty, a second standard by which we may assess the normative adequacy of given theory of justice is the liberal standard of justification. Justification is indispensable to Western democratic thinking because it is thought necessary to preserve the equal liberty of those who are subject to the coercive effects of a political regime, the institutional structure of which is specified by a given normative theory of justice. As John Rawls argues, liberalism is characterized by the belief that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (Rawls, 2005, 137). When met, the liberal standard of justification implies that the political conception embodied within a given normative theory of justice is one that could be freely agreed by all citizens. In what follows, I clarify three prominent methods for meeting the liberal standard of justification, all derived from the work of Rawls. These include original position reasoning, wide reflective equilibrium and overlapping consensus.

3.2 Original Position Reasoning

As mentioned in chapter one, philosophers within the early liberal tradition have frequently

endorsed some version of the social contract in response to the problem of consent. Social contract theory starts from a description of the conditions under which and reasons for which all citizens would consent to the use of state power. Historically, these accounts have included a description of both human nature and human society, which have been invoked to show why all would be willing to subject themselves to coercive rule and served as an “initial” starting point for the development of just principles or principles that the parties involved would consent to. On one hand, in Hobbesian theory human nature and human society prior to the contract have been characterized as fundamentally self-interested and undesirable. In turn, the social contract has been posited as an agreement that provides for the mutual advantage of those who desire to escape this sort of state of nature in which life is “nasty, brutish, and short.” Alternatively, in Lockean-derived theories human nature and society prior to the contract have been commonly characterized as fundamentally rational and moral and the contract has been offered as a mechanism for securing the natural rights of individuals.

The most widely regarded contemporary liberal theory of justice, John Rawls’s justice as fairness, incorporates both these elements (i.e. of being both self-interested and fair) into a process of justification. In doing so, Rawls offers a distinctive normative interpretation of liberalism’s core values in terms of justice as fairness. Yet, of equal philosophical significance are his methodological innovations, for instance his theory of justification. In particular Rawls invokes a highly idealized method of reasoning about matters of justice in response to the problem of justification. Specifically Rawls recommends “original position” reasoning, which he envisions as hypothetical social contract between agents, idealized roughly along

Hobbesian/Humean lines (as rational and mutually disinterested²⁴), who argue from behind a veil of ignorance. This veil of ignorance pays tribute to Kant by ensuring that the rational agency of each is respected in the process of forming of an initial agreement regarding the principles of justice that are to govern the structure of coercive social institutions. The “original position” on Rawls’s view is thus a hypothetical starting point, and the contract is one between hypothetical agents in this hypothetical starting point, both of which are idealized in certain ways.

Social contract theories are all hypothetical in the sense that they do not require the explicit consent of the citizenry in order to demonstrate that the theory is justified. And, of course, they are not unique in this respect. Today most theorists presume a theory of justice is justified, either via some version of the social contract or some other method, if reason can be provided for the claim that citizens would actually endorse it (i.e. that it is justifiable to them). However, in employing “original position” type reasoning as a resolution to the problem of justification, Rawls and other contemporary social contract theorists who follow in his footsteps move beyond the less controversial assumption that justification is always in some sense hypothetical to the stronger more controversial claim that the problem of justification can be resolved by demonstrating that suitably idealized agents (rational, mutually disinterested, fully informed etc.) would agree to the theory in question.

“Original position” reasoning has been criticized on for a variety of reasons. One reason theorists have criticized “original position” reasoning is that imputes consent for certain groups of

²⁴ Hume thought justice serves a purpose only under the conditions in which individuals are rational and self-interested, although they are capable, in addition on his view of beneficence. Rawls characterizes the parties mutually disinterested rather than self-interested.

individuals or subsumes their reasoning under the standpoint of another. For example, Okin (1989) criticizes Rawls for idealizing the agents in the original position in his earlier writings as heads of households. This, she illustrates, subsumes all reasoning about what structure the institution of the family should take under the reasoning of “heads of households,” who at the time of the first publication of *A Theory of Justice* (1971) were presumed to be male.²⁵ In some cases, theorists have responded to this type of problem by reconstructing the original position so as to account for the views of those it has either misrepresented or failed to represent. Indeed, Okin (1989) advocates modifying the original position so that the process of reasoning reflects the reasoning of women, rather and or in addition to, men and heads of households. Others have rejected “original position” reasoning altogether on grounds that it is monological and therefore cannot establish agreement or political obligation for a diverse citizenry (Dworkin 1978; Sandel 1998).

My analyses in the forthcoming chapters highlights problems that I believe theorists who seek to meet the liberal standard of justification for citizens with cognitive disability will likely encounter if they employ some form of “original position” reasoning. While my argument does not illustrate the altogether inadequacy of original position reasoning, I contend that at least as it is employed within the theories I discuss, it fails to meet the liberal standard of justification. Therefore, it must be modified if the theory is to have hope of upholding political liberty for citizens with cognitive disabilities. Ultimately, I advocate moving away from employing “original position” reasoning as a method for meeting the liberal standard of justification. Nevertheless, since I do not claim that “original position” type reasoning is inherently

²⁵ In more recent editions Rawls (1999) offers the just savings principle as constraint on the reasoning of the representatives in the original position (111).

problematic, I acknowledge that with suitable modification, it might be capable of providing justification for all. Some version of original position reasoning may, in the end, even serve as a compliment to one or both of the other two less controversial methods of justification that Rawls endorses and that provide, in my analysis, a platform for comparing liberal theories of justice that do not endorse original position reasoning with those that do. In providing this platform for comparison, these methods help clarify what an adequate process of justification will require. These are the methods of wide-reflective equilibrium (WRE) and overlapping consensus (OC).

Although advanced initially by Rawls in an effort to resolve the problem of political justification, WRE and OC are widely endorsed by contemporary liberal theorists who do and do not endorse original position reasoning. Each requires that not simply the principles be justifiable via the employment of some procedural device (or method) like original position reasoning, but that the device itself be justifiable. In this way, WRE and OC incorporate a point of view that consults (at least in principle) the views of actual citizens (about how appropriate modes of deliberating about matters of justice, as well as about just principles) thereby avoiding some of the problems associated with straightforward original position reasoning, even when it is employed. From this point of view bias implicit in the construction of a theory of justice (including both the principles as well as justification for them) may come into view.

Though each method uses the force of a tri-part coherence between a set of beliefs, the moral principles that will govern the structure of coercive social institutions, and a justificatory process as necessary for justification, the focus of WRE and OC is different. Roughly speaking, the goal of WRE is to distinguish the most adequate or most “reasonable” theory of justice from the

variety of available options. By contrast, OC implies that the conception of justice could be compatible with the variety of comprehensive world-views or conceptions of the good that characterize liberal democratic societies and therefore, is a “public” form of justification. In what follows, I will outline both the method of wide-reflective equilibrium and the method of overlapping consensus.

3.3 Wide reflective equilibrium

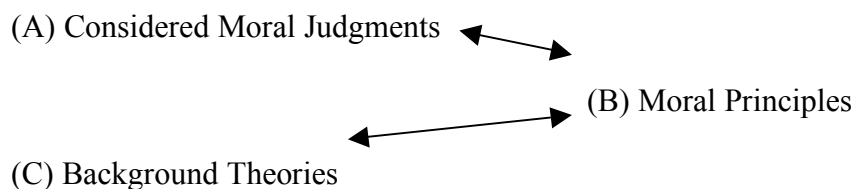
Though the term ‘reflective equilibrium’ was coined by political philosopher John Rawls (1971), the origin of reflective equilibrium stems back to Nelson Goodman’s discussions in *Fact, Fiction and Forecast*, (1955). Here, Goodman argues that justification for rules of inference (which appear in the form of law-like assertions) consists in coherence with what we believe to be acceptable inferences in wide variety of similar cases. In certain instances, where there are inconsistencies between a widely accepted rule of inference and a body of data, including other widely accepted inferences, Goodman recommends working back and forth between the rules and the particular inferences, rejecting, modifying, or reinterpreting either one or the other or both until a sort of equilibrium is reached. Following Goodman’s model of justification, Rawls brought ‘reflective equilibrium’ to political theory in arguing for a procedure of justification that aims at coherence between our moral principles (in this case principles of justice, the grammatical form of which is similarly law-like) against our firmest convictions or “considered moral judgments” about justice. Reflective equilibrium is arrived at through the process of testing our convictions against proposed moral principles, and vice versa, revising each in light of any inconsistencies that may be revealed.

In his most recent account of *Theory of Justice* (TJ), Rawls (1999) refers to the initial process of testing our firm convictions against a set of moral principles and the principles against the convictions as *reflective equilibrium* (RE). Although reaching RE could suffice as one way to meet the liberal criterion of justification, most moral theorists, including Rawls, find it useful as a partial form of moral justification—one that describes “a person’s sense of justice” and at most recommends the “smoothing out of certain irregularities” in this moral system of beliefs. RE does not however question the validity of the given system itself. What Norman Daniels refers to as *wide-reflective equilibrium* (WRE) is therefore preferable. WRE requires that we address the normative question of which moral system of beliefs the speaker should have. According to Daniels, WRE requires that in our analysis we “broaden the circle of beliefs that must cohere” (2011).²⁶ The basic idea is that in broadening the circle of beliefs by according to which a conception of justice must cohere, we are simultaneously filtering out unreasonable judgments about justice. In line with this, Rawls (1999) suggests that in seeking reflective equilibrium we are to present ourselves “with all possible descriptions to which one might plausibly conform one’s judgments together with all relevant philosophical arguments for them” (43).

The basic structure of WRE thus consists of a tri-part coherence between what Daniels (2011) describes as: (A) ‘considered moral judgments,’ or firm moral convictions, or deep-seated moral intuitions; (B) moral principles; and (C) relevant background theories. Thus, the basic structure of WRE can be diagrammed as follows:

²⁶ See also Daniels (1979,1980).

Figure 1: The basic structure of wide reflective equilibrium



Following Rawls, Daniels (2011) suggests that reflective equilibrium, or equilibrium between A and B, reveals the structure or form of moral claims in a given moral system of beliefs. What Daniels (1979,1980) refers to as *background theories* in (C) include the relevant philosophical theories used to constrain our convictions about justice. For Daniels, background theories comprise the set of moral and non-moral philosophically adequate theories and include, for example, theories of the person or of human nature, social theories, theories of proceduralism, as well as theories about the role of morality in society. In contemporary political theories “background theories” support the author’s preferred method or device (e.g. social contract, ideal discourse situation etc.) for determining philosophically grounded moral principles. Wide-reflective equilibrium requires coherence between equilibrium achieved in A and B as well as B and C. In other words, if the principles that we arrive at in AB do not match the principles we arrive upon in BC, we may work from either end to modify either our considered moral judgments, or the background theories (including the theoretical device), until we achieve coherence between all three. Nevertheless, coherence between A, B, and C is not sufficient for determining that a given theory is justified in WRE. We must then test the theory against at

least all relevant alternatives. In this way, WRE marks theoretical convergence upon a particular theory of justice as the most preferable among alternative conceptions.

Evidently, WRE is an ideal that in practice we may only approach to a greater or lesser degree. As Rawls (1999) specifies, "...even if the idea of all possible descriptions and of all philosophically relevant arguments is well-defined (which is questionable), we cannot examine each of them" (43). For this reason, he recommends that we consider the more prominent conceptions of justice or ones that are known to us in moral theory. Thus, contemporary political theorists generally seek to defend their position as the position capable of achieving WRE, against only some of the more prominent positions within the philosophical discourse. This I call the *alternative theories test*. For instance, in *TJ*, Rawls advances justice as fairness as a Kantian interpretation of justice, over utilitarian theories of justice as a better "fit" overall with our considered moral judgments. And both Martha Nussbaum and Eva Kittay advance conceptions of justice in terms of *capabilities* or *care* respectively, as preferable to justice as fairness. In this dissertation I presume that the ability of a theory to uphold political equality for citizens with cognitive disability is one way that we might discern which theory, among many that aspire to the liberal standard of justification, is most adequate. My analysis in the forthcoming chapters highlights a recognition-theoretic framework for social justice as the most suitable candidate for meeting the liberal criterion of justification via WRE.

3.4 Overlapping consensus

In *Political Liberalism* (PL), Rawls (2005) introduces the notion of overlapping consensus as a response to the question of “how it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines” (xxv). Now, the virtue of stability in regard to a conception of justice is debatable. Those who follow the tradition of critical theory, for instance, often argue that moral judgments including our conception of justice should be subject to re-evaluation over time and in accordance with the change in social conditions that constitute realistic descriptions of life as actually experienced. Nevertheless, if a given conception of justice were able to form the basis of an overlapping consensus, we could be assured that the conception of justice would meet the demands of liberal justification. Moreover, some consistency over time is generally regarded as a virtue of any conception of justice, for it is difficult to plan one’s life or to educate one’s children properly if the rules of justice are in constant flux. A conception of justice that did not demonstrate both continuity as well as the ability to promote change would appear unreasonable and unlikely to be justifiable over time. Thus, I presume that although an adequate conception of justice need not remain consistent indefinitely, it should have a reasonable degree of trajectory.

Unfortunately, Rawls’s own understanding of overlapping consensus is vague. On a general level, overlapping consensus suggests that a given conception of justice is interpretable from within the individual’s own world-view or comprehensive conception of the good. It is for this reason that Rawls can suggest that his understanding of justice as fairness is a “free-standing” political conception of justice—one which is not tied to any particular world view or conception

of the good (philosophical or otherwise) but rather capable of cohering to the diversity of reasonable conceptions of the good that characterize a democratic society. However, what Rawls intends by ‘consensus’ or what specifically he suspects is shared between citizens in overlapping consensus is debatable. By overlapping consensus he could mean consensus on merely the principles of justice, the principles along with fundamental ideas that support them (e.g. the concept of the person and of society), or the principles, their underlying ideas, and their justification (Stark, 2010, 120).²⁷

At the very least, we can be fairly assured that on Rawls’s view overlapping consensus refers not only to the principles, but in addition their underlying ideas. In *PL* Rawls specifies that the depth of the consensus “goes down to the fundamental ideas within which justice as fairness is worked out. It supposes agreement deep enough to reach such ideas as those of society as a fair system of cooperation and of citizens as reasonable and rational, and free and equal” (2005,149).²⁸

²⁷ Slightly differently, D’Agostino (2008/2011) suggests by overlapping consensus Rawls could mean a consensus as in a shared reason or set of reasons offering support for a given regime, or he could intend by consensus the convergence of individuals with differing world views on a set of beliefs that support the regime perhaps through some process of reflection like narrow RE, or finally, he could intend by consensus that individuals with differing world views share or converge on a set of beliefs that support original position reasoning.

²⁸ This reflects his assertions in earlier works as well. Rawls (1975) states “first of all, a well-ordered society is effectively regulated by a public conception of justice. That is, it is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice. It is also the case that basic social institutions and their arrangement into one scheme (the basic structure) actually satisfy, and are on good grounds believed by everyone to satisfy, these principles. Finally, publicity also implies that the public conception is founded on reasonable beliefs that have been established by generally accepted methods of inquiry; and the same is true of the application of its principles to basic social arrangements. This last aspect of publicity does not mean that everyone holds the same religious, moral, and theoretical beliefs; on the contrary, there are assumed to be sharp and indeed irreconcilable differences on such questions. But at the same time there is a shared understanding that the principles of justice, and their application to the basic structure of society, should be determined by considerations and evidence that are supported by rational procedures commonly recognized” (255).

However, in regards Rawls's intention behind the justificatory method of overlapping consensus as discussed in *PL*, I agree with Cynthia Stark (2010) who suggests that although overlapping consensus could refer to consensus on principles, it is only properly understood as referring to principles and their justification (120).

Stark (2010) is correct to highlight that Rawls's understanding of overlapping consensus corresponds to his understanding of justice as fairness as a form of political constructivism and in turn on his employment of a procedural device (a hypothetical version of the social contract) suitable for delivering principles that specify a political value system constructed independently of any particular comprehensive doctrine. As she argues:

in a society characterized by reasonable pluralism, people disagree not only about the truth or falsity of moral propositions but also about the metaphysical status of moral propositions and the proper way to justify those propositions. So, in order for reasonable people to agree on a political conception of justice, that conception must be amenable not merely to the moral substance of various comprehensive doctrines but to those doctrines' metaethical and justificatory commitments as well (121).

And in "Public Reason Revisited" Rawls stipulates that a condition for a conception of justice's being advanced in public reason is that it meets a *criterion of reciprocity*, which "requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens

and not as dominated or manipulated, or under the pressure of an inferior political or social position” (*PL*, 446).²⁹

For this to be the case, we have to have justification for why others might be willing to accept those terms. Since, to borrow Stark’s words political constructivism does not imply that “the procedure of construction *produces* the order of moral values” it can remain neutral among comprehensive doctrines, so long as the procedure constructs principles that cohere with fundamental ideas those doctrines share (e.g. that people are free and equal, or rational and reasonable). Overlapping consensus on the principles of justice then, as Stark argues, provides an important yet partial justification, but consensus on the procedure of justification is crucial as well.³⁰

Given that consensus must form over both the justificatory commitments of the theory as well as the principles of justice, at this point the structural distinction between wide-reflective equilibrium and overlapping consensus blurs.³¹ However, there are a couple noteworthy differences between WRE and OC. First, unlike WRE, OC does not require an alternative

²⁹ For a preferred conception of justice to meet the criterion of reciprocity Rawls specifies that we must “reasonably think” that when offered fair terms of social cooperation citizens “might also reasonably accept them” (*PL*, xlii).

³⁰ Stark’s observations also conform to Rawls’s specifications that, “a legitimate procedure is one that all may reasonably accept as free and equal when collective decisions must be made and agreement normally lacking” (*PL*, 428). Indeed, justification for the procedure is quite important for Rawls as the veil of ignorance is employed to varying degrees throughout the four-stage sequence.

³¹ At the very least it seems rather unsurprising that Rawls would argue that his account is capable of forming the basis of an overlapping consensus, as it is rather unsurprising that ‘reasonable and rational’ citizens, or those with ‘reasonable comprehensive doctrines’ could endorse a conception of justice that employs concepts of the person as ‘reasonable and rational’ and derives principles suitable to their circumstance.

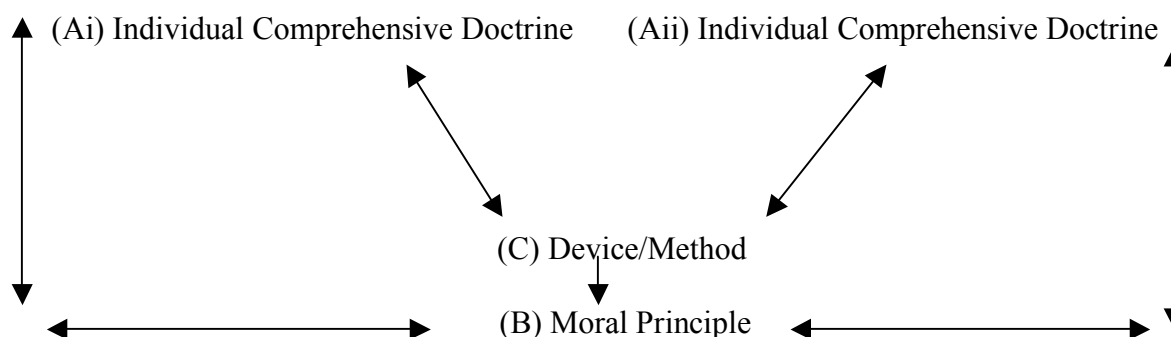
theories test. Second, OC is a form of “public justification” where as WRE is a form of individual justification. The reason OC is called a form of “public” justification is because it does not seek to adjudicate between differing comprehensive doctrines or moral systems, which are characterized in part by differing views on the person; the role of morality in society (i.e. the sorts of things that constitute (C) background theories). As Rawls (2005) specifies:

Public justification happens when all the reasonable members of political society carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive views. In this case, reasonable citizens take one another into account as having reasonable comprehensive doctrines that endorse that political conception, and this mutual accounting shapes the moral quality of the public culture of political society (387).

Since different comprehensive doctrines will support somewhat different background theories, convergence on all aspects of these theories these is not necessary in OC. Overlapping consensus then will not address all relevant background theories, although it will entail convergence on some aspects of those theories.³² The following figure presents a scaled down version of the general structure of overlapping consensus.

³² For example, while in *TJ*, the conception of the person is roughly Kantian, in *PL* the parties must converge on a normative understanding of the person, but not necessarily a Kantian one. In *PL* Rawls specifies that “a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life” and that “the conception of the person, ..., is a normative conception, whether legal, political or moral, or indeed also philosophical or religious, depending on the overall view to which it belongs. ... It is in effect a political conception of the person, and given the aims of justice as fairness, a conception suitable for the basis of democratic citizenship. As a normative conception, it is to be distinguished from an account of human nature given by natural science and social theory and it has a different role in justice as fairness” (18, f20). Convergence is required then on the political conception of the person in OC.

Figure 2: The general structure of overlapping consensus



3.5 Operationalizing the liberal standard of justification for citizens with cognitive disabilities

Though each of methods of justification discussed is hypothetical the tri-part coherence necessary for justification in WRE as well as OC offer a point of view that consults (at least in principle) the views of a diverse citizenry. Specifically, incorporates a perspective from which the entire political conception, including the procedural device as well as the principles of justice, may come under consideration. In this way, WRE and OC offer insight into whether, and if so how, a procedure of justification (like original position reasoning) might be modified so that the perspectives citizens with cognitive disabilities would be represented in the process of selecting or constructing suitable normative principles of justice. In some cases, the level (C) background theories advanced by a given theorist may support processes of reasoning that are highly inclusive of citizens with cognitive disabilities. This is more likely in theories where cognitive disability is not excluded by the theory of human nature or society the theorist endorses. In other cases, the particular characterization of any level (C) method or device may,

in itself, deny individuals with cognitive disabilities a voice in the process of justification, perhaps by inappropriately subsuming their perspectives under the standpoint of another, or by allowing others to impute consent for them “in their best interest” even when they are capable of issuing or withholding it.

To be sure, wide reflective equilibrium and overlapping consensus may not be available to all citizens with cognitive disabilities, but the degree to which members of this social group are denied justification may be marginal or quite extensive. Arbitrarily assuming that principles of justice need not be justifiable to citizens with cognitive disabilities violates their political liberty. Once again, as Rawls suggests, it is only in the instance either that we have no better way of dealing with issues of justice or the injustice is tolerable only to preclude an even greater injustice (1999,3). This means failing to provide justification for citizens with cognitive disabilities is only acceptable either in the circumstance that we have no better (more inclusive) method for justifying a given theory and therefore for upholding the political liberty of these citizens, or that failing to uphold the political liberty of these citizens is tolerable to preclude an even greater injustice to these citizens or to those others who, of course, are all likely to be touched by cognitive disability at some point in their lives.

4. Can Justice as Fairness Uphold the Values of Political Equality and Liberty for Citizens with Cognitive Disabilities?

4.1 Justice as Fairness and the exclusion of citizens with cognitive disabilities

The most widely regarded and influential philosophical theory of social justice of the twentieth century is justice as fairness—the position articulated by John Rawls first in his 1971 edition of *Theory of Justice* (TJ) and developed over a period of thirty some odd years.³³ Unfortunately, a Rawlsian perspective on social justice provides little guidance to those interested in what justice might require for citizens with cognitive disabilities. Throughout his works Rawls stresses repeatedly that the scope of those to whom justice as fairness extends, is limited, at least so far as he has argued. Rawls does not offer a conclusive word as to whether or not justice as fairness can handle “hard cases” like those presented by temporary or permanent illness or disability (cognitive or otherwise) where “fairness” at least appears to be threatened by one’s inability to participate in relations of reciprocity or to be a fully cooperating member of society (1975, 2005). Instead, he simply notes that, “how far (his theory’s) conclusions must be revised once these matters are understood cannot be decided in advance” (1999, 15).³⁴ Worse yet, Rawls expresses doubt about the ability of his account to accommodate these cases, arguing that “we should not expect justice as fairness, or any account of justice, to cover all cases of right and wrong” (2005). In turn, theorists are left to decipher just what, if anything, justice as fairness might have to say in regards to the question of justice for citizens with cognitive disabilities.

³³ I will focus primarily on Rawls’s discussion of *justice as fairness* as reflected in the 1999 revised edition of *A Theory of Justice* (1999) as well as in *Political Liberalism* (PL, 2005).

³⁴ Rawls assert something like this again in PL (2005, 21).

In this chapter I examine whether and to what extent justice as fairness can plausibly meet the two standards of adequacy specified in chapter 1 and elaborated in chapters 2 and 3. These are the standard of presumptive political equality and the liberal standard of justification. My analysis reveals that Rawls's doubts about the ability of his preferred conception of justice to address the question of cognitive disability are not unfounded. Indeed, I argue that justice as fairness fails to uphold political equality for citizens with cognitive disabilities. Not only is it unclear how the theory could plausibly extend equal basic rights to citizens with cognitive disabilities, it does not have the resources to adequately address the substantive concerns for equal treatment that citizens with cognitive disabilities are likely to have (i.e. medical impairment, social and political exclusion and stigmatization). Therefore, it does not provide for them equal political consideration. Moreover, I will show that the theory fails in light of the liberal standard of justification insofar as it is not clear how the theory could be justifiable to citizens with cognitive disabilities. By contrast, the theory appears to exclude them outright from the scope of justification, in violation of their liberty.³⁵ Part of the problem, I conclude, lies in Rawls design of the original position, which, in accordance with the conceptions of human nature and human society as Rawls describes them, presupposes that the parties are "normal" individuals.

³⁵ I will not argue explicitly for this claim here. Over the course of this dissertation I will provide grounds for presuming that there are more suitable methods for justifying a theory of justice, that do not exclude citizens with cognitive disabilities.

4.2 An overview of justice as fairness

By Rawls's own specification justice as fairness represents an exercise in ideal theory. It is a conception of justice designed to govern a highly idealized or "well-ordered society." As Rawls stipulates, a well-ordered society is one that meets three conditions:

1. *It is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice.*
2. *Its basic structure—that is its main political and social institutions and how they fit together as one system of cooperation—is publicly known, or with good reason believed, to satisfy these principles.*
3. *Its citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just (PL, 35).³⁶*

Though the "well-ordered society" is highly idealized, it is intended to represent a sort of "realistic utopia" that presumably can serve as a vision of justice for actual societies to orient themselves toward. Since the "well-ordered" society is intended as an ideal, the conception of justice that governs the well-ordered society is presumably one that, unlike actual societies, upholds the core liberal values of political equality and liberty of the citizenry or of those who are subject to it. Nevertheless, Rawls's characterizations not only of the well-ordered society but also the citizens who would occupy it must be "realistic enough" so that the ideal of justice he develops can be useful for providing guidance on concrete, non-ideal matters of justice.

³⁶ In *TJ* Rawls argues that in a well-ordered society the following two conditions hold: "(1) everyone accepts and knows that the others accept the same principles of justice; and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles" (1999, 4).

Therefore, the well ordered society must be a plausible ideal for contemporary Western liberal democratic societies, the constituency of which is diverse.

In conjunction with the claim that justice as fairness is a conception of justice that could govern a well-ordered society, Rawls contends that justice as fairness is a conception of justice that citizens who are “free and equal” and “normal and fully cooperating over a complete life” could endorse. These are the sorts of citizens then, that effectively occupy the well-ordered society justice as fairness governs on Rawls’s view. Such citizens, Rawls presumes, will be both *reasonable* and *rational*. *Reasonable* citizens, Rawls stipulates, are those who are willing and able to propose and participate in fair terms of social cooperation, i.e. to be fully cooperating “over a complete life.” *Rational* citizens, on Rawls’s view, have their own individual interests, which correspond to their particular comprehensive doctrines or conceptions of the good life (2005, 35).³⁷ Indeed, citizens who are “free and equal,” presumably have differing comprehensive doctrines, such as religious doctrines, conceptions of the good life, or world-views which shape what they desire and what they take to be valuable (2005, 47).

³⁷ Some theorists interpret this “fully cooperative” assumption as distinct from the moral power of being reasonable (or indeed rational). However, in *PL* Rawls argues that the two moral powers “are the necessary and sufficient condition for being counted a full and equal member of society in questions of political justice.” He then stipulates, “Those who can take part in social cooperation over a complete life, and who are willing to honor the appropriate fair terms of cooperation, are regarded as equal citizens. Here we assume that the moral powers are realized to the requisite minimum degree and paired at any given time with a determinate conception of the good” (*PL*, 302). I interpret this description as implying that the fully cooperative assumption is implied as being met when one possesses the two moral powers. Furthermore, since the moral power of being rational corresponds to her ability to have a determinate conception of the good, it seems that the fully cooperative assumption corresponds to the moral power of being reasonable.

Given these concepts of the well-ordered society and of citizens as free and equal and hence “rational” and “reasonable,” Rawls specifies two principles of justice that should regulate the basic institutions of the well-ordered society as well as a method of justification (i.e. original position reasoning) that provides an explanation for why those citizens would presumably endorse those principles. The two principles of justice form the substantive core of justice as fairness are specified as follows³⁸:

1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society (2005, 5).

These principles are distributive principles, which are to govern the arrangement of the basic structural institutions of the well-ordered society. On Rawls’s view, we discern individuals’ relative positions in that society according to the index of primary goods that these two principles embody.

Primary goods, according to Rawls, are the sorts of things or goods that any *rational* person would want—“they have a use whatever a person’s rational plan of life” (54). Justice as fairness specifies the “chief” primary goods are rights, liberties, opportunities, income and wealth.

³⁸ I draw these from *PL*. For the principles as specified in *TJ* see (1999,53)

Rawls's first principle of justice regulates the just distribution of rights and liberties while the second principle regulates the just distribution of opportunities, income, and wealth. In addition, Rawls argues that 'self-respect' is a primary good. Although self-respect is something that any rational agent would want, Rawls argues that it "is not so much a part of any rational plan of life as the sense that one's plan is worth carrying out" (155). Moreover, he notes that self-respect requires "confidence in one's ability, so far as it is within one's power, to fulfill one's intentions" (Rawls, 1999,386). In turn, on Rawls's view, (1999) self-respect refers to one's self-concept, in particular how he or she views his own self-worth. Unlike the other primary goods, which are fulfilled distributively, according to Rawls self-respect is fulfilled by the condition of publicity, which implies that all members know and accept the principles of justice, that basic institutions satisfy the principles of justice, that the conception of justice "is founded on reasonable beliefs established by generally accepted methods of inquiry" (*PL*). On Rawls's view, a conception of justice that meets the condition of publicity will ensure that basic rights and liberties are protected over and above any other primary good. Thus, justice as fairness specifies the first principle securing basic liberties as lexically prior to the second principle.³⁹

³⁹ In *TJ* Rawls (1999) argues that "... a desirable feature of a conception of justice is that it should publicly express men's respect for one another" and further that the two principles of justice do so "for when society follows these principles, everyone's good is included in a scheme of mutual benefit and this public affirmation in institutions of each man's endeavors support men's self-esteem" (156). Later Rawls (1999) argues that "the basis for self-respect in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties" and thus "in a well-ordered society then self-respect is secured by the public affirmation of the status of equal citizenship for all; the distribution of material means is left to take care of itself in accordance with pure procedural justice regulated by just background institutions which narrow the range of inequalities so that excusable envy does not arise" (478). See also: (1975, 255; *TJ*, 386-392).

While all theories of justice are all ideal in the sense that (1) they advocate political ideals (such as fairness and reciprocity) and (2) they are necessarily general and abstract, ideal theory in the Rawlsian sense has been criticized for employing what Charles Mills (2004) describes as “deficient” abstractions, or abstractions that diverge too far from the “essentials of the situation” to provide a realistic account of justice for actual societies or to even address the issues of justice that are pervasive in even liberal democratic societies and therefore ought to be of utmost importance for political theorists. For example, Charles Mills (2004) notes that the topic of racial justice was in over thirty years never directly addressed by John Rawls. Yet, as Mills argues, in a nation like the United States—a highly race conscious nation where disparities in wealth and opportunity are largely discernable along racial lines—it seems imperative that our theories of justice have something to say about race relations and how to address any of the persistent and systematic racial injustices between various racial groups. Similarly, I argue that in a nation where cognitive disability is frequent, it seems imperative that our theories of justice be equipped to address issues of justice for citizens with cognitive disabilities.

The problem, however, isn't simply that Rawls ignores important issues. The claim in the case of race is rather that the theory cannot even acknowledge the issue, or at least highly important aspects of it, because the conception of justice is designed for a society in which racial injustice doesn't exist and it employs methods of justification for individuals who are stripped of knowledge about racial inequality and racial injustice. The worry is that so-called “ideal” theories of justice may actually facilitate racial injustice, albeit through covert means. For instance, as critical theorists caution, racial injustice need not be perpetuated through explicitly or obviously racist practices. They can be, and often are, perpetuated through the “color-blind”

policies or practices, which frequently invoke assumptions about merit. Merit-based standards although not explicitly biased against racial minorities often incorporate values and reflect dominant “white” norms as the standard or ideal in evaluation. Moreover, they ignore the multiple barriers that individuals of color often face in achieving those standards, resulting in the appearance that these individuals are simply less deserving.⁴⁰ While, there is certainly room for questioning whether or not the very construction of justice as fairness as an ideal theory makes it likewise ill-suited to address the issue of cognitive disability, it is more evident that at least Rawls’s characterizations of the citizens in the well-ordered society, and in turn, his characterization of the representatives in the original position lead to the exclusion of citizens with cognitive disabilities from the scope of justice.

In *TJ* Rawls specifies that, “equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation” (422). The “initial situation” is a term for the conditions under which and reasons for which individuals would agree to the principles of justice Rawls specifies. In other words, it is a description of Rawls’s favored method of justification of “original position” reasoning. As mentioned in chapter 3 the “original position” is hypothetical version of the social contract between a set of idealized agents or representatives for the citizens of the well-ordered society. In line with Rawls’s characterization of the citizens of the well-ordered society, the representatives in the “initial situation” or “original position” are understood to possess two moral powers: (1) “the capacity

⁴⁰ For example, IQ scores are commonly understood to reflect one’s intelligence. On the face of it, using IQ scores as a standard of assessment does not imply anything about race. Yet, IQ tests have historically been racially biased. In effect then, using IQ scores as a standard of assessment can function to perpetuate racial bias. See Gould (1996); Stubblefield (2007, 2010). Also, for a discussion of the “myth of merit” see Young (1990).

for a sense of right and justice (the capacity to honor fair terms of cooperation, i.e., to be a “fully cooperating member of society over a complete life,” and thus to be *reasonable*), and (2) the capacity for a conception of the good (and thus to be *rational*)” (PL, 302).⁴¹ These representatives are to select principles of justice from behind what Rawls describes as a ‘veil of ignorance,’ which operates as a constraint on the sort of knowledge that the contracting parties may have; it is intended to filter out any knowledge that may bias the parties in their selection of the principles of justice (race, class, gender, etc.), making the selection process *fair*. The only factors the representatives do know consist of basic facts about human psychology, the laws of nature, and the circumstances of justice.

Drawing from Hume, Rawls understands the circumstances of justice to be the circumstances under which the need for justice arises in the first place. On Rawls’s view they include the objective conditions of moderate scarcity, vulnerability to attack, and roughly equivalent physical and mental powers. In addition they include the subjective conditions of an awareness of the fact that citizens conceptions of the good differ in addition to the desire to advance one’s own interests in line with the conception of the good that he or she holds. Finally, Rawls suggests that the representatives are to select principles of justice from a perspective of mutual disinterest. In this way, they are inclined to select principles that will best enable them to

⁴¹ In TJ Rawls states that “Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of the good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree. We use the characterization of the persons in the original position to single out the kind of beings to whom the principles chosen apply” (442). This characterization is consistent with his description in PL, however, Rawls’s discussion of *justice as fairness* in PL aims at public justification within a ‘well-ordered society.’ See “A Reply to Habermas” in (PL, 386-387).

advance their own ends or conceptions of the good in any given outcome, which gives credence to the claim that the outcome is one that a reasonable person could accept.

Given Rawls's description of the citizens of the well-ordered society and, in turn, his characterization of the representative in the original position, it seems that the set of beings to whom equal justice is guaranteed with plausibility under justice as fairness includes only *reasonable* and *rational* individuals, who are not likely citizens with cognitive disabilities. Only if citizens with cognitive disabilities could be presumed both to be able to participate under fair or reciprocal terms of cooperation as well as to hold a rational plan of life or comprehensive conception of the good, would these citizens then be guaranteed equal justice under Rawls's conception. Yet, given certain of Rawls's remarks, we have reason to believe that this is not the case. In articulating his understanding of the well-ordered society Rawls assumes a standard of normalcy as a characteristic of the citizens in the well-ordered society. This standard is tacitly associated with the two moral powers those citizens are supposed to possess. For instance, in an early work he states explicitly, "I ... suppose that everyone has physical needs and psychological capacities within the normal range, so that the problems of special health care and of how to treat the mentally defective do not arise. Besides prematurely introducing difficult questions that may take us beyond the theory of justice, the consideration of these hard cases can distract our moral perception by leading us to think of people distant from us whose fate arouses pity and anxiety" (1975, 246).

In more recent writings Rawls maintains a similar view. For example, in *Political Liberalism* (2005), he characterizes questions of temporary and permanent illness and disability that

undermine one's ability to cooperate on fair terms or in the "usual sense" as "problems of extension," and states that justice as fairness addresses only part of these problems—namely those concerning "normal health care" (21). While one might think that at least citizens with less pervasive disabilities may be *prima facie* guaranteed equal treatment, even this is highly uncertain. The reason is that "disabilities" of any kind do not typically constitute normal health care problems. By contrast disabilities, of any kind, are typically regarded as "abnormal." Moreover, it is unclear that many citizens with cognitive disabilities can cooperate with others "in the usual sense" or without the making of what are often presumed to be "special accommodations."⁴²

Indeed, the standard of normalcy implicit in justice as fairness casts doubt even on the plausibility that the theory can extend equal basic rights to citizens with cognitive disabilities since it is specified for a constituency that does not appear to include them.⁴³ Moreover, I will argue in what follows that even if citizens with cognitive disabilities were presumably owed

⁴² In a recent article Cynthia Stark (2007) suggests that the constituency whom Rawls excludes from the scope of justice includes only those individuals with impairments so severe as to preclude their ability to function in a sense that is "absolute"—that is no matter the technological advancement or modifications made within the social context to facilitate their ability to participate. My problem with this is that what is at issue for the inclusion of the non-severely cognitively disabled is not the individual's capacity to participate under any term whatsoever, but rather the individual's capacity to participate under *fair* terms. We cannot assume in advance the sorts of social modifications that would be required to facilitate cooperation in advance to be fair. And while it is certainly true that we cannot presume that such accommodations are antithetical to fairness, it certainly is not the case that individuals with medical impairments that preclude them from participation without social accommodation are perceived as falling within the "normal" range for human functioning that Rawls seems to associate with this capacity. If this were not the case, citizens with cognitive disabilities would hardly be identifiable as a social group. I will return to this discussion in section 4.2.

⁴³ This does not mean that Rawls would recommend depriving citizens with cognitive disabilities of equal basic rights, but rather that the theory he endorses is not comprehensive enough to address this question.

equal justice under the theory, justice as fairness is ill-equipped to give them equal political consideration. At the very least we have reason to challenge the particular construction of justice as fairness as an ideal theory, leaving open the possibility that with certain modifications to either the conception of the well-ordered society or to the methods of justification employed in selecting principles of justice Rawls might arrive at a more normatively adequate ideal theory of justice.

4.3 Can justice as fairness plausibly address concerns for the equal treatment of citizens with cognitive disabilities who have medical impairment?

As discussed in chapter 2, to extend equal political consideration to citizens with cognitive disabilities a theory of justice must be able to address concerns for the equal treatment of those citizens with cognitive disabilities who have medical impairment. Citizens with cognitive disabilities, for instance, such as Down syndrome or autism spectrum disorders (ASD's) will likely have concerns involving medical impairment, which is often regarded as a contributing factor to the "disabling" aspect of the condition. Citizens with Down syndrome may need corrective treatments in order to alleviate certain limitations in functioning, such as a variety of medications, or speech and muscle therapies. Likewise, citizens with ASD's may need, among other things, anti-depression medication or medication used to treat emotional or behavioral problems. In turn, in order for a theory of justice to extend equal political consideration to citizens with cognitive disabilities it should be able to offer plausible guidance on how these sorts of needs can be met or justification for why these health care related needs will be disregarded.

Unfortunately, of all the theories of justice that will be addressed in this dissertation, justice as fairness is perhaps the least equipped to address concerns for justice involving medical impairment. As noted earlier, Rawls states that his theory is capable of addressing questions of health care that fall only with the “normal range.” At this point we may ask why the two principles of justice in justice as fairness cannot offer plausible guidance on the question of medical impairment or medical concerns that fall outside the “normal” range. To understand why we might first consider the types of goods the principles govern the distribution of. They are once again: rights, liberties opportunities, income, wealth and the social bases of self-respect.

One reason is that several of these goods (rights, liberties and opportunities specifically) are effectively formal freedoms. Under justice as fairness, to say that society will guarantee the same basic rights and liberties for all, and to say that opportunities ought to be arranged so as to be to the maximum benefit for the least well off, simply suggests that there are no formal (for instance legal) constraints preventing these individuals from having or exercising these rights and liberties or precluding them from having similar opportunities. An individual with an autism spectrum disorder, for instance, could feasibly have the same formal freedoms as everyone else yet be unable to exercise those freedoms due to limitation in functioning attributable to medical impairment that could be alleviated through medical treatment. Indeed, as a citizen of the well-ordered society, an individual with an ASD may have the formal freedom to speak or the right to vote but may, as a result of the disorder, be incapable of exercising her voice. There is nothing in the specification of the two principles that requires provision for the conditions that would either

eliminate the barriers that preclude one from exercising her rights and liberties or enable her to exercise them.⁴⁴

Perhaps this is not too troubling, however, because the individuals of the well ordered society are also guaranteed that the society be structured in a way so as to ensure that the distribution of other primary goods, such as income and wealth are to the greatest benefit of the least advantaged. Income and wealth could certainly be used to acquire medical treatment and care, which could potentially enable them to exercise their formal freedoms. The problem here is that there is no guarantee under justice as fairness that institutions will be arranged in a way so as to make feasible for individuals with cognitive disabilities the option of getting necessary or even vital medical treatments. This is perhaps unsurprising given that the list of primary goods is based on a standard of what a “rational” and “reasonable” person would want. Rational and reasonable individuals have little incentive to meet medical needs that they will not encounter and that fall outside the boundary for whatever is taken to be “normal” human functioning. Nor do they have reason to ensure (under whatever system of medical care they decide to implement) that such things like access to, or costs for such treatment are feasible for individuals who need them. In turn, the structure of the health care system specified by justice as fairness is likely to disadvantage citizens with cognitive disabilities. Yet, it is incompatible with citizen equality to stipulate that some the health status of some citizens falls beyond the bounds of ideal justice.

⁴⁴ I will return to the question of enabling conditions in section 4.7. My claim here is restricted simply to the two principles of justice Rawls endorses over the course of his work and not to the principle of enabling conditions he mentions in the introductory chapter to *PL*. Namely because it appears to me to be cast off-hand, without much consideration or justificatory support.

4.4 Can justice as fairness plausibly address concerns for the equal treatment of those citizens with cognitive disabilities who are socially or politically excluded?

In addition to addressing the concern for the equal treatment of citizens with cognitive disabilities who have medical impairment, in order to uphold the political equality of citizens with cognitive disabilities a normatively adequate theory of justice must be able to address the concern for the equal treatment of those who suffer social and political exclusion. For in some cases it is not medical impairment that citizens with cognitive disabilities regard as primarily “disabling” but rather biased social policies or an unaccommodating or oppressive social environment. For instance, certain learning styles or teaching methods may be unaccommodating for individuals with certain learning disabilities. Example would help. In these cases, citizens with disabilities may have a higher degree of concern for alternative forms of education than say medical treatment. A normatively adequate theory of justice should be able to offer guidance on questions, like these, which involve the social and political exclusion of citizens with cognitive disabilities. Given that Rawls does recognize the basic structure of society to have a profound influence on the individual and his or her life chances, one would think that justice as fairness would be able to offer guidance on questions of social and political exclusion that result from the way society is structured. Unfortunately justice as fairness is ill-equipped to do so.

The primary reason that justice as fairness cannot offer plausible guidance on the issue of the social and political exclusion citizens with cognitive disabilities is that Rawls fails to acknowledge the role the social environment can play in limiting the abilities of citizens with cognitive disabilities or in other words “disabling” certain citizens. Indeed, over the course of his

work Rawls appears to take for granted that “normal” individuals can participate under fair terms of cooperation. However, the social structure itself helps to determine what constitutes “normal” and “abnormal” or “deficient” functioning. The result of this oversight is that the two principles of justice lack the resources to address questions of bias in social institutions that simultaneously shape what counts as “normal” while favoring those who meet whatever criteria are associated with the category. The question of social and political exclusion doesn’t simply concern whether or not one has the same set of distributive goods as everyone else, it concerns in addition the fact that social institutions make the exercise of the rights and liberties they protect realizable for some and not for others.

Let us consider, for instance, whether the two principles of justice could offer guidance on the question of social bias in the structure of education. Once again the two principles specify the distribution of primary goods including rights, liberties, opportunities, income, wealth and the social bases of self-respect. Rights, liberties and opportunities are formal freedoms that all citizens should either share equally or, in the case of opportunity, that should be distributed in a manner so as to benefit the least well off. Even if we presume that citizens with cognitive disabilities are entitled to equal justice alongside other citizens,⁴⁵ the principles would then offer guidance on the distribution of these primary goods to citizens with cognitive disabilities but they still would not offer guidance regarding the question of equal treatment for citizens with cognitive disabilities who suffer social and political exclusion, which is not exclusively a matter of formal equality. Thus it would have to provide some way of acknowledging, if not remedying

⁴⁵ *Justice as fairness* of course does not specify this, instead it only guarantees equal justice to those who possess the two moral powers.

the sorts of policies and practices that make the exercise of the liberties they protect infeasible for citizens with cognitive disabilities but feasible for others.

For example, consider equality of opportunity in terms of education. While the two principles of justice might require that citizens with cognitive disabilities have access to an education, certain intellectual disabilities, including ASD's might need specialized forms.⁴⁶ Unfortunately, justice as fairness, is no more equipped to offer guidance regarding this sort of social and political exclusion than medical impairment. Rawls's only provision is that social institutions be arranged so as to be to the maximum benefit of the least-advantaged. However, it is not clear that citizens with cognitive disabilities are the "least-advantaged" members of society.

Now here one might contend that I am, contrary to what I claim in chapter 2, really suggesting that a normatively adequate theory of justice must offer a particular substantive conclusion regarding questions of justice involving the social and political exclusion of citizens with cognitive disabilities. By contrast what is of importance for this analysis, and indeed the example of equality in education, is that justice as fairness cannot address the issue of the social and political exclusion of citizens with cognitive disabilities because it has no resources for challenging the standards according to which not only social opportunities, like equality in education are distributed, but also according to which they are interpreted. The question of social and political exclusion involves not simply what a "equal" distribution of a particular good would be but, what "equality" in terms of a particular opportunity means.

⁴⁶ The value of mainstreaming in the case of certain cognitive disabilities, such as Down syndrome is currently debated. I do not intend to suggest that all citizens with cognitive disabilities will benefit from separate or specialized forms of education. The benefit of specialized education will likely turn on the type of disability in question.

4.5 Can justice as fairness plausibly address concerns for the equal treatment of citizens with cognitive disabilities who are stigmatized?

A final consideration of justice a normatively adequate theory of justice must be able to address if it is to uphold political equality for citizens with cognitive disability concerns the stigmatization of citizens with cognitive disabilities. Stigma is a distinctive form of social exclusion that suggests certain individuals are far from equal and instead morally inferior. Stigma it often results from the interaction between individuals' identities and/or self-concepts and social perceptions and understandings about cognitive disability, including the social categories in which those understandings are embodied. According to Goffman (1997), stigmatization of an individual or members of a social group is often rationalized upon the basis of a "stigma-theory" that provides an explanation for why the trait (in this case disability or impairment) the individual is perceived as possessing is undesirable. In addition, it offers a putative justification of for why others ("normal" individuals) who do not possess that trait hold a position of superiority in relation to the individual (205). Often, the "stigma theory" takes the form of medicalizing discourses that interpret cognitive disabilities as "defects." When disabilities are viewed as defects, those with disabilities, including cognitive disabilities appear "defective," subhuman or inferior.

Certainly, some aspects of cognitive disability might be undesirable. Yet, it is unclear that all aspects of cognitive disabilities are undesirable. For instance, as mentioned in chapter 2, while autism spectrum disorders do present challenges and difficulties, they can also be helpful. ASD is sometimes associated with savant-like qualities. Moreover, even some of the most disabling

medical conditions are not described by those who experience them in exclusively negative terms. For instance, consider the following individual's reflections on the early stages of Alzheimer's:⁴⁷

One day as I fumbled around the kitchen to make a pot of coffee, something caught my eye through the window. It had snowed and I had forgotten what a beautiful sight a soft, gentle snowfall could be. I eagerly dressed and went outside to join my son who was shoveling our driveway. As I bent down to gather a mass of those radiantly white flakes on my shovel, it seemed as though I could do nothing but marvel at their beauty. Needless to say, my son did not share in my enthusiasm. To him it was nothing more than a job; but to me it was an experience. Later, I realized that for a short period of time, God granted me the ability to see snowfall through the same innocent eyes of the child I once was, so many years ago. Jan is still there I thought, and there will be wonders to behold in each new day. They will just be different snow.

Once again, of all theories considered in this dissertation, justice as fairness is the perhaps the least equipped to address the question of equal treatment for citizens with cognitive disability who have been stigmatized. First and foremost it is quite explicit in its distancing of citizens with cognitive disabilities from "normal" individuals. Rawls discourages consideration of cognitive disabilities as a characteristic of the citizens of the well ordered-society that the two principles of justice are to govern on grounds that they "can distract our moral perception by leading us to think of *people distant from us whose fate arouses pity and anxiety*" (emphasis added, 1975, 259). Since consideration of the issue of cognitive disability is excluded from the design of the

⁴⁷ This account and others can be found in Daniel Kuhn, (2003, 86,87,93).

political conception (in the depiction of the well-ordered society, in the characterization of the citizens, and in the process of selecting just principles), it is unsurprising that the resulting political conception cannot combat stigmatizing assumptions about those who have cognitive disabilities.

Nevertheless, even if justice as fairness were presumed to extend to citizens with cognitive disabilities, as purely distributive form of justice it can offer no remedy for faulty or biased presumptions about “normalcy” or “disability” that underpin the distributions it recommends. The problem is that if an uncritical or biased understanding of “normalcy” is operating in a given social context, the fairness of the distribution of shares in terms of primary goods may be undermined in a society governed by the two principles of justice as fairness regardless of whether or not the shares are distributed in accordance with the principles. And, more specifically, since the standard of “normalcy” itself is never critically assessed, even in a system which distributes shares perfectly in accordance with the two principles, the unfairness of the system may be overlooked or invisible because it is presumed to be *just* and citizens with cognitive disabilities, simply less competent or less deserving as a cause of some medical rather problem.

For example, let us consider for a moment the claim that “social and economic inequalities ought to be attached to positions and offices open to all under conditions of fair equality of opportunity” in light of shifts in social expectation about individual performance. As Susan Wendell (1996, 2006) highlights, shifts in expectations about the pace of life within a given social context may function to exclude or “disable” individual who might otherwise be able to

participate. As Wendell relates the pace of life affects disability because it increases expectations about individual performance:

When the pace of life of a society increases, there is a tendency for more people to become disabled, not only because of physically damaging consequences of efforts to go faster, but also because fewer people can meet the expectations of ‘normal’ performance. The physical (and mental) limitations of those who cannot meet the new pace become conspicuous and disabling, even though the same limitations were inconspicuous and irrelevant to full-participation in the slower paced society (37).

When an individual cannot meet the new pace, medicalizing discourses are often employed as an explanation for the failure to achieve the level of expectation associated with at certain function. In this way the reason for the inability to “keep up” is often regarded simply a problem of the individual. In turn the disabled individual may appear at worst incompetent, at best less qualified, and in both cases less deserving of a particular position.

While citizens with cognitive disabilities might receive assurance that they are in a better position in terms of the primary goods they are afforded than if institutions were arranged differently, such an assurance should appear dubious. For in effect, what it means is that the citizens with cognitive disabilities are assumed to be naturally inferior and that for this reason they occupy positions among the least well-off. Thus, rather than either combating or even being able to acknowledge the problem of stigma associated with cognitive disability justice as fairness may actually facilitate it.

4.6 Is justice as fairness justifiable to citizens with cognitive disabilities via wide-reflective equilibrium?

Rawls advances justice as fairness as a political conception that is justifiable in wide-reflective equilibrium. If this were so, then we would have reason to believe that even if justice as fairness cannot provide political equality for citizens with cognitive disabilities, it is a plausible candidate for meeting the liberal standard of justification. The liberal standard of justification specifies that a normatively adequate conception of justice must be justifiable to all those who fall within its scope.⁴⁸ As an artifact of ideal theory justice as fairness admittedly appears to fulfill this requirement; Rawls's theory would presumably be justifiable to the citizens of the well-ordered-society as he has described them. However, as I will argue, his theory is not justifiable to a wide range of citizens with cognitive disabilities who are capable of being justified to and who would be subject to any actual political regime that was governed by the coercive social institutions the two principles specify. Despite attempts to read Rawls in a charitable light, justice as fairness arbitrarily excludes citizens with cognitive disabilities from the scope of justification and in doing so violates their liberty.

Once again, WRE is characterized by a tri-part coherence between considered moral judgments, principles of justice, and background theories, including the theorists preferred justificatory device, which in this case consists in "original position reasoning" as specified in section 4.2. Let us consider first whether and to what extent "original position" reasoning includes or excludes citizens with cognitive disabilities. Perhaps most obviously, original position reasoning

⁴⁸ For a more detailed description, see chapter 3.

offers justification for the principles of justice to those who have the capacity to be *reasonable* as well as the capacity to be *rational* to the exclusion of citizens with profound cognitive disabilities and impairments or those who are likely unable to form and revise a conception of the good are therefore lack the capacity for rationality. Less obviously, Rawls's characterization of the original position excludes numerous other citizens with cognitive disabilities from being represented in the process of justification, even when these individuals do possess the capacity for rationality and are therefore capable of being justified to. This is because although the citizens may be *rational* or capable of forming a conception of the good or of comprehending justification, they may nevertheless be *unreasonable* or incapable of participating under what Rawls calls "fair terms of cooperation" (Rawls, 2005, 20).

Under justice as fairness if an individual's ability to participate under "fair terms of cooperation" is diminished (according to some abstract standard), she will not meet the requirements for personhood in the Rawlsian sense. In turn, she is not owed justification either for the principles of justice or for the policies and practices adopted in accordance with them, which may limit the scope of opportunities available to her or which may marginalize her in her ability to generate income and wealth or even pursue her talents. As Silvers and Francis (2005) caution:

By so idealizing the citizens who can be involved in specifying the terms of social cooperation, Rawls ignores the perspectives of anyone judged to be incapable of contributing at normal levels or in standard ways. And because these 'outliers' are not sufficiently centrally positioned to prevent the adoption of practices that impose detrimental terms or force them into alienating roles, any social and political participation permitted to them may be no more than a form of consensual subordination (49).

Consider, for instance, individuals with Asperger's syndrome who, as Temple Grandin notes, have personality quirks and intercommunication difficulties that make them seem ill-suited for certain university positions. As she questions "How...could a patent clerk, as Einstein was at the time he wrote it, get a groundbreaking paper published in a physics journal in 2005? I just don't think it would happen. An Einstein today would end up driving the FedEx truck or something, rather than concentrating on his theories" (Grandin *cited in* Cohen 2005).

At this point one might argue that I have interpreted Rawls too stringently. For instance, in a recent article Cynthia Stark (2007) interprets Rawls to presume only those whose disabilities preclude participation under fair conditions in a sense that is "absolute" are denied justification under justice as fairness. In support of this claim Stark notes that, "disability activists have made it abundantly clear that whether a disability is a handicap is often a matter of a society's willingness to accommodate those with unusual needs" (131). In line with this assertion, she highlights the fact that fair terms of cooperation are only interpretable in terms of established social conventions. Here she states, "just as the capacity to contribute to a scheme of cooperation is often relative to particular social arrangements and hence often a matter of convention, what counts as a contribution is also largely a matter of convention" (132). In turn, she presumes that those with less pervasive disabilities (cognitive or otherwise) are not among those Rawls desires to neglect in his account of justification and underscores the fact that "in considering the issue of justice for the non-cooperating, we must acknowledge that we are following to some extent certain existing conventions regarding what counts as engaging in social cooperation" (132). If Stark were correct, then an Aspergian such as Einstein would

perhaps be among those to whom Rawls intends to include in the process of justification. However, I have three problems with this interpretation.

First and foremost, we should note that Rawls associates the ability to participate under fair terms of cooperation with a conception of “normal” human functioning. While individuals with cognitive disabilities may be capable of participating under certain conditions, it is far less clear to me that those with cognitive disabilities fall within the perceived norm for intellectual functioning. Indeed, as Shelly Tremain’s (2001) analysis highlights, disabilities emerge as disabilities only in contrast to some standard for normal human functioning.⁴⁹ Second, the question is not whether and to what extent citizens with cognitive disabilities could contribute under any social conditions, but rather under “fair” ones. This notion of “fairness” is particularly troubling for Stark’s reading of Rawls, given that whether and to what extent the sorts of modifications that enable certain citizens to participate are fair is often contentious and the so-called social conventions she speaks of hard won.⁵⁰ Finally, this interpretation of Rawls is clearly incompatible with his leanings toward a Kantian interpretation of political liberty and equality, which influence the initial design of the original position.

In *TJ* and other early works it seems that that the political conception of justice as fairness is specified in accordance with Kantian intuitions about human equality, human dignity and impartial reasoning. In *TJ* Rawls (1999) states that “the original position may be viewed, ..., as a procedural interpretation of Kant’s conception of autonomy and the categorical imperative

⁴⁹ See chpt.2

⁵⁰ My intention is not to assert that conventions like the ADA, which employs the social model of disability Stark refers to in making her case, are unjust. I simply challenge her presumption that Rawls thought the spectrum of cases she refers to as uncontroversial.

within the framework of an empirical theory (226). As Rawls (1999b) notes, on Kant's view, heteronomy of the will can lead us astray, threatening our negative freedom or our ability "to act independently from the determination of alien causes;" and accordingly, Rawls suggests that, "we interpret this as requiring that the conception of justice that regulates the basic structure, with its deep and long lasting effects on our common life, should not be adopted on grounds that rest on a knowledge of the various contingencies" (221). In turn, Rawls's initial characterization of the original position as a highly idealized hypothetical contract between *rational* and *mutually disinterested* agents from behind a veil of ignorance was intended to mimic a Kantian conception of the autonomous qua noumenal self. This is a self, guided by "pure" or impartial reason legislating for a kingdom of ends, or a constituency of free and equal persons as self-originating sources of valid claims. Similarly the representatives in the original position are seen as legislating principles for the free and equal citizens of the well-ordered society.

Even in later work (namely *Political Liberalism*) where Rawls advances the account as an artifact of political constructivism, distancing the theory from Kantian intuitions about moral autonomy, the basic construction of justice as fairness nevertheless continue to reflect Kantian intuitions about human dignity as consisting in one's ability to reason and about impartial reasoning as reasoning that is not biased by contingent factors. In addition, Rawls continues to contend in these later works that the principles of justice express "public reason," or rules that all could adopt and that respect all subject to them as self-authenticating sources of valid claims. The problem for Stark then is this: we can see that over the course of Rawls work the idealizing constraints applied to the initial situation, which omit "hard cases," are regarded as excluding the very sort of contingency she must introduce in order to get the claim that most individuals

cognitive disabilities are both agents and subjects of justice, that they fall within the justifiable as well as substantive scope of justice, off the ground.⁵¹

It would seem then, that if Rawls wishes to extend justification for justice as fairness to even those citizens with cognitive disabilities who are presumably capable of being justified to, he will need to reject one or more of the Kantian intuitions guiding the rather highly idealized process of justification he endorses. This, of course, will likely alter not only the procedure (so that original position reasoning is no longer preferred or, if it is, it is suitably modified), but in turn the principles of justice.

Of course, even if justice as fairness fails to be justifiable to citizens with cognitive disabilities in WRE, there may be some reason to uphold the theory if it were justifiable in narrow reflective equilibrium (RE). RE consists of equilibrium between our considered moral judgments and the principles of justice alone. Here I shall simply note that it is unclear to me that Rawls has provided suitable or un-question begging grounds for suggesting that justice as fairness does achieve reflective equilibrium. While I agree that justice as fairness does match many of our “duly pruned” judgments about justice, for instance I would consider the belief that violations to one’s bodily integrity are unjust to be one such judgment, it is unclear to me how Rawls can assert with confidence that the beliefs that racial discrimination and religious intolerance are unjust are “duly pruned judgments” without questioning discrimination against the disabled.

⁵¹ Charles Mills (2005) makes a similar argument in “Ideal Theory as Ideology.” See, in particular pg. 179.

While I certainly agree that racial discrimination and religious intolerance are unjust, I question whose judgments Rawls is consulting when evidently he appears to have no qualms about emphasizing the difference between citizens with cognitive disabilities and “normal” citizens while emphasizing the similarities between members of other social groups that ground these sorts of judgments. At least historically, these sorts of claims (in the case of racial discrimination and religious intolerance) have been similarly controversial. It seems then that, in order to be consistent, Rawls should either emphasize how the principles cohere with more generalized judgments about justice (for instance that violations of bodily integrity are generally unjust), or provide a more thorough discussion of why he believes certain less generalized judgments about justice to be duly pruned and others not.

4.7 Is justice as fairness justifiable to citizens with cognitive disabilities via overlapping consensus?

A second method by which a given normative theory of justice may meet the liberal standard of justification is via overlapping consensus. As mentioned in chapter 3 Rawls (2005) introduces the notion of overlapping consensus (OC) in *Political Liberalism* in response to the question of stability—specifically, “how it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical and moral doctrines” (xxv).⁵² OC is generally understood to imply that a given conception of justice is compatible with the diversity of comprehensive visions of the good that characterize a

⁵² The problem, as he notes, is that “the argument in *TJ* relies on a premise the realization of which its principles rule out. This is the premise that in the well-ordered society of justice as fairness, citizens hold the same comprehensive doctrine, and this includes aspects of Kant’s comprehensive liberalism, to which the principles of justice might belong” (*PL*, xl).

democratic society. The pertinent question for overlapping consensus then is whether and to what extent the citizens of the well-ordered society could continue to endorse the conception of justice over time. Now, as mentioned in chapter 3, overlapping consensus concerns not only the principles of justice but in addition the methods used to justify them. This being the case, it does not initially seem plausible that justice as fairness could be justified to a broader scope of individuals in OC than it is in WRE.

Nevertheless, while in the initial process of selecting the principles the representatives are guided by conditions of mutual disinterest, Rawls acknowledges that once the veil has been lifted, the citizens in the well-ordered society may have interests in the well being of others as well as bonds of affiliation. For this reason, one might think that even though citizens with cognitive disabilities are by and large not represented within the initial process of selecting the theory, their perspectives may be represented over time, at least by others who advance claims on their behalf. In turn, one might suggest that where the disability does not preclude them from doing so, citizens with cognitive disabilities could at least endorse the substantive prescriptions justice as fairness recommends and, in addition, where it does one might argue that the substantive prescriptions would be endorsed by this constituency if only they could endorse them.

Now as I have argued above, as specified justice as fairness appears to be incapable of guaranteeing citizens with cognitive disabilities equal political consideration. Therefore, it seems implausible to suggest that even if others could advance claims on their behalf in accordance with the principles, the theory would be then be justifiable to citizens with cognitive disabilities. This is because it is unclear that the concerns citizens with cognitive disabilities are likely to

have can be addressed by the principles, even if they were to be advanced by some other on their behalf. Yet, in a recent article Sophia Wong (2010) challenges this account of justice as fairness as incomplete. Instead, she argues that upon closer inspection justice as fairness does appear to have the resources to give due consideration to citizens with cognitive disabilities.

Wong's analysis draws attention to aspects of the theory that are frequently over-looked, namely that Rawls understands moral personality (characterized by the capacities of being reasonable and rational) "...as a potentiality that is ordinarily realized in due course" (1999, 442). In line with this, in *PL* Rawls (2005) acknowledges a third principle of justice, which he suggests is lexically prior to the other two. Here he specifies that:

the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens basic needs must be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties (7).

For these reasons, Wong argues that we should interpret the claim that "equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation" as implying that possession of the two moral powers is sufficient but not necessary for falling within the scope of justice in the Rawlsian sense (Wong, 2010, 131). While Wong acknowledges that those who do not have the potential, or at least are regarded as not having the potential for developing the powers will, so far as Rawls has argued not be owed equal justice, she argues that we ought to err on the side of including consideration of the good even for individuals with profound cognitive impairment. She argues in turn that,

given the lexical priority of the principle of enabling conditions “we should endeavor to imagine the interests of people who cannot communicate with us and to speak on their behalf” (139).

Wong’s analysis is certainly astute and her recommendations here quite prudent. However, contra Wong, I believe such a heavy reliance on the lexically prior principle to be inconsistent with most of Rawls’s remarks over the course of his work. Rawls’s remarks concerning the addition of a principle of enabling conditions to the two principles of justice is restricted to two sentences in *Political Liberalism*. It reflects an afterthought not an argument. Nowhere does he consider the quite extensive implications this principle would require for the restructuring of his theory, as the principle could specify potentially vast redistributions of resources to beings who may never be able to participate under “fair terms of cooperation.” First, we may recall that Rawls classifies temporary and permanent illness and disability as “problems of extension.” If the principle of enabling conditions were intended in a way that could cover these cases, justice as fairness would have an immediate answer to the question of what justice requires for citizens who fall outside the “normal” range of fully cooperative citizens. The lexically prior principle would, by its very specification, have priority over the other two. Instead Rawls argues that justice as fairness provides a plausible answer only to “part” of the problem of temporary and permanent illness and disability—namely the part that concerns “normal health care.” This suggests that, to be consistent with the rest of his remarks, this lexically prior principle should not be interpreted in a way that covers the variety of cases Wong suggests but rather should be understood as a part of justice to facilitate the realization of the two moral powers for “normal” individuals—whomever they may be.

Finally, if we grant that citizens of the well-ordered society are permitted to advance claims on behalf of others that challenge the original distribution of goods specified by the two principles of justice and in accordance with the particular needs of these individuals, this seems to at least stand in tension with the value of fairness that underpins Rawls's entire project. Indeed, it would require consideration of particular need at a cost to what he considers impartial and therefore fair reasoning. In turn, it seems that Rawls is left with a choice: he can either cast his understanding of human nature and society differently (for instance, by depicting the citizens of the well-ordered society in a way that is more inclusive of individuals with cognitive disabilities) or he can reject original position reasoning in favor of a process that would allow for issues of justice concerning citizens with cognitive disabilities to come to the fore in the initial process of selecting justice principles.

5. Can Connection Based Justice Uphold Political Equality and Liberty for Citizens with Cognitive Disabilities?

5.1 Care and connection: The promise of inclusion and the limits of original position reasoning.

In chapter 4, I argued that justice as fairness fails to guarantee equality and liberty to CWCDs. Nor does it appear justifiable to them. I suggested that the inadequacy of justice as fairness stems both from the way Rawls's characterizes human nature and a well-ordered society and from his depiction of reasoning in the original position. Over the course of her work (although primarily in *Love's Labor*) Eva Kittay (1999) argues for the need to conceptualize the human condition, even in "well-ordered societies," in a way includes individuals who fall outside the "norm" of an able-bodied, able-minded or otherwise relatively independent being and thus outside the range of citizens to whom justice as fairness is intended to govern. Once again, on Rawls's view a well ordered society is one in which the following three conditions maintain:

1. *It is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice.*
2. *Its basic structure—that is its main political and social institutions and how they fit together as one system of cooperation—is publicly known, or with good reason believed, to satisfy these principles.*

3. *Its citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just (PL, 35).*

As Kittay notes all human beings spend a portion of their lives in “utter” dependency. Without the loving care of a “maternal” figure no one could survive beyond the state of infancy. Therefore, on Kittay’s view any adequate conception of justice should address the fact that human nature and human society are inevitably characterized by “utter” and partial dependencies.

On Kittay’s view such a conception of justice will not only have the resources to address issues arising from this fact of dependency, in addition, it will be capable of addressing questions of justice for those with disabilities as well as for “dependency workers” or those (typically women) who are primarily responsible for their care. According to Kittay (1999), this account of justice will be “connection-based.” As she specifies:

If we begin our thinking not with persons as they are individuated nor with the properties that pertain to them as individuals, their rationality and their interests, but with persons as they are in connections of care and concern, we consider commonalities that characterize this relatedness. These would form the basis of a *connection-based* equality rather than the *individual-based* equality more familiar to us. The question for a connection-based equality is not: What rights are due me by virtue of my status as an equal, such that these rights are consistent with those of all other individuals who have the status of an equal? Instead, the question is: What are my responsibilities to others with whom I stand in specific relations and what are the responsibilities of others to me, so that I can be well

cared for and have my needs addressed even as I care for and respond to the needs of those who depend on me?” (128).

Since Kittay’s recommendations focus on equality in connection, in what follows, I will call the vision of justice she points toward connection-based justice.

In this chapter, I assess Kittay’s work toward a connection-based conception of justice according to the two standards for normative adequacy developed in chapters 1, 2, and 3. Once again, these are the standards of presumptive political equality as well as the liberal standard of justification. Of course, by her own specification, Kittay does not offer a complete account of justice. Instead, part of what she illustrates in *Love’s Labor* is the sorts of modifications that would be required of justice as fairness in light of connection-based equality. Because the conception of justice she develops is incomplete, part of my goal in this chapter is to flesh out just what connection-based justice might entail. In doing so, I acknowledge that I am taking certain liberties with the construction of connection-based justice that Kittay may or may not endorse.

After exploring the modifications to justice as fairness which Kittay recommends in order to make it responsive to what she calls “the dependency critique” and examining Kittay’s notion of “connection-based equality,” I clarify why the vision of justice she points toward would meet the equality standard to a higher degree than justice as fairness. Nevertheless, I argue that connection-based justice still does not have the resources to give citizens with cognitive disabilities equal political consideration. Moreover, I will show that connection-based justice is

not able to meet the liberal standard of justification. Part of the problem, I conclude, lies in Kittay's continued endorsement of original position reasoning.⁵³

Despite these challenges, I do believe Kittay's conception of justice would provide equal justice and justification for "dependency workers." Although I do not explore the issue of justice for dependency workers in this dissertation, I concur that this question is of extremely high importance and that an adequate comparison of each of the theories I discuss will eventually address this issue as well. Nevertheless, in order to provide a clear and brief comparison between the theories I discuss in this dissertation, I focus more exclusively on the question of whether and to what extent connection-based justice could uphold the political values of equality and liberty for citizens with cognitive disabilities.

5.2 An overview of connection-based justice

Recall that on Rawls's view justice as fairness is a conception of justice fit to govern a well-ordered society, or a society of free and equal individuals participating under fair terms of cooperation over a complete life. Rawls presumes that these citizens will possess two moral powers: they will be *reasonable* or willing and able to propose and participate in fair terms of social cooperation (i.e. capable of full cooperation) "over a complete life," and they will be

⁵³ I acknowledge here that I have taken certain liberties in reconstructing the theory that Kittay may not herself endorse. It should not be understated that Kittay's reflections on *justice as fairness* and the need for conceptualizing equality in terms of connection were not advanced with the intention of being a complete conception of justice. Nevertheless, she does advance a modified version of original position reasoning as a plausible method for justifying a theory of justice that incorporates the fact of dependency at its core as well as conceptualizes equality as connection based. I contend that this form of reasoning is nevertheless ill-suited for meeting the liberal standard of justification where citizens with cognitive disabilities are concerned.

rational or have their own individual interests, which correspond to their particular comprehensive doctrines. On Kittay's view, this conception of a well-ordered society does not accurately capture the realities of all real world societies—it is empirically inadequate. As Kittay states “no society could last beyond a single generation if there are not persons who care for the young. No society—save those enduring the harshest economic, geographic, or climatic conditions—can remain decent if some do not attend to the needs of the ill or disabled and the frail elderly as well as the young” (1999, 28).

The call to acknowledge dependency as a part of the human condition has sweeping ramifications for the construction of the well-ordered society as presented in justice as fairness. In particular, it yields the need to recast the “Kantian conception of equality” to acknowledge relations of dependency and the fundamental need for care. In addition, it challenges the notion of reciprocity that functions in Rawls's understanding of what makes a citizen *reasonable*, since no citizen could be fully cooperative over a complete life. Drawing on the insights of care ethics, which often highlights the maternal relation as paradigmatic and in turn emphasizes the importance of attentiveness and responsiveness to individual need, Kittay argues for a “connection-based” conception of equality that captures the fact of “utter” dependency. This is the sort of equality that all human beings experience as “some mother's child.” On her view we are all equal in the fact that we have all experienced “utter” dependency at some point in our lives, at the very least as infants. As such we have (for the most part) all been the recipients or beneficiaries of some other's caring labor. Many of us, in addition, have or will experience “utter” dependency more than once during our lifetimes. For example, some may experience “utter” dependency in the instance of illness, accident, or disability due to ageing. Finally during

these states of “utter” dependency no individual can reciprocate care in similar kind to those who bestow care upon her.

This means that any realistic depiction of human society must start from the assumption that at any given time, there will be some called upon to labor on behalf of others, without guarantee that they will ever be reciprocated for their efforts by the individual to whom they have cared for. In turn, Kittay (1999) proposes that the ideal for political reciprocity in a well-orderd society as “reciprocity in *doulia*”:

Just as we have required care to survive and thrive, so we need to provide conditions that allow others—including those who do the work of caring—to receive the care they need to survive and thrive” (italics in original Kittay, 107, 112).

“Fair terms of cooperation” on Kittay’s view then, must be interpreted to make room for the fact that some will be dependent and some responsible for the care of others.

Given the fact of dependency, the need for care and the conception of equality as “connection-based,” the principles of justice that would govern a well-ordered society as well as the list of primary goods embodied within those principles is more expansive on Kittay’s view than on Rawls’s. We may recall from chapter 4 that on Rawls’s view primary goods include: rights, liberties, opportunities, income, wealth, and the social bases of self-respect. As Rawls (1999) specifies, they are the sorts of things any rational individual would want, “whatever else” he wanted. However, as Kittay (1999) suggests, someone who is rational would presumably want to be cared for in the circumstance that he or she became dependant and in addition would want to be supported in the case that he or she found himself or herself charged with the care of another

(102). Therefore, in addition to the two principles of justice Rawls articulates, Kittay adds a third principle, which specifies the just distribution of an additional primary good of care.

The principles of justice that, on Kittay's view, would govern the distributions of primary goods in a society governed by a connection-based justice include the following three (the first two of which are the same as in justice as fairness):

1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all' and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.
3. To each according to his or her need for care, from each according to his or her capacity for care, and such support from social institutions as to make available resources and opportunities to those providing care, so that all will be adequately attended in relations that are sustaining (*italics in original*, 1999, 113).

While it is unclear that justice as fairness could provide equal treatment for citizens with cognitive disabilities, Kittay's approach to justice expands the scope of those who are to be regarded as equals. Where Rawls specifies the constituency to whom equal justice is due as those

“who have the capacity to take part in and to act in accordance with the public understanding of the initial situation,” underscoring the characteristics of being *reasonable* and *rational* as morally salient features for determining who is owed equal justice, Kittay’s recognition of “utter” dependency as characteristic of human equality yields this dependency relation as morally salient for determining whether or not one is owed equal justice. When using original position reasoning, this requires altering the depiction of the initial situation in ways that reflect the fact of dependency.

Since, on Kittay’s view the citizens of the well-ordered society are envisioned from the start as being enmeshed in relations of dependency, the characteristics she assigns to the representatives in the original position include not only the two moral powers of being *reasonable* and *rational*, but in addition the moral power of or *capacity for care*. In addition, she drops the assumption that citizens will be “fully cooperating members of society over a complete life.” Thus, while the representatives in the original position are presumed to be *reasonable*, they are nevertheless aware that they may become dependent and therefore incapable of “full cooperation.” Finally, Kittay adds to the circumstances of justice the inevitability that some will be severely dependent. In this way, even though the representatives in the original position presumably know that they (at the moment) do not have a cognitive disability so profound as to impede their rationality, they will envision themselves as always at risk of becoming so and, in addition, they know that at some point they could be charged with the care of others who are.

Of course, if dependency is taken as the paradigm of how we as human beings are similar, and in turn, this relation is what gives one moral standing in terms of justice, then there would seem to

be no reason for the conception of justice to prima facie exclude citizens with cognitive disabilities, no matter how pervasive the disability nor how profound the impairment. Both citizens with cognitive disabilities as well as citizens without cognitive disabilities participate in these relations at some point in their lives and so, in principle, both are owed equal treatment. And for this reason, it seems plausible that connection-based justice would extend equal basic rights to *all* citizens, including citizens with cognitive disabilities.

Given that connection-based equality forces the representatives in the initial situation to consider responsibilities between others with whom they are involved caring relations, one would also hope that connection based justice would yield principles of justice that extend equal political consideration to citizens with cognitive disabilities. Unfortunately, it is less clear that connection-based justice can do so. Although, as I will argue, it is quite capable of addressing concerns for the equal treatment of citizens with cognitive disabilities who have medical impairment, it is less capable of addressing concerns for the equal treatment of citizens with cognitive disabilities who are either socially and politically excluded or stigmatized.

5.3 Can connection-based justice plausibly address concerns for the equal treatment of citizens with cognitive disabilities who have medical impairment?

One concern of justice citizens with cognitive disabilities are likely to have involves equal treatment for those who have medical impairment. In some cases, medical impairments are regarded as *a* if not *the* primary contributing factor to an individual's experience of disability. In certain cases, at least, citizens with cognitive disabilities may need or desire medical treatment or

cure (where possible) to help alleviate the limitation in functioning or “disability” associated with the impairment. As discussed previously, individuals with Down syndrome often need medications to help alleviate depression or thyroid disorders in addition to speech and muscle therapies etc. In addition, individuals with Alzheimer’s disease often need combined medical treatments (for instance Aricept to forestall the development of the disease), and at times quite extensive supervision in the case that they eventually lose the ability to perform even the most basic tasks such as eating or using the restroom.

Where justice as fairness offered scant advice concerning medical impairment—at best it could only offer guidance concerning the distribution of wealth and income, which could be used to purchase medical treatments and cures however costly they may be—connection-based justice presumably can offer guidance in light of medical impairment. At the very least we can see that the third principle of justice Kittay specifies recognizes care as a primary good. In turn it specifies that institutions be arranged so as to support individuals who stand in dependency relations and who are in need of and who are capable of giving various forms of care. These relations will evidently include individuals who have medical impairments who are in need of medical care. While it is true that “care” is often associated with forms of emotional labor, it also often involves tending to their physical needs. Presumably then, the third principle of justice could be drawn upon in determining the just distribution of care in order to meet medical need. Here we may note that Kittay’s stipulation “to each according to his or her need for care and from each according to his or her capacity for care” does not simply extend the benefit of “love’s labor” to citizens with cognitive disabilities or others who have medical needs. It can also

recognize these citizens alongside all other citizens as having of obligations to care for others, albeit perhaps not at the same time or the contexts in which they are the recipients of care.

5.4 Can connection-based justice plausibly address concerns for citizens with cognitive disabilities who are socially and politically excluded?

A second concern of justice that citizens with cognitive disabilities are likely to have involves equal treatment for those who suffer social and political exclusion. In particular, social policies, practices, beliefs and attitudes may structure the social context in ways that impede those with cognitive impairments from social and or political participation. In chapter 4, I argued that justice as fairness fails to offer plausible guidance where social and political exclusion of citizens with cognitive disabilities because it presumes citizens to be “normal” functioning individuals who participate in “fair terms of cooperation over a complete life” without acknowledging either the role the social structure itself plays in determining what constitutes “normal” functioning or “fair terms of cooperation” in any given context.⁵⁴ Given that Kittay challenges Rawls’s characterization of citizens as “normal” functioning and fully cooperative individuals, one would hope that connection-based justice would be better equipped to address concerns of justice that involve social and political exclusion. Indeed, it is. Under connection-based justice citizens with cognitive disabilities presumably will be considered full citizens with entitlements to justice alongside everyone else. This is because on Kittay’s understanding, the citizens in the well

⁵⁴ This point is not to be confused with the claim in section 2.3 that *justice as fairness* is inadequate in terms of comprehension. Certainly, a theory of justice that addressed the ideological function of the concept ‘normal’ or ‘normalcy’ would be more likely to avoid the problem of internal inconsistency I am pointing to here. Nevertheless, the two are separate points.

ordered society need not be “fully cooperating citizens” in the Rawlsian sense to be owed equal justice. Instead, they may be severely dependent.

Yet, while connection-based justice does make certain advances over justice as fairness in terms of social and political inclusion in this regard, it is unclear that the theory makes striking advances over justice as fairness. For one thing, the first two principles of justice, so far as Kittay has argued, remain as they have been specified in justice as fairness. As discussed in chapter 4, these principles do not offer plausible guidance where the question of the social and political exclusion of citizens with cognitive disabilities is concerned because they specify the distributions of rights and liberties formally and there is no mechanism for challenging the ways in which the social institutions are structured upon biased or faulty assumptions, in ways might benefit as well as disadvantage some in terms of their ability to exercise these rights and liberties.⁵⁵ For this reason, if any hope that connection-based justice can address social and political exclusion must lie with Kittay’s specification of the third principle of justice and the addition of the good of care to the list of primary goods Rawls has articulated. Unfortunately, it is doubtful that connection-based justice can offer plausible guidance on the question of equal treatment for citizens with cognitive disabilities. This is because Kittay focuses narrowly on the fact of “inevitable” or “utter” dependency, which most all experience as infants and some experience later in life, in informing the principle of care.

By Kittay’s own specification, the sort of dependency relation she is concerned with includes “inevitable dependencies.” As Kittay describes, *inevitable dependencies* are “those times in our

⁵⁵ See chapter 4 §4.3.2

lives when we are utterly dependent” (76). She highlights these types of dependencies because, as she states:

inequities in the organization and distribution of dependency work—and its impact on the possibility of equality for all—are most evident when dependency is a feature of our human condition rather than a consequence of socially prescribed roles, privileges, or distribution policies” (76).

These are not the sorts of dependencies that are eliminable through making modifications to the social and or political environment. Kittay hopes, however, that “if we try to accommodate the most needy, we have a better chance of capturing the requirements of justice for all” (xiii). The problem, unfortunately, is that the principle of care then seems tailored to address the concern of dependency, and in turn disabilities that are relatively fixed. In the case of cognitive disability then, the sorts of concerns that will likely be covered by the principle of care will include concerns centering more or less exclusively on medical impairment rather than disabilities stemming largely from social and political exclusion and are thus, in principle, eliminable. In turn, it is unclear that the principle of care could offer guidance on questions, for instance, regarding what sort of educational opportunities (if any) should be available for individuals with intellectual or developmental disabilities (including learning disorders, Down syndrome or ASD’s).

Nevertheless, one might argue that surely the citizens of the well-ordered society under connection based justice could advance claims on behalf of others who cannot do so themselves in the form of guardianship. This would presumably afford citizens with cognitive disabilities some political representation, which might in turn facilitate measures that would help alleviate

other social and political exclusions. Indeed, if citizens are imagined from the start as having duties toward beings who, given their condition cannot advance claims on their own and moreover if they are aware that they too could become similarly dependent in their lives then presumably citizens will be able to advance claims on behalf of others under connection-based justice and in accordance with the third principle of care.

Even so, the sorts of claims that could feasibly be advanced or acknowledged under the conception of justice turns this time, not simply on how we interpret “care” but on how we interpret “need.” For instance, should we consider exercising one’s right to vote a fundamental need? And even if we did, should “caring” for an individual entail being able to, for instance, vote on her behalf? Once again, in making inevitable dependency paradigmatic of the relations between citizens in the well-ordered society of connection-based justice it seems likely that only claims regarding needs arising in relations of “fixed” disabilities can be plausibly addressed. If we construe “need” so broadly as to define a basic right or liberty as a human need, then what work the first or even second principle of justice might be doing in connection-based justice becomes less clear.

5.5 Can connection-based justice plausibly address concerns for the equal treatment of citizens with cognitive disabilities?

In addition to concerns for the equal treatment of citizens with cognitive disabilities who either have medical impairments or suffer social and political exclusion, a normatively adequate theory of justice must also be able to address the concern for the equal treatment of citizens with

cognitive disabilities who are stigmatized if it can be said to uphold political equality for these citizens. As discussed in chapter 2, stigmatization or “stigma” is a marking out of certain individuals, which far from suggesting that those who are “marked out” are equals, implies that they have a lesser moral status. Stigma often results from the interaction between individuals’ identities and/or self-concepts and social perceptions and understandings about cognitive disability, including the social categories as well as social attitudes through which those perceptions and understandings are expressed. According to Goffman (1997) rationalizations for stigma often take the form of a “stigma-theory” or an ideology that serves as an explanation for why some aspect an individual is perceived to have (e.g. “disability” or “impairment”) is undesirable. In the case of cognitive disability, the “stigma theory” often takes the form of medicalizing discourses about disability in conjunction with uncritical or unreflective assumptions about human normalcy, which rationalize dispositions toward citizens with disabilities as inferior to “normal” people (205). This “stigma theory” obscures the fact that certain so-called cognitive “disabilities” are not always experienced as being exclusively negative and by contrast can sometimes appear as assets depending upon the context (e.g. ASD’s are sometimes associated with savant-like qualities).⁵⁶

Initially, connection-based justice might appear to be an attractive approach for addressing the question of stigma, after all one of Kittay’s criticisms of justice as fairness is that it fails to acknowledge the fact of dependency as a part of the human condition and instead makes it appear as if it were anomalous. Excluding infants, those who are “utterly” dependent on others are often quite stigmatized. For instance, in regard to physical disability a relatively common

⁵⁶ See chapter 2, in particular section 2.3.

sentiment among able-bodied individuals is that becoming paralyzed or quadriplegic is a “fate worse than death” (Silvers, 1998). Yet, those who are paralyzed or quadriplegic usually do not express the same sentiment. Today the terms “dumb,” “crazy,” “psycho,” “schitzo,” “retarded” and “manic” all have a derogatory connotation—they are frequently used in ridicule—and all suggest a deficit in one’s cognitive or intellectual functioning. Yet, sometimes individuals with, for example, manic depression remark that mania can be an enjoyable state, if only the populace would be more accepting of it.⁵⁷ The lives of Alzheimer’s patients are most always regarded with sadness, anxiety and pity and selective abortion practices are not simply offered but recommended in the case of a positive screening for certain disorders like Down syndrome despite growing protest from parents of children with Down syndrome and in some cases from individuals who have Down syndrome. As a social group, citizens with cognitive disabilities are often regarded as childlike or unquestioningly compared with animals (Carlson, 2101). Since the citizens of a well-ordered society under connection-based justice are conceptualized from the start as being enmeshed in relations of severe dependency, all human beings, including those with severe cognitive disabilities” ought to be included as full members of the community from the start.

While the formal inclusion of citizens with cognitive disabilities in the scope of justice under connection based justice marks an improvement over justice as fairness, I nevertheless worry that

⁵⁷ Consider the following description of manic-depression by Kate Millet, “Depression—that is what we all hate. We the afflicted. Whereas relatives and shrinks...they rather welcome it: you are quiet and you suffer...For we could enjoy mania if we were permitted to by others around us so distressed by it, if the thing were so arranged for manics to be safe to be manic awhile without reproach or contradiction, the thwarting and harassment on every side that finally exasperates them so that they lose their tempers and are cross, offensive, defensive and antagonistic—all that they are accused of being” (Kate Millet *cited in* Nicki, 2001, 90).

by focusing more narrowly on “utter” dependencies Kittay undermines the ability of her theory to thoroughly address the problem of stigma. On the one hand, I worry that in practice connection based justice will tacitly invoke a split between those who are dependent and those capable ones whom are charged with caring for them. Specifically, if we are all equal in virtue of the fact that we are all “some mother’s child” then I worry that connection based justice may even reify the image of citizens with cognitive disabilities as childlike, where they do remain severely dependent throughout their lives. After all, while we are all “utterly” dependent as infants most people are not “utterly” dependent for the majority of their lives, although they may experience periods of “utter” dependency or varying degrees of dependency throughout their lives.

On the other hand, I worry that connection-based justice is simply not nuanced enough to offer guidance in light of less pervasive cognitive disabilities. This is because although connection-based justice acknowledges that human beings all experience “utter” dependency at some point in their lives, it doesn’t appear to have the resources to challenge conventional or medicalizing assumptions about “normalcy.” By focusing only on “inevitable dependencies” as Kittay describes them to be “utter” dependencies and more or less ineliminable dependencies, it is at least unclear what the theory could recommend in order to challenge these assumptions. Instead, it appears that the concerns citizens with cognitive disabilities might have must all be cashed out in terms of issues of equal treatment for those who are severely dependent or for those who are charged with their care. This oversight might be due to the fact that Kittay’s primary concern in *Love’s Labor* is providing justice for “dependency workers” or caretakers. Yet, when we consider the question of equal political consideration for at least certain citizens with cognitive

disability, both medicalizing assumptions about disability and, in addition, the necessary association of dependency with disability is part of what comes under scrutiny.

5.6 Is connection-based justice justifiable to citizens with cognitive disabilities via wide-reflective equilibrium?

Thus far, connection-based justice does appear to make at least certain advances over justice as fairness in terms of its ability to provide equality to citizens with cognitive disabilities. Nevertheless, the standard of presumptive political equality is not the only standard by which we may evaluate the normative adequacy of a given liberal theory of justice. In addition, all liberal theories of justice must meet the liberal standard of justification. The liberal standard of justification requires of any normatively adequate theory of justice that it be justifiable to all those who fall within its scope. As discussed in chapter 3, one method by which many philosophers seek to justify the theories they endorse is wide-reflective equilibrium (WRE). WRE is characterized by a tri-part coherence between considered moral judgments, principles of justice and background theories, including the theorists preferred justificatory device, which in this case consists in Kittay's version of modified original position reasoning as specified in section 5.2. In what follows, I will provide several reasons for believing that connection-based justice does emerge in WRE as preferable to justice as fairness, insofar as it does offer some justification to certain citizens with cognitive disabilities. However, I also cast doubt on the normative adequacy of original position reasoning, even in modified form, for it too risks marginalizing the perspectives of numerous citizens with cognitive disabilities. Therefore it is unclear that as a political conception of justice connection-based justice would be justifiable to

many citizens with cognitive disabilities. Moreover, I will highlight how original position reasoning is inconsistent with what appears to be Kittay's own methodological commitment to enriching social and political theory with detailed descriptions of dependency and disability and highly empirically informed information about dependency as a part of the human condition.

In Chapter 4, I questioned Rawls's claim that justice as fairness meets our considered moral judgments in reflective equilibrium. As Rawls specifies, our considered moral judgments about justice are our "duly pruned" or most firm convictions (1999, 2005). There I suggested that in order to substantiate this claim, Rawls ought either to emphasize how the principles of justice he recommends cohere with more generalized judgments about justice, for instance that violations of bodily integrity are generally unjust, or provide a more thorough discussion of why he believes certain less generalized judgments about justice to be duly pruned and others not. For example, he posits the claim that racism and sexism are unjust as considered moral judgments, without discussing the possibility that "ableism" and "normal ability" might be unjust as well.

By contrast, in *Love's Labor*, Kittay offers support for the claim that a third principle of justice responding to the fully human need for care is warranted. Indeed, two thirds of *Love's Labor* consists of highly empirically informed arguments about dependency, disability and human need. In the first section of the book Kittay offers rich and vivid descriptions, which substantiate her claim that severe dependency is characteristic of the human condition and that we are all reliant on the care of another to meet our own needs, at least in early development. Kittay also devotes the entire third section of her book to illuminating the empirical realities associated with the fact of human dependency and disability, and in addition dedicates the last section of the book to

critiquing concrete policies concerning dependency relations demonstrating the importance of considerations of dependency and care for social justice. Given this discussion, it seems reasonable to presume that the third principle of justice, which governs the distribution of care in order to meet human need in times of dependency does cohere with judgments about justice that are “duly pruned.” Now we must determine whether and to what extent her theory is justifiable to citizens with cognitive disabilities.

In critiquing justice as fairness I suggested that one reason the theory could not meet the liberal standard of justification is that Rawls designs the original position in accordance with “a Kantian conception of equality,” which precludes the theory from being justifiable to citizens with cognitive disabilities. Following the Kantian intuition that heteronomy of the will can lead us astray, Rawls invokes a highly idealized version of the social contract that he hopes will eliminate contingencies (including affections for others) and therefore bias in the process of selecting just principles. By contrast, Kittay’s conception of human equality as characterized by relations of dependency is guided by an ethic of care. An ethic of care regards beneficence and connectedness as central features of human reality.⁵⁸ As Kittay states,

The character of the moral self, the asymmetry of the relationship, the partiality of its participants, and its nonvoluntary nature make the moral demands of the dependency relationship more amenable to an ethic of care than to a rights-based or an utilitarian-based morality. An ethic of care regards the moral subject as inherently relational. It understands moral reasoning to be contextual and responsive rather than a calculus

⁵⁸ Even though Kittay prefers the language of dependency to that of care, her understanding of dependency work suggests that it is fundamentally a form of care.

performed on rights or utilities. And an ethic of care centers not on impartial judgments, but on judgments partial to participants within a caring relation” (54).

And her depiction of the original position reflects this ethic to a degree: Kittay not only assigns the representatives in the original position the capacity for care, but also acknowledges dependency as a fact of the human condition and therefore part of the circumstances of justice that the representatives have an awareness of in their considerations about justice. Given that the dependency relation becomes what is morally salient for who is owed equal justice on Kittay’s view, and that the representatives in the original position on Kittay’s view have the capacity for care, it seems then that at least in principle citizens with cognitive disabilities would be represented in the process of justification.

The problem is that while citizens with cognitive disabilities may be formally represented in the process of justification in virtue of a shared dependency relation, it is not clear that the characterization of this relation as one of inevitable or “utter” dependency provides room for consideration in original position reasoning of the sorts of issues that arise, in particular, in response to less-pervasive cases of cognitive disability where the individual may be able to reciprocate to a higher degree, or where the disability and/or dependency may be eliminable. As a representative in the original position, one might indeed imagine either that she could become “utterly” dependent upon the care of another to meet her basic needs or that she could be responsible for the care of another who is “utterly” dependent, without acknowledging the role the social context plays in “disabling” or rendering dependent others who *are not* “inevitably” or “utterly” dependent. Therefore it is not surprising that the substantive recommendations of connection-based justice are unclear or silent on these issues. Although Kittay’s construction of

original position reasoning seeks to uphold political equality for citizens with cognitive disabilities, it is not clear that it can uphold their equal liberty. This is because the perspectives of citizens with less pervasive cognitive disabilities or less profound impairments must either be subsumed under the standpoint of one who is “inevitably” or “utterly” dependent, or under that of a caretaker. And if this is the case, it is not clear that connection-based justice proves to make vast improvements over justice as fairness in terms of the justifiability of the theory. The same constituency who was *excluded* under justice as fairness will be likely *neglected* under connection-based justice in the process of justification. The constituency of citizens with cognitive disabilities is diverse, and their concerns varied. Not all of them are likely to fall neatly into the category of “utterly” dependent, and their concerns of justice are no more likely to overlap with those who have caretaking responsibilities.

To generate consideration of the interests of those who are less than “inevitably” or “utterly” dependent Kittay would need to infuse her take on the original position with even more standpoints from which we may envision ourselves in relations of dependency that vary from mild to extreme. In this way it would seem that the inclusion of individuals with less than severe dependencies (including certain mild to moderate cognitive disabilities) would be more than a token gesture. Instead their concerns would be represented in the process of justification and therefore, in turn, more likely reflected in what the theory entails substantively. Yet, adding additional standpoints into the procedure once again seems contrary to the value of impartiality and in turn the need to eliminate contingency that Rawls recognized in his construction of the original position.

Here we should note that where Rawls's employment of original position reasoning made sense insofar as it cohered with his Kantian intuitions about human equality, dignity and impartial reasoning, Kittay's employment of original position reasoning is somewhat perplexing. This is because, part of what is characteristic of an ethic of care and care reasoning, yet contrary to other forms of reasoning is that care reasoning endorses moral particularism rather than moral universalism, and it is skeptical of both the value of impartiality in deliberating about or attempting to resolve moral matters as well as the claim that these processes are ever "impartial".⁵⁹ As Rosemary Tong (2011) describes, proponents of care argue that care reasoning is distinct and more adequate mode of moral reasoning not only because it regards the self as relational or connected rather than individualist and abstract—"the more connected the self is to others, the better the self is"—but also because they understand that "the more particular, concrete, partial and emotional knowledge is, the more likely it represents the way in which people actually experience the world." In addition, Kittay seems to acknowledge the importance of concrete facts in theorizing about questions of justice, for as mentioned she employs them in making her case for the inclusion of concerns for the "inevitably" or "utterly" dependent. For these reasons, it is at least curious that Kittay doesn't consider an alternative method or procedure for selecting just principles, like for instance, some version of rational discourse which would permit more standpoints or more "concrete, partial and emotional knowledge" to come into view in the process of selecting just principles.

⁵⁹ For a discussion of care ethics and the debate regarding moral particularism vs. moral universalism and care vs. justice reasoning, see also: (Gilligan 1982; Jagger, 1995).

5.7 Is connection-based justice justifiable to citizens with cognitive disabilities via overlapping consensus?

Kittay hopes that “once we understand the implications of the clearest cases of dependency, we will appreciate the full range of human interconnection, and see how all moral and political concepts need to reflect these connections” (1999, 30). I have already provided reasons for thinking that in focusing more narrowly on cases of “utter” dependency we risk failing to give equal political consideration to citizens with less pervasive cognitive disabilities or less profound cognitive impairments. This is because certain concerns of justice citizens with less pervasive cognitive disabilities or profound cognitive impairments are likely to have may never emerge in the process of selecting the principles of justice that are to govern the structure of basic social institutions. The question then turns to whether or not over time, individuals living under connection-based justice might “come to appreciate the full range of human interconnection” in which case at a later point at least, the theory might be justifiable to this constituency of citizens. If this were to be the case, then connection-based justice would make a substantial improvement over justice as fairness in terms of meeting the liberal standard of justification.

Here I have two concerns. First, as mentioned in chapter 3, overlapping consensus concerns not only the principles but in addition the methods used to justify them. Therefore, even if the citizens of the well-ordered society under connection-based justice did come to “appreciate the range of human interconnection” and even if they did, in turn, come to believe that “political concepts need to reflect these connections” it is not clear why they would endorse the modified form of original position reasoning Kittay recommends. Original position reasoning, even as

Kittay has described it, does not guarantee representation of the variety of standpoints needed to inform the substantive content of principles of justice in a way that would give citizens with cognitive disabilities equal political consideration and indeed that would reflect this range of human interconnection.

Second, as I argue above, it seems to me more likely that by focusing on “inevitable” qua “utter” dependency in the first instance, connection-based justice will facilitate the stigmatization of certain citizens with cognitive disabilities over time. The effect, I worry, will be to sharply differentiate between individuals in virtue of the dependency relation rather than seeking grounds for their similarity. In this way, similar to justice as fairness it is likely that in the well-ordered society of connection-based justice because, to borrow the words of Francis and Silvers (2005) citizens with cognitive disabilities are not “sufficiently centrally positioned to prevent the adoption of practices that impose detrimental terms or force them into alienating roles, any social and political participation permitted to them may be no more than a form of consensual subordination” (49).

To remedy this problem, Kittay might introduce not more generally dependency but more specifically dependency and disability as characteristics of the human condition (and thus a part of the circumstances of justice) and, in turn, she might alter once again the characterization of the citizens of the well-ordered society and in turn the representatives in the original position. Or, she might reject original position reasoning altogether in favor a method of justification that does not utilize highly abstract reasoning. I find this last option to be most consistent with the insights of care ethics and Kittay’s own methodology, which tends to employ vivid descriptions of severe

dependency and pervasive disability. And in more recent work, Kittay (2010) appears to be moving in this direction. Indeed, Kittay (2010) argues for the moral worth of all human beings explicitly from the perspective of a philosopher, a stakeholder and a mother who has a wealth of experience with citizens with cognitive disabilities. In addition, she criticizes Peter Singer's and Jeff Macmahan's on grounds of epistemic irresponsibility insofar as their descriptions of individuals with cognitive disabilities are empirically uninformed. She further challenges the former to actually take a look at "some of these people that [he is] taking about (395-402). What sorts of principles of justice could be justified to citizens with cognitive disabilities via a procedure of justification that employs such rich and vivid descriptions, of course, remains an open question.

6. Can Nussbaum's Capabilities Approach Uphold Political Equality and Liberty For Citizens With Cognitive Disabilities?

6.1 Nussbaum's Capabilities Approach and the Problem of Justification

In recent work Martha Nussbaum advances an approach to justice that recognizes individual capability as central to one's ability to live a good life and in turn to the determination of whether and to what extent a society is just (2006, 155). Nussbaum argues that this theory of justice is preferable to alternative theories of justice—namely those that employ some version of social contract reasoning in order to justify the normative principles they specify—because, among other things, hers is better equipped to address the issue of cognitive disability.⁶⁰ On her view, social contract approaches to the question of justice (e.g. contractualist approaches like justice as fairness), conflate questions of “justice for whom” with questions of “justice by whom,” excluding by and large citizens with cognitive disabilities from the scope to whom justice extends equally. This is because contractualist theorists have typically assumed that citizens with cognitive disabilities do not possess whatever capacities (e.g., *reasonability* or *rationality*) are taken to be morally salient for grounding representation in the imagined contractualist justificatory process or because the process is not philosophically stipulated in such a way as to include the diversity of standpoints necessary to adequately represent the diversity of citizens with cognitive disabilities. By contrast, Nussbaum argues that because her account starts from a

⁶⁰ In *FJ* Nussbaum claims that the capabilities approach can address several issues that have been largely neglected or handled poorly by theorist of justice. These issues are: cognitive disability, global justice and justice for animals.

conception of the good and therefore is an outcome-oriented approach, it is able to extend equal justice to citizens with cognitive disabilities. In addition, Nussbaum claims that hers is a liberal theory of justice that is justified in wide-reflective equilibrium as well as overlapping consensus. Given these claims, Nussbaum's capabilities approach is initially a very attractive candidate for upholding the political equality and liberty of citizens with cognitive disabilities.

In this chapter I will assess whether and to what extent Nussbaum's theory of justice in terms of central human capability (which I will henceforth call Nussbaum's capabilities approach)⁶¹ can uphold political equality for citizens with cognitive disabilities. As in the previous chapters I will also assess whether and to what extent Nussbaum's capabilities approach can uphold the liberty of citizens with cognitive disabilities. Although Nussbaum does not advocate a contractualist approach to justification, she does proclaim that her capabilities approach embodies a liberal vision of justice and therefore her account of justice likewise must meet the liberal standard of justification. I will argue that while Nussbaum's theory does improve on the previous two theories in terms of upholding the political equality of citizens with cognitive disabilities, her theory is unjustified. Moreover, the theory is not simply unjustifiable to citizens with cognitive disabilities; Nussbaum does not offer adequate justification to anyone and therefore fails to uphold the value of political liberty at all. Rather than providing justification for the list of capabilities she argues should serve as the basis for a conception of justice, as some theorists

⁶¹ In this chapter I distinguish between Nussbaum's capabilities approach and the capabilities. The former refers to the entire political conception she endorses, including the process she uses to justify the theory. The latter refers simply to the list of capabilities, which inform the substantive content her conception of justice. Nussbaum's capabilities approach derives from the work of Amartya Sen and this is reflected in a basic distinction she makes between functioning and capability. However, she goes beyond Sen in promoting a specific list of capabilities, which he never does.

have noted, the process of justification Nussbaum endorses is rigged in favor of the list. Nussbaum offers too little support for the list of capabilities outside of her own intuitions, and provides no way of challenging dominant or harmful belief systems and practices that are compatible with the vision of the good embodied in that list.

6.2 An overview of Nussbaum's capabilities approach

Nussbaum's approach to justice in terms of capability stems from Amartya Sen's work toward creating a measure of development for the United Nations Development Programme. Thus her work reflects Sen's orientation toward questions of human well-being or the good. In addition, rather than discerning what justice requires starting from "utopian" vision or a vision of justice an ideal or well-ordered society, Nussbaum argues that a conception of justice will be grounded on an understanding of what a good life consists of for all real, flesh and blood citizens. Nussbaum's capabilities approach is thus an empirically-oriented approach to justice which emphasizes the connection between a just society and the ability of its citizens to live a good or dignified life. More specifically, Nussbaum approaches the question of justice by considering what it means, generally speaking, for a member of a particular species to live a good and dignified life (i.e. on a normative ideal for species membership). In the case of human beings, the account starts by considering what it means for a biological human being to live dignified life. On Nussbaum's view then, a decent society is one that ensures all human beings the opportunity to live this sort of dignified, human life.

Nussbaum's understanding of the norm for species membership in the case of human beings is, by her own specification, Aristotelian. Following Aristotle, Nussbaum presumes that rationality is merely one part of our animality and that a normatively adequate conception of justice should not eclipse the importance of other aspects of the human experience, such as those that correspond to our material bodies as well as emotional and social natures (2006,159). In turn, Nussbaum develops a list of ten capabilities, which she deems necessary for living a dignified human life and which recognize our material, social and rational natures. These are *life, bodily health, bodily integrity, senses imagination and thought, emotions, practical reason, affiliation, other species, play, and control over one's environment*.⁶² Although Nussbaum's list of capabilities is a conception of the good, she argues that the capabilities can also serve as a measure of social justice. On Nussbaum's view any society that can be deemed just must guarantee its citizens a certain threshold level of capability in each area and, likewise, any society that fails to guarantee that threshold level of capability for its citizens may be deemed unjust.

The notion of a threshold level for capability suggests a moral minimum for a society—it is the boundary only above which realizing human dignity becomes possible and the boundary beneath which “truly human functioning is not available to citizens” (2006, 71). Even though a minimum threshold for each capability must be guaranteed for all citizens of a society in order for that society to be deemed just (more of one capability cannot be substituted for less of another) on Nussbaum's view, citizens are not required to exercise any particular capability. While justice can be measured according to a standard of capability, Nussbaum cautions against conflating

⁶² For a full description of each of the capabilities see: Nussbaum (2006, 76-77).

capability with actual functioning. Capability refers to the feasibility that one could function in a particular way. If a society ensures the threshold level for a particular capability this means that its citizens could presumably exercise that capability or function in a particular manner. A just society is not one that requires citizens to actually function in a particular way. On Nussbaum's view, citizens simply must have the opportunity to live a good life if they so choose; yet, whether and to what extent citizens decide to exercise a given capability ought to be "up to them," in absence of sanction or penalty for making "unhealthy choices" (2006, 80).⁶³

Nussbaum's account purports to offer an ideal for species membership; on her view any member of a particular species is entitled to a threshold level of capability for that species. Since citizens with cognitive disabilities are evidently human beings, they too are entitled to a threshold level of capability on Nussbaum's account. While Nussbaum acknowledges that in some extremely rare instances a biological human being may be subject irremediably to a life so impoverished that it is hardly recognizable as a human life at all (such as in the very rare case of a permanent vegetative state), insofar as it is biologically plausible for a member of the human species to experience at least some of the aspects of a dignified human life, Nussbaum's capabilities approach requires guaranteeing for them a minimum threshold level of capability. Thus the conception of the just society under the capabilities is one that continuously strives to elevate all its citizens to the point at which they could function in accordance with a particular capability if they so choose.

⁶³ So for example, the capability of *bodily health* would recommend provisions so that individuals are enabled to live a healthy life-style if he or she chooses. The approach does not then specify that individuals must actually live a healthy life-style, by say, exercising on a regular basis or by taking medication. This is one aspect of the theory that, according to Nussbaum, makes the theory less susceptible to charges of perfectionism (Nussbaum, 2006, 79-80).

Since entitlement to capability is based upon a species norm, Nussbaum's capabilities approach holds a good deal of promise for upholding political equality for citizens with cognitive disabilities and thus for treating them equally (i.e. extending them equal basic rights as well as equal political consideration). Although Nussbaum does not employ the language of basic rights, meeting a threshold level of capability would require protection of basic rights for all citizens, including those with cognitive disabilities. For instance, meeting a threshold for capability in terms of life, bodily health, practical reason and control over one's environment would require that social institutions be arranged so that all citizens could live a life of normal human length, have good bodily or reproductive health, be able to think, sense and feel in an elevated manner, participate in social and political determination, if they so choose. Social policies and practices that permit violations to bodily integrity, or prohibit freedom of thought or speech would fail to uphold a minimum threshold for each of these capabilities. Given the promise of this approach to extend equal justice to citizens with cognitive disabilities, it is one that deserves careful consideration.

6.3 Can Nussbaum's capabilities approach plausibly address the concern for the equal treatment of citizens with cognitive disabilities who have medical impairment?

As specified in chapter 2, in order to provide equal political consideration to citizens with cognitive disabilities, a theory of justice must be able to address the concerns of justice citizens with cognitive disabilities will predictably have, one of which includes equal treatment for those who have medical impairment. In some cases, medical impairment is understood to be a primary

factor impeding individuals with cognitive disabilities from functioning in a particular and desirable way.⁶⁴ In these cases, citizens with cognitive disabilities may need or desire medical treatment or cure (where possible) to help alleviate the limitation in functioning or “disability” associated with the impairment.

In regard to the question of medical impairment Nussbaum’s capabilities approach performs quite well. Nussbaum (2006) acknowledges that, “people with severe mental impairments, like other human beings, have needs in the areas covered by all the capabilities” (168). Insofar as a medical impairment impedes the ability of an individual to function in accordance with one of the capabilities on the list, the capabilities approach requires medical treatment, if not cure, when available. Given that individual medical needs are quite particularized, in turn so too may be the treatments necessary to bring those who have them above the threshold level for a particular capability. As mentioned previously, a child with Down syndrome, for example, may need assistance early on to facilitate the development of the muscles of the tongue, which enable one to speak. She may also need medication to reduce the risk of seizure, or to alleviate ear infections or to correct for thyroid disorders. Although the medication is not used to correct Down syndrome itself these are common disorders associated with the condition. Since speech is important for developing one’s ability to reason practically and to participate in human affiliations, the capabilities would mandate treatments perhaps in the form of speech therapy designed to bring the individual above the threshold level. And insofar as all have an entitlement to bodily health, Nussbaum’s capabilities approach would mandate the means necessary for ensuring that entitlement (for instance, it could support policies that provide accessible and

⁶⁴ See: Goering (2002); Silvers (1999); Kristiansen et al (2009), Smith (2009); Wendell (1989; 1996; 2001; 2006)

affordable medical treatment and care for those with cognitive impairments who need medical treatment for these as well as associated conditions).

Even in some cases where it seems that an individual may never be able to achieve the threshold level for a particular capability, like for instance in the case of Sessa, a young woman and beloved daughter of political theorist Eva Kittay, who has profound mental retardation, Nussbaum insists on a standard of universal health care. The same species norm embodied in the list of capabilities guide our decisions for the availability of corrective treatment and cure in profound as well as less-severe cases of cognitive medical impairment. Although perhaps more costly, in profound cases Nussbaum (2006) suggests that a minimally decent society would be “obliged” to pay for treatments that could bring an individual with profound cognitive impairment above the threshold level for each capability where possible. More controversially, she claims that if the society could “engineer the genetic aspects of it in the womb, so that she would not be born with impairments so severe, that, again, is what a decent society would do” (193).

Nussbaum, of course, does not give specific guidelines for how individual needs should be met in light of medical impairment. Nevertheless, her capabilities approach does offer guidance on the issue of medical impairment, for it would recommend the institutional measures necessary to ensure that citizens with cognitive disabilities, like everyone else, could expect to live a life of normal length, to have bodily health, to exercise practical reason etc. if they so choose.

6.4 Can Nussbaum's capabilities approach plausibly address the concern for the equal treatment of citizens with cognitive disabilities who are socially and politically excluded?

A second concern a normatively adequate theory of justice must be able to address in order to extend equal political consideration to citizens with cognitive disabilities involves the question of equal treatment for those who suffer social and political exclusion. In some cases what citizens with cognitive disabilities experience as primarily “disabling” is a matter of the social policies, practices, beliefs and attitudes that structure the social context in ways that impede individuals with impairments from social and or political participation.⁶⁵ For instance, what serves as a barrier for an individual in a wheel chair who seeks to visit the library may be a lack of public transit that accommodates the chair, or access to ramps etc. Or what serves as a barrier for an individual who is deaf and prevents her from communicating with others may be a heavy social preference on oral communication in the process of education. Likewise what may serve as a barrier for an individual with, for instance, Down syndrome, preventing her from working or obtaining a job may be policies regarding the number of required hours on the job.⁶⁶ In regard to the question of social or political exclusion Nussbaum's capabilities approach also excels.

At a general level, the capabilities mandate modification of social policies and practices so as to both eliminate or reduce the barriers that prevent the realization of a capability, as well as to facilitate the development of attributes necessary to make its realization possible. Whether the source be medical or not, if a decent society must ensure that its citizens qua human beings can

⁶⁵ Most contemporary forms of legislation concerning disability, such as the ADA acknowledge the contribution of social and or political exclusion to the disabling experience.

⁶⁶ These are the sorts of concerns that the Americans with Disabilities Act seeks to address through the requirement of reasonable accommodation.

function in accordance with the threshold level for each capability, then it must make efforts in order to do so. This often means modifying social policy not simply by “opening the door” but often by providing special accommodations where necessary. Nussbaum discusses two examples in *Frontiers of Justice (FJ)* (2006).⁶⁷ In this work as well as in more recent writings she argues for ‘equality in education’ as one entitlement necessary for ensuring that it is feasible for individuals with cognitive disabilities to develop a sense of self-respect.⁶⁸ In addition, she advocates guardianship or trusteeship as a means by which, certain individuals with cognitive disabilities can be ensured ‘equality in political entitlement’⁶⁹ in terms of the right to vote, or serve on juries etc.

In regard to ‘equality in education’ certain highly individualized (and sometimes costly) methods of education may be helpful, or even imperative, for a child or adult with autism or Asperger’s Syndrome to develop capability for practical reasoning and affiliation. These methods may not be helpful or necessary for a child or an adult who is not autistic or who does not have Asperger’s or who has some other form of cognitive disability. Even though individuals’ educational needs may be highly particularized, and in despite of the fact that transforming social policy and practice to meet these needs would be costly, insofar as having these needs met is

⁶⁷ See also Nussbaum (2010, 2011).

⁶⁸ Nussbaum (2006) lists “having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin” as part of the capability of *affiliation* (77).

⁶⁹ Nussbaum (2006) lists “being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association as well as “being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers” as part of the capability of *control over one’s environment* (77).

necessary to ensure a minimum threshold of capability for each citizen, the capabilities would mandate that they be met. Indeed, as Nussbaum (2007) argues, all citizens—including those with cognitive disabilities—are “worth the expenditure” (190).

Likewise, Nussbaum argues that special arrangements, including guardianship and trusteeship should be made in order to ensure ‘equality in political entitlements’ (2010, 86). Here she notes, although sometimes cognitive impairments do not themselves impede one from voting or participating on juries, individuals with cognitive disabilities may be prevented from the activity because of policies that, for example, require written competency in the form of a signature which the individual may be unable to do, even if she is able to comprehend what is going on. Other times, individuals with cognitive impairments may have the comprehension skills and ability to communicate preferences if, for instance, the material in question is presented to them in certain ways. And in these cases they may be excluded because they themselves cannot without assistance advance their interests even if they could express them to a trusted party. Finally, there are some cases in which an individual’s impairment precludes her from communicating her wishes at all, or in some cases from even forming them. In such cases, the individual is often denied participation. In all cases, Nussbaum claims, the capabilities recommend special accommodation so that the individual’s preferences (if she has them, presumably) and interests are advanced and political inclusion secured.

6.5 Can Nussbaum's capabilities approach plausibly address the concern for the equal treatment of citizens with cognitive disabilities who are stigmatized?

Lastly, a third issue of justice a normatively adequate theory of justice must be able to address if it is to extend equal political consideration to citizens with cognitive disabilities involves stigmatization. In some cases, what citizens with cognitive disabilities experience as problematic about disability is not a matter of medical impairment or straightforward social or political exclusion. Instead, the problem is stigma—a marking out of certain individuals in a way that suggests they are inferior. Stigma is often facilitated through our concepts of what cognitive “disabilities” and “impairments” are, our concept of “normalcy” against which so called disabilities and impairments of all sorts are often discernable, and social attitudes or dispositions toward citizens with cognitive disabilities. As discussed in chapter 2, medicalizing discourses about disability sometimes serve as a “stigma theory.” A stigma theory is effectively a rationalization for why a particular trait is undesirable and in turn for why individuals who demonstrate that trait are inferior (Goffman, 1997). Historically, disabilities and impairments of all kinds have been viewed as medical problems and been interpreted as natural deficits or defects and correspondingly citizens with disabilities naturally inferior to those who do not have disabilities. Today, disabilities continue to be commonly regarded as exclusively negative and are often medicalized.

This, as I suggested before, is problematic for two reasons. First, it tends to obscure the fact that many “impairments,” which are understood to be necessary conditions of one's being disabled can be positive attributes, such as gifts or talents. For instance, individuals with Asperger's

syndrome (often referred to as a “high-functioning” form of autism) are often able to focus to an intensity and degree well beyond that of the normal person; they may demonstrate highly specified knowledge and this can contribute to success in life. Here we may recall that Isaac Newton and Albert Einstein are both suspected to have had ASD (BBC News, 2003; Grandin, 2006). Second, discourses about disability and impairment often constitute a sort of dignitary harm to citizens with cognitive disabilities because they distinguish certain individuals or groups of individuals as “subhuman.”

Where in terms of medical impairment and social or political exclusion Nussbaum’s capabilities approach is quite commendable in its ability to extend justice to citizens with cognitive disabilities, in regards to stigma, the approach falters slightly. Certainly, Nussbaum’s capabilities approach has the advantage of acknowledging from the start that individuals with cognitive disabilities are human beings and in this regard far from being “other.” Yet, as Anita Silvers and Leslie Francis Pickering (2005) argue the capabilities are presented by Nussbaum as being so central to normal human functioning, and in turn what it means to be able to live a dignified that a life, that a life that is unable to achieve a sufficient level of any one of them is deemed at least unfortunate, if not tragic.⁷⁰

Silvers and Francis (2005) fear that, in practice, the normative ideals embodied in the list of *capabilities* may encourage stigmatization of those who cannot live up to the standard as well as assimilation of those who can. Here they state “on [Nussbaum’s] capabilities approach, just treatment of the disabled seems to mean permitting, encouraging, or obligating the nondisabled

⁷⁰ Nussbaum suggests this herself in the *Tanner Lectures*, (2003).

to relate to the disabled primarily by improving them, whether or not they prefer to be improved” (2005, 55). Now, Nussbaum’s capabilities approach implies only that individuals must be able to exercise a given function if they so choose. However, what Silver’s and Francis (2005) highlight is that the normative ideal embodied in the list of capabilities itself presents the challenge—rather than expanding the concept of what a “normal” human life’ is and what a dignified life can consist of, or challenging conventional understandings of the sorts of people that can lead a dignified life, so-called “disabilities” and “impairments” may continue to be regarded as inherently or exclusively undesirable and citizens with disabilities, although human, nonetheless “other.” Indeed, Nussbaum (2006) notes that the *capabilities* neither endorse nor rule out genetic engineering that would prevent the continued presence of individuals with Down syndrome or autism. Thus the degree to which this problem could be alleviated by the fact that Nussbaum’s capabilities approach requires only capability, not actual functioning, is questionable.

This concern about Nussbaum’s work raises a more general issue for all philosophical attempts to address justice for the disabled. As I mentioned in chapter 2 addressing both the issue of medical impairment and stigmatization for citizens with cognitive disabilities is difficult because the claims of justice in each case appear somewhat in tension with one another. Citizens with cognitive disabilities may have concerns involving the treatment or correction of certain medical impairments, or they may be primarily concerned with combating distorted and stigmatizing, even medicalizing, views about cognitive disability, or both. Insofar as both are important dimensions for a theory of justice to address, the theory may have to waver between these issues. In light of this, I conclude this section by tentatively suggesting that if no other theory can provide for a better way of guaranteeing all citizens with cognitive disabilities equal political

consideration, Nussbaum's distinction between *capability* and *functioning* may offer a way of balancing these two goals as it would provide the opportunity for improvement those who *do* prefer to be improved, and while it might encourage it would not require those who dissented from undergoing "improvement."

6.6 Is Nussbaum's capabilities approach justifiable to citizen's with cognitive disabilities via wide-reflective equilibrium?

Thus far I have argued that Nussbaum's capabilities approach is quite inclusive and plausible. It seems to guarantee both equal basic rights to all citizens with cognitively disabilities and address several of the concerns of justice citizens with cognitive disabilities are likely to have. Nevertheless, the theory must in addition be justified. Nussbaum argues, as does Rawls, that hers is a liberal theory of justice, justifiable in both wide-reflective equilibrium and overlapping consensus. I take as my focus for this section, her claim that this capabilities approach is justified in wide-reflective equilibrium. As I have explained in more detail in chapter 3, WRE is characterized by a tri-part coherence between some set of (A) 'considered moral judgments' or deep seated moral intuitions (B) moral principles (in this case principles of justice) and (C) relevant background theories (philosophical supporting conditions, including theories of the person and society, as well as theories of procedural justice etc.) (Daniels, 1979, 1980, 2011).⁷¹

⁷¹ Full WRE requires a cross comparison of different theories of justice, each of which seeks to meet the liberal criterion of justification. In this dissertation I effectively employ relevance as one condition by which we may perform this sort of normative cross comparison. See: Daniels (1979, 1980, 2009); see also: Rawls (1999, 2005).

A theory is presumed to be justified according to WRE if coherence is achieved between both axes⁷² and it emerges as preferable when tested against alternative conceptions.

In *FJ* Nussbaum suggests that the advantages of her capabilities approach over other theories of justice in terms of its ability to extend justice to citizens with cognitive disabilities are made possible, in part, by the distinction between questions of ‘justice for whom’ and ‘justice by whom’ the account acknowledges. That is, on her view the constituency who develops the account does not need to be the same constituency as the one who would reasonably endorse it for the theory to be just. This “conflation,” she argues, prevents social contract theories from admitting individuals with cognitive disabilities into the scope of justice, as these theories tend to interpret human dignity in Kantian fashion as corresponding only to ones rational capacities.⁷³ Indeed, Rawls’s description of the well ordered society and in turn, his characterization of the original position is notoriously designed with “normal” individuals in mind. In turn, on his view, citizens with cognitive disabilities are not included in the scope to whom equal liberty, in terms of justification, is extended and as a result his preferred conception of justice cannot address the questions of equal treatment these “hard cases” raise at all (1971, 1975, 1999, 2005).⁷⁴

According to Nussbaum, this is an irremediable flaw of social contract approaches to justice. Yet, by Nussbaum’s own specification the social contract is an extremely powerful procedure for approaching questions of justice and therefore it is one that, on her view, we should not reject

⁷² See figure 1, chapter 3.

⁷³ I do not overlook the fact here that Rawls characterizes the representatives in the original position as *reasonable* and *rational*. The presumption implicit in the concept of *reasonable* however, seems to be that rational individuals will only want to cooperate with others who can cooperate under relations of reciprocity that are symmetrical.

⁷⁴ See chapter 4.

unless it proves untenable. However, since the “conflation” between the constituency to whom the theory is addressed (the subjects of justice) with the constituency by whom the theory is selected (agents of justice) is, on her view, inherent to all social contract theories, it is a primary reason for shifting to an outcome-oriented approach. As discussed previously, the capabilities approach is presented as an outcome oriented approach. Nussbaum claims that this approach respects the dignity of all human beings because it recognizes alongside Aristotle that human dignity does not reside solely in one’s rational capacities. Instead, human nature, on Nussbaum’s view includes having emotions, affections, etc. in addition to having rational faculties. Moreover, since the approach is outcome oriented, or guided by a conception of the good based on this roughly Aristotelian ideal for species membership, the account can extend justice equally to all citizens qua human beings.

However, as Cynthia Stark (2010) highlights, respecting rationality is essential to respecting human dignity, even if we understand human dignity according to an Aristotelian norm for species membership. Moreover, human dignity is not respected if citizens are subjected to coercive constraints with which they could not or do not agree. In light of this, Nussbaum cannot simply posit the capabilities approach as a conception of the good that all would endorse but must, in addition, provide some argument for this claim. Unfortunately, Nussbaum’s account is unjustified. Not only does she fail to provide adequate justification for citizens with cognitive disabilities, she fails to provide adequate justification for any citizen. Moreover, I worry that the methodology she pursues poses special dangers for citizens with cognitive disabilities, who although are regarded in principle under Nussbaum’s capabilities approach as having the same

political status as all other human beings, may in practice be subject to authoritarian treatment more akin to the treatment of children or of animals.

On the one hand, Nussbaum (2000, 2006) claims that her list of capabilities embodies “an intuitively powerful idea of truly human functioning that has deep roots in many different traditions” (2000, 151). In this way, the capabilities supposedly conform to our deep-seated moral intuitions, which on her view reflect something like Rawls’s notion of considered moral judgments about justice. Insofar as the list converges with a plurality of context or culturally specific value systems it is advanced as a non-platonist substantive good approach (2000, 158). On the other hand, Nussbaum offers some support for the list of capabilities in an approach to justification that utilizes “informed desires.” Let us consider the “informed desire approach” first.

Nussbaum defends her reliance on the informed desire approach as her preferred procedural form of justification mostly in her work *Women and Human Development* (WHD, 2000). Here she identifies the methodological promise of informed desire as a reliable procedure of justification. On her view, it is one that is suitably constrained by liberal values so as to ensure that the outcome is not influenced by adaptive preference (2000, 152). “Adaptive preferences” she understands are those preferences that exemplify mistaken or irrational desires that have likely been developed in oppressive rather than just or egalitarian circumstances and therefore cannot be trusted. While Nussbaum discusses her methodological commitments mostly in WHD, her wariness of adaptive preference is not far from her view in *FJ* where she focuses largely on the topics of capability and disability. In *FJ* Nussbaum suggests that we can no more avoid the

problem of adaptive preference in the case of individuals with disabilities than in any other case. Here she cautions against letting the fact that certain citizens with disabilities prefer to be cared for or to have their needs met by others influence our decisions regarding the value of independence and the prioritizing of measures that would make a greater degree of independency possible for citizens with cognitive disabilities (2006, 189).

Undoubtedly, a theorist's ability to limit the possibility of adaptive preferences influencing the selection of substantive moral principles (capabilities or principles of justice) may be quite important to ensuring that the conception does not conflict with deep-seated substantive liberal values. Yet, as is widely acknowledged, a theorist's substantive moral claims should be sufficiently independent from the methods used to justify them. Moreover, as Alison Jaggar (2006) argues, to insist on this "is not to assert that methods of moral reasoning are immune to revision if they regularly validate conclusions that are intuitively unacceptable" (311). At this point one might ask, how does Nussbaum identify 'adaptive preference'—that is, how does she determine if a preference is informed? According to Nussbaum (2000)

A habituated preference not to have any one of the items on the list (political liberties, literacy, equal political rights, or whatever) will not count in the social choice function, and an equally habituated preference to have such things will count" (WHD, 149).

In short, Nussbaum justifies the *capabilities* according to the list itself. Here one might be tempted to say that the informed desire approach is, indeed, extremely reliable—the outcome of the procedure is guaranteed from the start. Unfortunately, this sort of reliability or epistemic rigging does not demonstrate that the theory is justified.

Given that WRE requires convergence between considered moral judgments (or in this case deep seated moral intuitions), moral principles and background theories (including a theory of procedural justification), we can see that Nussbaum's capabilities approach remains unjustified according to WRE. Nevertheless, we may still evaluate Nussbaum's claim that the list of capabilities is with deep-seated moral intuitions about what a dignified human life would require that spans a variety of cultures and traditions. While I contend that the theory might cohere with certain Western liberal ideas about what a dignified life will consist of, as Jaggard (2006) and Stark (2010) note, evidence of actual consensus is both scant and privileges the moral authority of the author. Neither in WHD nor in *FJ* does Nussbaum offer sufficient discussion of available intuitions—especially of those that may initially seem to conflict with the normative presuppositions or prescriptions inherent to the list. As Stark argues “the list is simply laid out, ..., by the theorist on the basis of intuitions about human dignity, along with a certain sort of empirical investigation checking the list against peoples actual informed desires” (Stark, 2010, 119). Instead, as Jaggard (2006) suggests, Nussbaum's approach is “covertly authoritarian”—“It does not allow everyone to participate as equals in developing moral theories but instead encourages “us,” the theory builders, to use the ideas of others as evidence or raw data for “our” theories” (319).

For this reason, it is perhaps easier to see why the capabilities approach falters in challenging stigma inherent to conceptions of “normalcy” and “cognitive disability.” Given that the positive experiences of those who are classified as having a disabling condition may simply be presumed to be uninformed “adaptive preferences” they may then be regarded as worthy of neglect. Indeed, all dissent may be dismissed as an uninformed or “adaptive preference.” At this point, it is even

difficult to discern how Nussbaum's account of justification proves different for the case of human beings than for the case of animals. Here she argues that mosquitoes ought to be denied justice on grounds that they are not sentient creatures and that we have "enough on our plate" when considering questions of justice for sentient beings, and that lions, and tigers and bears etc. are proper subjects of justice and therefore ought to be capable of living a dignified life according the particular ideal for species membership that corresponds to their type of being. In each case, Nussbaum offers little support for her conclusions outside of her own intuitions. Given Nussbaum's assertion that "*the same attitude to natural powers that guides the approach in the case of human beings guides it in the case of other animals,*" the similarity should perhaps be unsurprising (emphasis mine, 347). However, as Stark (2010) argues, given that human beings do have rational faculties, it would seem that this capacity should be respected and this is what the liberal standard of justification specifies.

The danger in covertly authoritarian social policy and practices should not go understated in the human case. For one thing, it is prudent to recall the fact that citizens with cognitive disabilities have historically been the targets of eugenicist's practices. And we should not forget, regarding this matter that the eugenics movement was, at the time, largely construed as a "progressive movement."⁷⁵ Now Nussbaum, of course, would not endorse the sort of mal-treatment of citizens with disabilities were subject to during the eugenics movement. And she does not favor cruelty to animals. Nevertheless, her approach to justification is troubling because there is no way of identifying which practices would be endorsed by the citizenry outside of her own intuitions, and no mechanism for challenging the authority of dominant perspectives in general,

⁷⁵ See: Carlson (2001;2010); Goddard (1913;1914) Kline (2002); Rafter (1988); Stubblefield (2007; 2010); Trent (1994).

in favor of non-dominant ones. Under her capabilities approach it is unlikely that dissenting views will be addressed. By contrast they will likely be excluded.

6.7 Is Nussbaum's capabilities approach justifiable to citizens with cognitive disabilities via overlapping consensus?

Insofar as at either procedural justification or at least a reasonable degree of substantive justification is pertinent for determining if a given theory justice could be a plausible candidate for OC as well as WRE, it is simply unclear how Nussbaum's capabilities approach could be justifiable according to the former as opposed to the latter. Another way of putting this is, there is no reason either to believe that the theory will guard against covert authoritarianism over time, or to believe that over time those who live under a political regime governed by capabilities would continue to endorse it. Nevertheless, if we grant for the purpose of charity that citizens raised under the capabilities, with diverse comprehensive conceptions of the good, would in fact to endorse the substantive values they embody over -time, an additional challenge arises in the case of cognitive disability that threatens the coherence of the theory as a whole.

Here we may recall that Nussbaum sees the conflation of questions of 'justice for whom' with questions of 'justice by whom' as an irremediable defect of social contract theories. Theories that employ the social contract, it seems, inevitably privilege rationality and therefore cannot plausibly extend justice to many citizens with cognitive disabilities. So, for example, Nussbaum argues that the most widely received theory of social justice today—justice as fairness—as a social contract theory cannot ensure that considerations of justice will extend to citizens with

cognitive disabilities in WRE or OC. One of the reasons she cites is Rawls's reliance on the Kantian conception of the person, which privileges rationality above all other facets of the human experience. In the case of WRE, Nussbaum's worry is clear, and falls right alongside Rawls's own doubts about the ability of the theory to extend justice to all beings. If by his-own specification "equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation" then this results de facto in the exclusion of numerous individuals with cognitive disabilities (1999, 442).

Matters in the case of OC are not so simple, however, for Rawls acknowledges that individuals in society governed by the principles of justice as fairness will neither be purely self-interested nor mutually disinterested⁷⁶ beings but presumably will have concerns of affection for others (1999,129). For this reason, one might have hopes that justice as fairness could extend justice to citizens with cognitive disabilities over time and thus be justifiable in OC on grounds that these concerned third-parties could advance claims on their behalf, perhaps in the form of guardianship or trusteeship. Nevertheless, Nussbaum (2006) determines this resolution to be untenable because even if some individuals care enough to advance claims on behalf of those who cannot themselves do so "the full range of human and animal powers will get support only insofar as it is an object of concern for Kantian rational beings." Insofar as one's rational capacities are what is taken to be morally salient for determining political obligations and political status, those beings who do not have the capacity for rationality (at least to a requisite degree) will not be

⁷⁶ Rawls specifies that the representatives in the original position are mutually disinterested.

guaranteed consideration. This is, on her view, a “slight” to “the dignity and worth that all needy human animals surely possess” (138).⁷⁷

Yet, Nussbaum’s concern that the guardianship/trusteeship solution in the case of social contract theories “makes the dependents not full parts of the ‘we’ and the ‘our,’ not fully equal subjects of political justice” in the case of social contract theories is problematic for her own account for two reasons.⁷⁸ First, as Stark (2010) argues it appears to conflict with Nussbaum’s leanings toward an Aristotelian conception of human dignity, characterized by the belief “that there is something wonderful and wonder-inspiring in all the complex forms of life in nature.” These differ, on Nussbaum’s own understanding of what Kantian intuitions about human dignity entail. As Nussbaum expresses, Kantian intuitions about dignity presume that “only humanity and rationality are worthy of respect and wonder; the rest of nature is just a set of tools” (Nussbaum, 2006, 347). Indeed, the distinction between ‘justice for whom’ and ‘justice by whom,’ which initially appeared to render the theory plausible in terms of representation of perspective across all three dimensions of analysis and specifically through the practice of guardianship/trusteeship, appears to invoke the same sort of “Kantian split” between “the reasonable and the rational and the rest of human nature” that Nussbaum rejects (Nussbaum, 2006,138; Stark 2009, 378).

Second, as Stark (2010) correctly notes, in insisting that the concerns or the interests of non-rational beings will be “necessarily demoted” by rational ones who seek to advance claims on their behalf, Nussbaum loses the force of her claim that the interests of citizens with cognitive disabilities will be ensured over time to a higher degree under the *capabilities* than under some

⁷⁷ In the original text, these assertions are posed in the form of a series of rhetorical questions.

⁷⁸ Nussbaum (2006, 138)

version of justice that employs social contract reasoning (122). For one thing, even under the capabilities approach rational beings would still be doing the advancing of claims for non-rational ones, who could not do so themselves. In this case, by her own specification the interests of a least certain citizens with cognitive disabilities would necessarily be demoted. This is because the Aristotelian conception of the “human being” only recognizes that part of living a dignified life consists in having ties of affection for others; it does not and ought not, by her own specification, require that everyone will.⁷⁹ Therefore, even if we assume that certain rational beings do care enough to advance claims for those who could not otherwise do so themselves, and even if we do assume that in their doing so they would strive to genuinely uphold the interests those citizens with cognitive disabilities, this would still effectively make the interests of citizens with cognitive disabilities subject to the charitable or beneficent dispositions of some others.

At this point it seems that Nussbaum has to choose among three options. First, she can take back the charge that matters pertinent to citizens with cognitive disabilities will necessarily be demoted by rational beings who advance claims on their behalf. In this case, by her own specification we have less reason to reject the social contract in some form as a adequate procedural form of justification and more reason to accept it since her preferred methods of justification appear unable to meet the liberal criterion of justification. Second, she can reject the Aristotelian conception of the human being, which appears to stand in tension with both her conceptual split between questions of ‘justice for whom’ and questions of ‘justice by whom’ as well as her prospects for guardianship and trusteeship as means for ensuring political entitlement

⁷⁹ This I presume to be what Nussbaum intends by the distinction she makes between *capability* and actual *functioning*.

at the level of justification. Here again we will be left with less reason to adopt an outcome oriented approach as opposed to a proceduralist approach of the sort employed in social contract theories. Third, she can take back the charge that the matters pertinent to the citizens with cognitive disabilities will necessarily be demoted by rational beings and search for a different form of justification that respects procedural concerns yet is sufficiently distant from the social contract. I find option three most plausible.

As Stark (2010) notes Aristotelian conception of human dignity recognizes “rationality” as one aspect of our “animality.” It therefore appears to have the resources for coherence with a method of justification as well as moral principles that respect this aspect of human dignity as well as extend to citizens with cognitive disabilities. For instance, we might use the Aristotelian species norm to inform our conception of a suitable procedure for discerning questions of justice. Thus, contrary to option two, we do not need to reject the Aristotelian account of human dignity even if, in the end, we opt for methods of justification with a heavier procedural emphasis than the ones Nussbaum employs.⁸⁰ Moreover, while it would be helpful for matters of consistency for Nussbaum to reject the charge that the matters pertinent to citizens with cognitive disabilities will necessarily be demoted by rational beings who advance claims on their behalf, I do not wish to obscure the fact that contractualist approaches to justice do at least tend (or thus far have tended) to eclipse the perspective of citizens with cognitive disabilities and historically have

⁸⁰ This isn't to say that we must endorse the Aristotelian conception of human dignity either. We might, for instance, endorse a conception of human dignity along the lines of Axel Honneth (2000) as somewhere between Aristotle and Kant, or along the lines of certain feminist theorists, who suggest that human dignity is inherent to our connectedness with others. See also, Kittay (1999).

excluded them from the scope of justice altogether.⁸¹ For this reason, there is some pragmatic reason to place a certain conceptual distance between theories of justice which, like contractualist approaches, use the force of consent as a measure of justification, and “social contract theories” which have historically failed to uphold political equality as well as liberty for citizens with cognitive disabilities. Nevertheless, this would not rule out all forms of “contracting” or “rational agreement.” For instance it would not rule out Francis and Silvers’ recommendations to interpret the social contract in terms of trust enhancing rather than adversarial processes (2005). It would however require shifting to a degree the emphasis of justification away from the outcome slightly and back toward the proceduralist concern for rational agreement. For these reasons, I find option three most adequate, although this is not inconsistent with option one insofar as “social contract” is interpreted broadly.

⁸¹ Nussbaum criticizes both traditional as well as contemporary forms of contractualism, the most prominent of course being justice as fairness; however, she also has a quite lengthy discussion of Scanlon’s contractualism.

7. Can Differentiated Recognition Uphold Political Equality and Liberty for Citizens with Cognitive Disabilities?

7.1 Differentiated Recognition: the promise of an alternative approach

Given the inadequacies of each of the previous three approaches, I turn now to an approach to social justice that is not widely known in the Anglophone tradition of political philosophy. This approach has been developed by Axel Honneth over the course of his work but most notably in *The Struggle For Recognition: The Moral Grammar of Social Conflicts*. In this, as well as more recent work, Honneth (1996, 2003) specifies justice in terms the ability of a society to secure the conditions under which recognition is possible. Honneth's argument is embedded in a rich normative description of contemporary Western liberal democratic social life. In fact, Honneth intends his theory of recognition to articulate those vague moral norms already deemed legitimate in the social order and thus his account of justice in terms of "differentiated recognition" is historicized and contextualized from the start.

By his own specification, the project Honneth primarily pursues is to clarify what he refers to as the "moral infrastructure of modern society" or to "describe social reality in a way that shows how norms and principles considered justified could already have become socially valid" (2003, 257). In turn, he identifies three forms of recognition (love, respect and esteem) as the necessary pre-requisites for individual autonomy ("self-realization") and therefore well-being. This provides Honneth with normative framework or a "formal conception of the good" from which he develops his conception of justice in terms of differentiated recognition. As he states, "the

justice or well-being of a society is proportionate to its ability to secure conditions of mutual recognition under which personal identity-formation, hence individual self-realization, can proceed adequately” (2003, 174).

In what follows I will clarify why differentiated recognition has the potential for upholding the values of political equality and liberty for citizens with cognitive disabilities better than the theories previously discussed. Once again, I will employ the standard of presumptive political equality and the liberal standard of justification as measures of the normative adequacy of differentiated recognition in performing my analysis. As I explained in chapter 2, the standard of presumptive political equality requires that all citizens be guaranteed equal basic rights as well as equal political consideration, including citizens with cognitive disabilities. And, the liberal standard of justification requires that the theory of justice in question be justifiable to all those whom fall within its scope, including citizens with cognitive disabilities.

7.2 An overview of differentiated recognition

In contrast to Rawls, who develops a conception of justice fit initially to govern an “ideal” society, Honneth’s account of justice is intended from the start for the real, flesh and blood citizens that comprise liberal democratic societies today. Likewise, in contrast to Rawls and more like Nussbaum, Honneth’s conception of justice emphasizes the importance of the outcome, i.e., the good (as opposed to the procedure) in determining a normatively adequate conception of justice. However, unlike Nussbaum, justice is not specified in terms of capability on Honneth’s view. Nor is it specified, as Rawls and Kittay assert, in terms of the principles for

distributing primary social goods. Instead, recognition is the primary factor for determining the justice of a society. Recognition, on Honneth's view, is most crucial for the well-being (e.g. the autonomy) of actual individuals in Western liberal democratic societies today.

Recognition is a relation; it is a way of being towards another individual that takes the other as a person and affirms the qualities that he or she has (Honneth, 2007; H.Ikhaimo, 2007). On Honneth's view, it is only when mutual relations of recognition exist among individuals that they are able to develop and sustain what he calls "intact" identities—the sorts of identities is characteristic of autonomous (competent and authentic, hence free) agents. Although recognition is often spoken of in interpersonal terms, on Honneth's view, there can be institutional forms of recognition (and conversely misrecognition). At the interpersonal level, Honneth describes recognition as a "stance" or an attitude realized in concrete action. However, as Honneth (2007) notes "institutional rules and practices can contain certain particular conceptions about which human evaluative qualities should receive recognition in which specific way" (335). In this way, we can see that the shape of institutional order, including legal and social policies, social practices and social and cultural symbols and, in particular, the beliefs and attitudes supporting them as well as facilitated by them, represents a certain sort of social disposition that can affirm or negate certain qualities of individuals or members of various social groups as valuable. In addition, institutions can be structured in such a way so as to make mutual relations of recognition sustaining or so as to obstruct them altogether. For instance, the institution of slavery within the United States was obviously antithetical mutual recognition across virtually all spheres of social life as it reflected and facilitated the disposition toward African American's as

subhuman. Honneth (2002) describes the deficit today in ways for the elderly to contribute to society in ways that are acknowledged to be socially meaningful as “a scandal” (273).

On Honneth’s view, three principles of recognition will ground the basis of a normatively adequate social order: the neediness principle, the equality principle, and the merit principle.⁸² Each principle acknowledges the importance of a value-sphere in which certain modes of recognition have been institutionalized over the course of the development of the bourgeois-capitalist order that characterizes contemporary Western liberal societies and hence are regarded as legitimate. The neediness principle governs the sphere of care and corresponds to the recognition relation of love through which the particular needs individuals are affirmed. The principle of equality governs the sphere of legal rights and corresponds to the recognition relation of respect, in which individuals are affirmed as equals. Finally, the principle of achievement governs the sphere of achievement and corresponds to the recognition relation of esteem in which one’s contributions to society (for instance in terms of labor) are affirmed as valuable.⁸³ These principles are recognitive in form not distributive, although certain distributions or distributive practices may be required to meet the requirement of credibility implicit in any instance of actual recognition. If, for instance, members of a particular social group are proclaimed or acknowledged by a governing body to be equal and deserving of similar privileges as members of another social group, yet so few measures are invoked or enforced that

⁸² These principles are sometimes referred to as “the principle of love” “the principle of legal recognition” and “the principle of achievement” respectively. This last principle is also referred to as “the principle of solidarity.”

⁸³ Given that the structure of each of the principles of recognition is tailored to a particular social-historical context Honneth leaves room for the possibility that alternative spheres may emerge in which alternative modes of recognition may support increased individual autonomy in different social contexts.

would actually enable those privileges to be accessed equally, the formal acknowledgement will not be credible and thus the formal acknowledgment will not be an instance of recognition. Moreover, these principles have a certain evaluative promise or in Honneth's words a "normative surplus of validity" that in any context is unlikely fulfilled. Therefore although their general form is the same, what they specify substantively is open to a degree to re-interpretation over time.

It is for this reason that Honneth does not actually spell out the principles of justice in any particular way that would, although continuing to resemble the formal conception of the good they are intended to reflect, also specify or "anticipate" something more (2003, 179-180). This would be the case if he specified the principle of achievement to require, for instance, that distributions of goods such as opportunities, income and wealth be arranged in a particular way (e.g. to the greatest benefit of the least-advantaged as Rawls does). While Honneth (1995) does suggest that abuse and rape, denial of rights and exclusion, and denigration and insult exemplify forms of misrecognition, the principles he outlines can be seen as a framework from which he argues we can interpret and assess particular existing "struggles for recognition." According to Honneth, "struggles for recognition" are rooted in the subject's experience or feelings of injustice—an individual perceives that he or she (or indeed some other) has been deprived of something within the established recognition order. That is, "struggles for recognition" occur in response to the perception or feeling of misrecognition, which puts the validity, indeed the legitimacy, of the social order in question.

In turn, Honneth acknowledges the need for some way clarifying both whether and to what extent misrecognition is present (2007a,351). This of course will clarify for us how the principles should be interpreted so that the coercive social institutions citizens are subject to are indeed legitimate, as well as just or conducive to well-being. Since the principles of recognition are deliberately vague, on Honneth's account, this assessment will not resemble a "top down" argument about how to *apply* any one of them (as would an argument how we are to interpret Rawls's second principle of justice, or about which policies and practices etc. will result in the greatest benefit to the least advantaged). Instead, it will require issuing reasons for constructing or interpreting the content of the formal specification of principles in a particular way. The process of evaluating *struggles* or perceptions of misrecognition simultaneously functions to specify what justice requires in accordance with the formal account of the good while offering justification for the specification.

Where other theorists (Rawls, Kittay, Nussbaum) have advanced certain procedures or approaches (i.e., original position reasoning and the informed desire approach) for selecting and indeed justifying their preferred conceptions of justice (in terms of just distributions or threshold for various capabilities), Honneth does not. He does, however, contend that his conception of justice is guided by a criterion of progress (2002, 2003). The criterion of progress acknowledges the ethical presupposition that recognition is a necessary prerequisite for autonomy and thus for individual well-being. Hence we can see that "progress" on Honneth's view occurs when the social order is arranged so as to secure the conditions for mutual recognition to a higher degree than before. This, he suggests, can happen under conditions in which more people are affirmed in terms of their legal equality, or when they are affirmed in terms of those aspects which make

them different or unique (not their personhood generally speaking, but their identity in terms of what they do and who they are) (2003, 185). The criterion of progress then effectively requires that social policies and practices be modified in accordance with the formal conception of the good (the three differentiated forms of recognition) in a manner that tends toward increased recognition. In short, “progress” tends toward inclusion or an expansion the scope of individuals to whom recognition is afforded through increased legal equality or affirmation individuality.⁸⁴

Despite the necessary abstractness of Honneth’s account of the principles of recognition, his remarks in an interview in 2001 do suggest that so far as he conceives it, the theory of recognition might not extend equal justice to certain, albeit few, citizens with profound cognitive impairments. For instance, in regard to the *principle of achievement*, Honneth specifies that “... where it is clear that people cannot contribute, where there are no chances whatsoever for contributing, and in that respect achieving something, I think the only chance we have is to compensate them by economic redistribution, a practice that is almost accepted in society. On the other hand, speaking on a more social level, we believe that close friends and relatives of the persons in question have a certain obligation to provide recognition in other ways” (Interview, Honneth, 2001, p.9). This is because, on Honneth’s view, recognition is mutual and certain kinds of recognition (respect and esteem) cognitive. Recognition consists, in part, of a disposition or

⁸⁴President Obama’s (2008) campaign speech on race highlights the notion of progress in accordance with socially recognized values that I believe Honneth has in mind. In this speech, Obama reminds us that while United States constitution was historically stained with the residue of slavery, it has “at its very core the ideal of equal citizenship under the law.” As Obama states, it is “a Constitution that promised its people liberty, and justice, and a union that could be and should be perfected over time.” This aim of perfection, as he implies, is undertaken “through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk - to narrow that gap between the promise of our ideals and the reality of their time.”

readiness to act towards one as a bearer of legitimate moral claims.⁸⁵ It also is characterized as a relation between beings who can relate reflexively to the conditions of their environment.⁸⁶ Given this specification, we can see that whether and to what extent an individual can participate in *each* of the three relations of recognition does appear to a degree to depend at least partly her biophysical or psychological capacities. And indeed, whether and to what extent a society can “secure conditions for mutual recognition under which self-realization can precede adequately” depends upon whether and to what extent the citizenry is biophysically capable of participating in these relations. Nevertheless, I contend that conceptualizing justice in terms of differentiated recognition holds a good deal of promise for extending equal justice, in terms of political equality (e.g. equal basic rights and equal political consideration), to the majority of citizens with cognitive disabilities, even those who have profound cognitive impairment.

First, we should note that insofar as one’s biophysical or psychological faculties do not fully, permanently or irreparably obstruct her potential for participating in recognition relations then presumably she has a claim to equal recognition across all spheres. Honneth (2007) acknowledges that although relations of recognition are characterized by symmetry, moral standing is not necessarily generated upon the basis of the autonomy one has in existing relations

⁸⁵ As Honneth describes it, the granting of recognition is “an actualization of the evaluative qualities that humans in a particular life-world always possess ‘potentially’ in accordance with the horizon of values upon which this world is founded” (Honneth, 2007, 355). In the contemporary Western social order, this means that individuals may have the capacity for autonomy but not be fully autonomous because the necessary preconditions, or relations of recognition (love, respect and esteem) are not sustaining.

⁸⁶ Honneth can suggest that in certain cases recognition may be afforded, for instance, in the sphere of care where it may not be afforded in the sphere of achievement because the sort of reflexivity and disposition towards others one must take up diverges across spheres. For instance, on Honneth’s view, love may be expressed and interpretable through a variety of non-linguistically communicative forms such as gestures, smiles, nods etc. See Honneth and Margalit (2001).

of recognition but upon the potential for autonomy one has and can acquire in relations of recognition. In fact, diminished autonomy can be a result of misrecognition or injustice, of a potential deprived of fulfillment. In turn it can illuminate the need for revaluing what the principles of recognition are taken to specify. More importantly however, on Honneth's view, neither the extent to which an individual can participate in recognition relations nor the extent to which a society is just or unjust is discernable in the abstract. Whether and to what extent a withholding or a granting of a particular mode of recognition to a citizen with profound cognitive impairment constitutes an injustice is discernable in light of concrete analysis. This is part of what makes Honneth's approach to justice most appealing. Unlike others, Honneth's conception of justice is one that is continuously open to new moral insights. Finally, the fact that this analysis, and indeed the conception of justice, must be guided by the criterion of progress suggests that the tendency of differentiated recognition is always toward equality.

For this reason we may presume that Honneth's theory of differentiated recognition would extend at least equal basic rights to all citizens with cognitive disabilities. Equal basic rights are widely acknowledged to be most foundational and certainly would be necessary to secure conditions of mutual recognition for any human being. Given that we have a wealth of historical examples demonstrating the injustice (the diminished autonomy and human well-being) that occurs through the deprivation of equal basic rights to a given constituency of individuals, it would seem that the theory of recognition, which is an empirically informed account, would protect these rights for all citizens until reason was shown for why a violation of these rights is warranted.⁸⁷ Moreover, since most contemporary liberal democratic societies already do

⁸⁷ For instance, citizens with disabilities were among the first targets of the holocaust.

acknowledge that *all* citizens ought to be guaranteed prima facie equal basic rights, the criterion of progress would ensure that only expansion of these rights would be permissible. In what follows, I will clarify why differentiated recognition has similar potential for giving equal political consideration to citizens with cognitive disabilities.

Following this discussion, I will assess whether and to what extent the theory of recognition can uphold the political liberty of citizens with cognitive disabilities. In this discussion I underscore the aspects of the approach to justification Honneth points toward that help facilitate equal justice, in terms of liberty and political equality for citizens with cognitive disabilities. I do, however, conclude on a cautionary note, which highlights that certain (though not all) approaches to justification that are likely compatible with Honneth's theory of recognition as well as his criterion of progress may fail to be justifiable as did Nussbaum's 'informed desire approach' on grounds of epistemic rigging.

7.3 Can differentiated recognition plausibly address concerns for the equal treatment of citizens with cognitive disabilities who have medical impairment?

As discussed previously, a normatively adequate theory of justice that can uphold the political equality of citizens with cognitive disabilities must be able to address the concern for the equal treatment of citizens with cognitive disabilities who have medical impairment. Medical impairment is typically identified by an abnormality or deviation from some biophysical or

psychological norm that is usually interpreted as a defect.⁸⁸ Individuals with medical impairments often need medical treatments to help alleviate the limitation in functioning associated with the impairment. Some desire cures (when available) to eliminate the condition altogether. Given that recognition of individual needs is, on Honneth's view, a prerequisite for autonomy, it seems plausible that cultivating and sustaining relations in which individual needs, including medical need can be met should be a goal of justice under the theory of recognition. For this reason, the theory of recognition should be capable of addressing concerns for the equal treatment of citizens with cognitive disabilities who have medical impairment.

Indeed, I see two avenues in particular that Honneth could employ in response to the question of medical impairment. Perhaps most obviously Honneth acknowledges that care is a proper sphere of justice as love is a mode of recognition that is crucial to one's development as an autonomous being. In turn, his account of recognition directs our attention to the question of what is necessary for care to be possible: i.e., it directs us to consider the particular needs individuals have and how those needs can be met. Although caring relations are most evident in the case of a mother-child relation, medical impairments too give rise to particularized individual needs. They draw our attention to those material aspects of our personhood and how these can obstruct our ability to govern ourselves. For instance, as mentioned previously, individuals with Down syndrome may need speech therapy in order to facilitate communication. Caring for another, or "loving" another requires not simply emotional support but demonstrating it through attending to these and other human needs. Insofar as care requires particularized modes of responding to individuals as needy beings, and insofar as care is necessary for subjects to realize their

⁸⁸ See: Goering (2002); Silvers (1999); Kristiansen et al (2009), Smith (2009); Wendell (1989; 1996; 2001; 2006)

autonomy it seems that the theory of recognition would support institutions, policies etc. that enable caring relations to sustain.⁸⁹

In addition, Honneth may appeal to the principle of equality in order to secure equal treatment for citizens with medical impairment. Indeed, certain of Honneth's remarks on how the principle of equality is to be interpreted suggests that securing recognition in terms of legal rights and opportunities requires more than merely the formal granting of rights and opportunities. For instance, consider that according to Honneth, the principle of legal recognition (the principle of equality) contains the legal norm of equality of opportunity, which tacitly acknowledges the need to acquire the skills and abilities to exercise those rights and liberties. The principle of equality, as he specifies "exercises constant pressure on the organization of the educational and occupational systems, for this principle demands that schools, other educational centers, and the differentiated occupational system be organized in such a way as to allow every individual not only to develop the abilities he or she deems appropriate, but also to pursue careers that fit with their abilities" (2007, 360).

Just as individuals may need certain skills and abilities to feasibly exercise any rights they have, so too will they need medical care, including the sort of care necessary to treat functional limitations attributable to cognitive impairment, in order to be able to exercise those rights and liberties. In turn, it seems reasonable to presume that the principle of equality could similarly be used to put constant pressure on the organization of medical institutions as well as the

⁸⁹ Certainly not all those involved in the caring relation will have the knowledge or capacity to care for the medical needs of individuals with cognitive disabilities but institutions that support caring relations would presumably provide access.

distribution of medical care so as to make feasible for every individual the opportunity to meet needs that arise in light of medical impairment (cognitive or otherwise). This interpretation of the principle equality of course should not be surprising, as it remains consistent with the understanding of recognition as a precondition for an “intact identity” and therefore autonomous agency.

7.4 Can differentiated recognition plausibly address concerns for the equal treatment of citizens with cognitive disabilities who are socially and politically excluded?

While certain functional limitations associated with cognitive disability are attributable largely to medical impairment, others result from the dynamic between an individual’s impairments and the social context in which she finds herself. For example, in the case of learning or developmental disorders, the functional ability that appears to be diminished may not correspond primarily to a biophysical defect, but rather, or in addition, to the prioritization or privileging of certain learning styles in that context. Additionally, an individual’s inability to participate in the work place may be due less to her inability to do the job or task at hand but rather her inability to do the job in specified ways or for the number of required hours etc. Thus a second concern any normatively adequate theory of justice must be able to address if it is to uphold the political equality of citizens with cognitive disabilities involves equal treatment for those who endure social and political exclusion.

In regards to the question of equal treatment for citizens with cognitive disabilities who suffer social and political exclusion, Honneth’s theory of recognition appears to perform quite well. Indeed, in a recent interview, Honneth expresses confidence that in most cases “either physical

or mental disabilities, as such, are not an obstacle to being needed in a society” (Interview, 2009, 9). Indeed, it once again appears that Honneth has two avenues by which the principles of recognition may be interpreted in way that addresses the concern for the equal treatment of those who are socially and politically excluded. First, on Honneth’s view, what is actually recognized in any context as being a valuable contribution to society may reflect a rather narrow subfield of what could and perhaps should be regarded as valuable. In turn, Honneth recommends that progress in the sphere of achievement can be interpreted as a process in which we challenge the perhaps narrow understandings of what can count as a contribution and what value various contributions have.⁹⁰ As he states, “what we can then expect is a fragmentary moral progress that consists in the serious interrogation of those ethical values that allow for a highly particularist recognition of actual contributions to reproduction” (2003, 264). In other words, implicit in the principle of achievement as having a “normative surplus of validity” is the possibility that activities, tasks, ways of doing things etc. that have been previously neglected, excluded, or otherwise deprived of social value could constitute misrecognition.⁹¹

Second, as mentioned above according to Honneth, the principle of legal recognition (the principle of equality) contains the legal norm of equality of opportunity, which tacitly acknowledges the need to acquire the necessary skills and abilities to exercise those opportunities. This principle could then be employed in order to challenge social institutions,

⁹⁰ This is what I take Honneth to intend by the assertion that we can “speak of a progressively redeemed surplus of validity when the core normative principle (achievement) can only be applied in social reality via value-based interpretations”... “if, instead of a positive learning process (“expansion”), we assume a negative process of overcoming the constraints of narrow horizons of interpretation” (2003, 264).

⁹¹ Once example of this might be the devaluing of women’s labor or of feminized forms of labor generally speaking.

policies, practices, ways of life, etc. that exclude citizens with cognitive disabilities. For instance, let us consider once again equality of opportunity in terms of education. If, as Honneth specifies, the principle of equality “exercises constant pressure on the organization of the educational and occupational systems,” and indeed “demands that schools, other educational centers, and the differentiated occupational system be organized in such a way as to allow every individual not only to develop the abilities he or she deems appropriate, but also to pursue careers that fit with their abilities” then presumably this principle could be employed to guarantee more than merely formal equality in educational opportunity to citizens with cognitive disabilities, (Honneth, 2007, 124). Therefore it seems we have at least some evidence that differentiated recognition can plausibly address issues of justice involving the social and political exclusion of citizens with cognitive disabilities.

7.5 Can differentiated recognition plausibly address concerns for the equal treatment of citizens with cognitive disabilities who are stigmatized?

A final test of the adequacy of any normative theory of justice involves its ability to address the concern for the equal treatment of citizens with cognitive disabilities who are stigmatized. As discussed in more detail in chapter 2, a characteristic of stigma is that it expresses a fundamental inequality between individuals, marking out some as lesser, inferior, or subhuman (Goffman, 1997). Quite often stigma is facilitated through medicalizing discourses about “disability,” “impairment” and “normalcy” which often assume that “disabilities and “impairments” reflect natural deficits or defects in an individual. Stigma is problematic for a variety of reasons, including that it obscures the fact that many “impairments” are not always experienced

negatively. Moreover, it often facilitates or provides a rationalization for treating citizens with cognitive disabilities in a way that is not simply different but frequently demeaning.

Although for reasons to be discussed shortly, I believe the theory of recognition to be capable of addressing questions of stigma there are two reasons for which one might be skeptical of such an assertion. The first is an indirect consideration that concerns the language Honneth employs. Honneth takes as his goal to “diagnose” what he calls “social pathologies” or “pathologies of reason,” which occur when there is a deviation in social practice from the ideals that are acknowledged within a community to constitute rational ends. Specifically, Honneth (2010) suggests that “the members of society must agree that leading a successful, undistorted life together is only possible if they all orient themselves according to principles or institutions that they can understand as rational ends for self-actualization. Any deviation from the ideal outlined here must lead to a social pathology insofar as subjects are recognizably suffering from a loss of universal, communal ends” (24). The notion of “pathology” of course is a form of medicalizing discourse, the remedy for which aims at eradication of the disorder. This is unfortunate, for this language relies on a medical analogy that from the perspective of stigmatization should be contested in at least certain cases. Second, since the approach recommends drawing moral implications or normative authority from already institutionalized moral and social norms, one might suspect that differentiated recognition could simply reaffirm existing ideologies or stigmatizing assumptions about cognitive disabilities.

Although these concerns are significant, the theory of recognition appears to have the resources to address rather than reaffirm stigmatizing assumptions. While the medicalizing analogy is

unfortunate, the idea implicit in the analogy equips the theorist with the tools for combating stigmatizing assumptions, as these and other ideologies often preclude individuals from “self-realization,” or authentic agency, autonomy etc. First, since we know that medicalizing discourses about cognitive disability do facilitate stigma and that they are often an inappropriate cause of “shame” and “indignation”—the very sorts of sentiments that suggest that the moral qua social/political order is unjust. In turn, there is already some reason to believe that the explicit pathologizing of cognitive disability could function to undermine the well-being of citizens with cognitive disabilities who then come to be regarded as defective, unequal, or burdensome and thus could constitute or at least facilitate misrecognition. Second, differentiated recognition does not recommend mere reaffirmation of existing social norms as they are exemplified more or less concretely in individual attitudes and institutionalized policies and practices; it recommends that the normative ideals live up to their “evaluative promise.” The criterion of progress guides any specification of the principles of recognition toward those measures that would increase the scope of whom are effectively counted as persons through legal inclusion and acceptance of individualization, including citizens with cognitive disabilities. This could mean expanding the scope of what counts as “normal” so as to recognize different aspects of human nature and the human condition, which are currently regarded as abnormal or pathological.

7.6 Can differentiated recognition be justified to citizens with cognitive disabilities via wide reflective equilibrium?

The second standard by which we may assess the adequacy of a normative liberal theory of justice is according to the liberal standard of justification. Indeed, Honneth acknowledges that

the legitimacy of any political conception turns upon whether and to what extent it can win the approval of those whom it is to govern. For instance In *Struggles For Recognition* Honneth states:

If a legal order can be considered to be valid and, moreover, can count on the willingness of individuals to follow laws only to the extent which it can appeal, in principle, to the free approval of all the individuals it includes, then one must be able to suppose that these legal subjects have at least the capacity to make reasonable, autonomous decisions regarding moral questions. ... In this sense, because its legitimacy is dependent on a rational agreement between individuals with equal rights, every community based on modern law is founded on the assumption of the moral accountability of all its members (114).

Moreover, he acknowledges that his theory rests on liberal assumptions about the inherent value of individual autonomy. Therefore it seems reasonable to require of Honneth's account of justice, as all the others, that it meet the liberal standard of justification.

Here we arrive at several problems. First, one might be immediately skeptical of the plausibility that Honneth could extend justification to citizens with cognitive disabilities, given that he acknowledges rational agreement as a condition for legitimacy. Indeed, Honneth's account may not in the end extend justification to all citizens with cognitive disabilities. Nevertheless, Honneth asserts that "rationality" is not a concept "fixed once and for all;" instead he also notes "what is meant in saying that a subject is capable of acting autonomously on the basis of rational insight is something that is determined only relative to an account of what it means to speak of rational agreement" and that the more demanding the legitimating procedure is (e.g. original

position reasoning, rational discourse etc.) “the more extensive the features will have to be that, taken together, constitute a subject’s status as morally responsible” (1996, 114). Since the features that are taken as central to moral responsibility may shift, Honneth’s account may provide more room for the extension of justification to citizens with cognitive disabilities in the process of justification.

Second, as discussed in chapter 3, one of two widely accepted methods for demonstrating the justifiability of a normative theory of justice is wide-reflective equilibrium. While Rawls and Nussbaum explicitly endorse the method of WRE, Honneth does not. In some respects then, it might be perceived as unfair to judge the merits of his theory according to these standards of justification. While I acknowledge this, I believe the analysis will be fruitful insofar as it provides a comparative approach to the previous theories discussed. Third, since Honneth does not specify a particular method or process of justification, it is more difficult to evaluate the theory overall according to WRE. To recap, WRE is a method of justification that implies a tripart coherence between some set of (A) ‘considered moral judgments’ or deep seated moral intuitions (B) moral principles (in this case principles of justice) and (C) relevant background theories (philosophical supporting conditions, including theories of the person and society, as well as theories of procedural justice etc.) (Daniels, 1979, 1980, 2011). This means that for a theory to be justifiable in WRE both the principles of justice must be justifiable to the constituency to whom they are to apply as well as the process used in selecting and interpreting them.

Even though Honneth does not argue for a particular method for justifying the three principles of recognition he does provide the foundation for a method of justification that acknowledges both to the procedural and substantive concerns that WRE aims to meet. On the one hand Honneth draws out what it is that individuals in contemporary Western liberal contexts take to be legitimate moral norms from the subjective experience of misrecognition. These are the sorts of norms that a political conception must employ if the social and political practices it recommends are to win the consent of its subjects. Of course, if Honneth is correct that the theory of recognition to which he attaches his conception of justice does represent the set of vague moral norms already deemed legitimate within the social order, then at least his “formal” account of the good should match something like what Rawls calls our considered moral judgments about justice or what Nussbaum calls our deep seated moral intuitions. And indeed, certain of Honneth’s remarks which point toward what, on his view, exemplify instances of misrecognition do seem to accord with widely held intuitions about injustice. As mentioned previously, Honneth suggests that acts of violence such as rape or abuse would constitute misrecognition (Honneth, 1995). Moreover, his analysis of the development of the principle of recognition highlights that in the contemporary social order the ideal of achievement implies that esteem should not be granted upon the basis of mere birth right but rather upon the basis of merit or what one does or contributes.

On the other hand, Honneth acknowledges that misrecognition is objectively evaluable. And, like Kittay, the approach Honneth recommends will be one that is grounded on a conception of human nature and human society that is in Kittay’s words “connected.” Honneth grants from the start that the subjects of justice are generally aware of the relational nature of their autonomy.

However, given the fact that his theory of recognition is historicized and contextualized from the start, it seems unlikely that the legitimating procedure Honneth would recommend (to evaluate misrecognition or justify a given interpretation of the principles of recognition) would resemble original position reasoning (or indeed any other highly idealized or highly abstract form of reasoning). These features give Honneth's theory of recognition the potential for being justifiable to all citizens with cognitive disabilities who can be justified to and will provide room for equal political consideration or representation of those who cannot. This is because the sort of approach compatible with these constraints would allow for the perspectives of actual individuals to be advanced in the process of interpreting the principles of recognition.⁹² Citizens with cognitive disabilities would not, in virtue of some abstraction, be reduced to a single representative standpoint such as the least advantaged member of society or to the standpoint of an individual who is severely dependent. Moreover, the focus on misrecognition forces consideration on whether and to what extent certain existing and exclusionary measures are normatively permissible. In this way, any neglect of the issues of concern that citizens with cognitive disabilities have or exclusions toward citizens with cognitive disabilities generally speaking taken to be the implications of the principles of recognition would not be made arbitrarily or in absence of adequate justification. Instead, reasons for the neglect or exclusion must be provided.

Despite the fact that Honneth's account appears to be compatible with a procedure for justification that extends to a larger scope of individuals than previous accounts, one might

⁹² In this case justification might be understood in terms of something like hypothetical consent for those who cannot participate. Nevertheless, at least on Honneth's view anyone who can advance a claim, or "speak for himself" can be considered an agent of justice, whose actual understandings should be addressed.

question the role Honneth assigns to the principles of recognition in the process of justification. Once again, for Honneth, the principles of recognition reflect the “formal” conception of the good life upon which a normatively adequate conception of justice will be grounded on this conception. Yet, if Honneth affords the principles too strong a role in the process of justification, he risks biasing the outcome in favor of his theory. While Honneth acknowledges that new forms of recognition may emerge over time, even here one might question how it is that, on Honneth’s view, we might discern when one has emerged. Unless Honneth is not only willing to acknowledge the possibility of alternative forms of recognition that fall outside of his three tiered framework, but can also provide a way of interpreting the principles of justice in a way that doesn’t merely invoke that framework he will face the charge of epistemic rigging like Nussbaum.

I do not wish to take issue here with Honneth’s claim that an adequate normative theory of justice will be grounded in a weak conception of the good. Nor do I wish to take issue with the three-tiered framework he suggests is representative of the modes of recognition that together represent the necessary prerequisites for individual autonomy in contemporary Western liberal democratic societies today. Even Rawls employs a thin conception of the good in characterizing the well-ordered society as he does. However, the larger concern I see involves the question of what role Honneth should assign to the formal structure of the principles in the process of justification.

If it is the case that, as Honneth suggests, the principles are open to interpretation in accordance with a criterion of progress and if it is the case that the principles, as he claims, reflect empirical

generalizations that are therefore falsifiable (that there is the possibility that a different form of recognition may emerge suggesting the existence of different yet legitimate “moral grammar” according to which the justice of a society maybe evaluated) then it seems Honneth’s approach to justification must provide room for moral claims that fall outside the framework of recognition he has provided to emerge as legitimate. In the following chapter I will sketch an outline of the sort of approach I believe compatible with Honneth’s account and capable of doing this critical work. For the time being I conclude my discussion of WRE by simply noting the potential for meeting a liberal standard of justification, provided an approach to justification that avoids merely reaffirming the formal account of the good underpinning the three principles of recognition. I turn now to the question of overlapping consensus.

7.7 Can Differentiated Recognition be justified to citizens with cognitive disabilities via overlapping consensus?

A second way in which contemporary liberal theorists suggest their theories of justice are justifiable is through overlapping consensus. OC implies that a given conception of justice is stable and therefore one that could be endorsed by the citizenry over time. Theories of justice that are justified in OC are thus presumed to be compatible with the diversity of comprehensive visions of the good that characterize a democratic society. As mentioned in chapter 3, the virtue of stability in regard to a conception of justice is debatable. Those who follow in the tradition Critical Theory, such as Honneth, presume that moral judgments including our conception of justice should be subject to re-evaluation over time and in accordance with the change in social conditions that constitute realistic descriptions of life as experienced. Indeed, this fact

compounds the sort of challenge I issued above in regard to the role Honneth might afford to the principles of recognition in the process of justification. Nevertheless, I presume that a degree of stability over time is a virtue of any normative conception of justice. In turn, I suggest that although an adequate conception of justice need not remain stable indefinitely, it should have a reasonable time span. And lastly, I presume alongside numerous others that a conception of justice, which is capable of having such time span is one that is compatible with the diversity of world-views that characterize Western-liberal democratic societies.

Once again, since overlapping consensus concerns consensus not only about the principles of justice but in addition the methods used in justifying them, the method of justification Honneth ultimately endorses will be pertinent to the ability of the theory to achieve OC as well as WRE. It seems that like Nussbaum, Honneth advances the principles of recognition as representing an understanding of the good that he views as weak enough to be compatible with a pluralism of views about the good life that exist (at least in liberal societies) today. He takes as an “empirical reference point” individual and collective experience of injustice or feelings of misrecognition and seeks to demonstrate how these feelings, which on his view guide us toward the principles that individuals deem legitimate, have arisen under the conditions of modernity. This gives initial plausibility to the belief that differentiated recognition is reasonably stable—they are presumably implicit in the individuals’ own moral understandings and self-conceptualizations, which although historically contingent have spanned a degree of time already. Moreover, Honneth suggests that justice should address individuals’ own beliefs and understandings to illustrate what it is that they actually require. For instance, in responding to the challenge of the gendered division of labor in the family, Honneth (2000) writes that the task of justice is “not only the

negative task of minimizing social conditions which supports a certain unjust division of labour, all that kind of institutional pressure which works on women, but also ...to enforce an understanding of the normative infrastructure of families so that, by the participants themselves, it can be seen that a fair distribution of labour in families is what they should accept” (387).

Of course, Honneth does acknowledge that alternative forms of recognition may emerge over time. Therefore the question of whether and to what extent a given specification of the principles remains legitimate as well as how we might discern whether or not a new mode of recognition has emerged (and hence whether or not a new principle of recognition is needed) remains. Even if Honneth is correct about the fact that the principles of recognition reflect the structure of moral norms that individuals today already deem valid, if he is to avoid the charge of covert authoritarianism Nussbaum faced over time, he cannot employ a method of justifying the principles that does not provide room for the emergence of a new principle. Another way of putting this is, he cannot rely on a justificatory procedure that, like “informed desire,” invokes the principles of recognition as an authoritative measure of which feelings exemplify feelings of misrecognition or indeed mark actual instances of misrecognition over time. As Anthony Laden (2007) cautions, “by providing a kind of script, or perhaps more precisely, a language in which to articulate social struggles [Honneth] may inadvertently blind himself to social struggles that not only speak in other languages and use other scripts, but whose demands are, as it were, untranslatable” (277). If Honneth sticks rigidly to this “script” (or the formal conception of the good he has outlined) over time differentiated recognition will not only fail to be justifiable to citizens with cognitive disabilities, but like Nussbaum’s capabilities approach, it will fail to be justifiable at all. Fortunately, since the theory remains less specified in terms of justification, it

still holds a more promise for meeting the liberal standard of justification than the theories previously discussed.

Since the general approach to justification Honneth points toward seems promising for extending justification to citizens with cognitive disabilities, in the next chapter I offer few concluding remarks toward a procedure for meeting the liberal standard of justification that, although could be used in an effort to justify alternative theories of justice, is highly compatible with differentiated recognition. This method would acknowledge but not rely solely on the normative authority of the formal conception of the good underpinning the principles of recognition in the process of justification.

8. Recognizing Justice For Citizens With Cognitive Disabilities

8.1 Toward political equality and liberty for citizens with cognitive disabilities

In the preceding chapters I have considered whether and to what extent each of four prominent contemporary liberal theories of justice can uphold political equality and liberty for citizens with cognitive disabilities. Equality requires that a normatively adequate theory of justice must extend equal basic rights to citizens with cognitive disabilities as well as give them equal political consideration. Liberty requires that an adequate theory of justice must be justifiable to all those who fall within its scope. This must include citizens with cognitive disabilities who will live in all societies and be subject to their coercive institutions.

I have argued that most of these theories are unable to meet both standards of adequacy. Moreover, I have shown that the extent to which any of these theories can extend equality and liberty to citizens with cognitive disabilities is a function primarily of the procedure or approach to justification the theorist employs in order to demonstrate that the theory he or she advances is one the citizenry could endorse. As we have seen, this procedure may cohere with conceptions of human nature and human society that are insufficient to support an approach to justification that could accommodate citizens with cognitive disabilities. Or, it may recommend modes of reasoning that are narrow, untrustworthy or otherwise biased in some way.

For example, in imagining the citizens of the well-ordered society as *reasonable* and *rational* and then modeling their representatives in the process of justification off this image, Rawls not only excludes citizens with cognitive disabilities from the scope of justification but he precludes the issue of cognitive disability from arising in considerations of justice altogether. Therefore it is unsurprising that justice as fairness is ill equipped to meet either the standard of presumptive political equality or the liberal standard of justification where citizens with cognitive disabilities are concerned. In contrast, by imagining the citizens of a well-ordered society as enmeshed in relations of severe dependency, Kittay is able to extend equal basic rights and equal political consideration to a broader scope of individuals than Rawls. Still, in chapter 5, I argued that connection-based justice cannot guarantee equal treatment for citizens with cognitive disabilities who endure social and political exclusion or who are stigmatized. It therefore falters in light of the standard of presumptive political equality for citizens with cognitive disabilities. The reason I noted for this theory's inability to guarantee equality for citizens with cognitive disabilities stems from Kittay's characterization of the original position. Certainly all citizens, including those with cognitive disabilities may be represented, in principle, in original position reasoning on Kittay's account in virtue of a shared dependency relation. Nevertheless, the issues of justice that citizens with cognitive disabilities are likely to have may still never arise in the process of justification because even on her account their concerns will be subsumed under the standpoint of another—of either a dependency worker or a dependent. The principles of justice thus reflect what concerns the representatives in the original position have, to the neglect or the marginalization of citizens with cognitive disabilities.

In chapter 6 I highlighted several reasons for believing that Nussbaum's capabilities approach is better equipped than justice as fairness as well as connection-based justice to extend political equality to citizens with cognitive disabilities. Nevertheless, I argued that the advances Nussbaum makes in terms of meeting the standard of political equality justice appear to come at a cost of justifying theory. Nussbaum's approach to justification simply rigs the outcome in favor of the list of capabilities she endorses. Finally, in chapter 7 I argued that the most promising account of justice is Axel Honneth's theory of justice in terms of differentiated recognition. Not only is this theory grounded on a conception of the good, which seems friendly to the concerns of CWCDs but it also remains open to new moral insights.

Although I expressed some initial concern that differentiated recognition may not be able extend equal justice to citizens with profound cognitive impairments, differentiated recognition does appear to have the resources to extend political equality to at least most citizens with cognitive disabilities, including those with profound impairments. Moreover, I suggested that the approach to justification Honneth points toward has more potential for guaranteeing liberty for citizens with cognitive disabilities, so long as whatever procedure is ultimately employed does not rely merely on stipulating the formal conception of the good Honneth outlines. In light of these considerations, it seems that what is needed is an approach to justification that is neither narrow in terms of the standpoints it acknowledges in the process of justification nor prejudges the outcome to such an extent that it is superfluous. Drawing from my analyses in the preceding chapters I conclude this dissertation with a few sketches toward an approach to justification that can facilitate both political equality and liberty for citizens with cognitive disabilities. This approach interprets the liberal standard of justification in terms of contextual transparency.

Though it could be used, in principle, to justify any of the four theories of justice, in clarifying how contextual transparency aspires to the liberal standard of justification I propose contextual transparency as a compliment to Honneth's theory of justice in terms of differentiated recognition.

8.2 An overview of contextual transparency

Contextual transparency is a feminist inspired vision of what constitutes moral justification, advanced most notably by Teresa Tobin (2007). This approach to justification incorporates feminist insights both regarding the need for "naturalized" methods of moral reasoning as well as the function and importance of trust in knowledge, understanding and agency. Contextual transparency assumes what Tobin, following Margaret Walker (1999), describes as a "non-modularity thesis." In Tobin's words, the non-modularity thesis denies the claim that there is "a single, acultural procedure or set of principles for moral reasoning that is both substantive enough to do the work of moral justification yet thin enough so as not to incorporate certain contextual values of any particular way of life" (p.155). Instead, contextual transparency assumes that "morality starts out thick" and that moral theorists should start not by positing moral authority in whatever arises out of a process of abstract moral reasoning but instead must and should start "in the thick of things, from where the actual moral agents are, with the actual moral-social-cultural-religious understandings they have" and with the way moral agents see their problems as constructed in their own eyes (160). Moral justification then commences its

analysis with a specific reference point in mind. Specifically, it starts from a set of understandings that are presumably shared within a given moral community.⁹³

In a second step, achieving contextual transparency requires clarifying or “testing” whether and to what extent these understandings are actually shared, whether and to what extent they are forced upon others or held in place by “abusive” power arrangements. In short, transparency testing helps to reveal which moral understandings are trustworthy and which ones are not. In order to perform this sort of test Tobin recommends drawing on a wide variety of data, including individuals’ qualitative experiences as well as interdisciplinary, empirical and theoretical studies. However, Tobin does not endorse simply relying on the perspectives of “insiders” within a given moral community. Those who are “outsiders” to a moral community can participate in the process of testing for transparency as well. Indeed, sometimes an outside perspective can help illuminate facets of individual experience that one would not otherwise have seen. Still, the goal of transparency testing is to achieve “contextual transparency,” which requires the assessment of shared understandings by appeal to modes of reasoning that are inherent to specific moral-social worlds and their inhabitants.⁹⁴

⁹³ Drawing from the work of Margaret Walker, Tobin suggests that “Shared understandings include commonly recognized norms, principles, values, and commitments, understandings about to whom norms apply and under what conditions, understandings about who is responsible for what and to whom, common recognition about what are the appropriate sources of moral knowledge and reliable processes of moral knowledge production” (p.161)

⁹⁴ For example, if the particular moral community recognizes the Qur’an as authoritative on matters of moral and social life, while one who does not recognize the Qur’an may still offer insights to how a particular mode of life is or is not supported by the Qur’an or is or is not held in place by abusive power arrangements. For an example of this see Tobin (2007).

One reason that Tobin as well as other feminists offer in advancing theories of justification that are grounded on the non-modularity thesis, is that in appealing to an over-arching, universal principle, or set of principles, we may fail to accurately identify what individuals experience as a moral violation. For instance, Tobin notes that human rights discourse might privilege certain Western ways of framing normative or moral questions. For instance, in rejecting human rights discourse Muslim theorist Masayam al-Faruqi argues that, “if we fail to define and evaluate the violations that Muslim women experience in terms of Islamic discourse, then we fail to accurately describe the moral nature of these violations as these women experience them” (*cited in* Tobin,). However, if this is the case, then two concerns may arise. One might be that transparency testing will not support a conception of justice that is grounded even in a weak (liberal) conception of the good, which presumes certain universal values.⁹⁵ A second might be that transparency testing fails to be sufficiently critical.

8.2.1 Moral communities and shared understandings: Understanding the structure of moral violation and injustice

In response to the first concern, one could note that the truth of the criticism depends on the construction of the moral community in question and, in turn, the modes of moral reasoning that are widely acknowledged. Tobin and Walker do not declare that advancing any and all moral frameworks as important reference points in the context of justification is wrongheaded. Indeed, transparency testing presumes a moral community and rests on the force of what might be called

⁹⁵ For instance, one might argue that as a universal, albeit “formal conception of ethical life,” differentiated recognition risks misconstruing the moral nature of the violations as individuals (including citizens with cognitive disabilities) might experience them.

genuinely shared understandings. Certainly, Tobin is concerned with moral norms that individuals associate with particular understandings of the good—such as religious understandings, which are not presumed to be shared by all but are still assumed as holding universally for all those who are supposed to share them. Thus, while it is true that transparency testing is incompatible with a conception of justice that is universal in at least one sense, it is not incompatible with a conception of justice that is universal in every sense.

The real challenge for a theorist who endorses transparency testing is empirical, and it consists in determining the moral community in question as well as the modes of moral reasoning that are acknowledged as having authority by the members of that moral community. Indeed, this is part of the inquiry Honneth has undertaken in *Struggles For Recognition*, where he presumes the modern liberal moral/social order as his context and is concerned with exposing what it is that individuals take to be the legitimate norms for justice within that context. The “shared understandings” Honneth is concerned with have a universal or general form. Nevertheless, they are not applicable outside of the liberal moral social order. Since the moral-social context I am concerned with is effectively a *Western liberal political community*, we might to avoid confusion by considering the exercise I endorse as one in *political transparency*.

8.2.2 Transparency testing and epistemic rigging

In chapter 5 I suggested that Nussbaum’s purported justification of her capabilities approach is open to the charge of epistemic rigging. What was problematic about Nussbaum’s method of justification was that it explicitly referenced the principles themselves as standards of

justification for the political conception. On Nussbaum's view, we are to test whether and to what extent a desire is informed by whether or not it accords or conflicts with one of the principles on the list. This rigs her account in favor of the capabilities in the here and now, as well as over time.

Similarly, one might worry that any conception of justice justified in terms of contextual transparency will be likewise subject to the charge of epistemic rigging, since the transparency test itself seems to presuppose a moral framework from within which all moral claims may be interpreted as legitimate. So, for example, drawing on Honneth's work, if the principles of recognition (even if in vague form) are posited in the transparency test as *the* authority on which types of claims are admissible and which ones are not, then the employment of the transparency test would be epistemically rigged in favor of differentiated recognition. In this case, *even if* we might grant Honneth's empirical account or specification of the legitimate moral norms in liberal societies today, over time the legitimacy of his theory will come under question if the process of reflection is oriented too strongly toward the original framework.⁹⁶ Since achieving contextual transparency requires working within a specified set of moral understandings, one might worry that the transparency test itself has no ability to transcend beyond the moral understandings that are social pre-givens.

In light of this, my recommendation is to consider the test for transparency in regard specifically to the particular weak conception of the good believed by a particular moral community at a

⁹⁶ This is analogous to the challenge I raised in chapter 7, in order to highlight that certain methods of justification that are compatible Honneth's theory of recognition may be subject to the charge of epistemic rigging.

given time to characterize the legitimate moral framework for a vision of justice as one necessary point of reflection in the process of justification. Thus we conceptualize the process of achieving transparency by putting individuals' claims for justice, however they may be construed, in dialogue with the weak conception of the good. Through this dialogue we can then assess whether and to what extent new questions raised either can be framed in terms of this weak conception of the good or require an additional category of reflection. In my account then, the principles or weak conception of the good would be referenced over time when conflicts arise but not invoked as wholly authoritative, fixed, or non-revisable. In employing the transparency test both how the conception of the good is understood to ground a conception of justice (that is how the principles are interpreted), as well as the framework itself (as a *complete* conception of justice), could come under review. In this way the weak conception of the good might have a "consciousness raising" effect but the principles of which it is comprised would not necessarily determine the boundaries for what always will count as a legitimate claim to justice. Instead, on my view, the weak account of the good would in effect provide what Honneth describes as "an historically grounded reference point" in a process that is open to increased modes of realizing justice.⁹⁷ The political conception will thus be anchored historically with a forward-looking trajectory.

8.3 Seeking contextual transparency: political equality and the liberal standard of justification

⁹⁷ It therefore requires that reinterpretations of the principles of recognition include an expansion the scope of individuals to whom recognition is afforded by promoting socially inclusive measures that affirm either legal equality or uniqueness and individuality. To be sure, this criterion would not be consistent with all processes of achieving transparency in all moral-social as it expresses explicitly egalitarian conditions for justification, but I believe it an adequate condition for a liberal moral-social order.

One might note that since contextual transparency presumes that there is no single procedure that can serve as *the* method for moral justification it is difficult to conceptualize what, if anything, could help us know or discern when a claim is justifiable and when it is not, from when a moral norm or practice is legitimate or illegitimate. In turn we may wonder what conditions of transparency might look like and how transparency testing could uphold the liberal values of political equality and justification for citizens with cognitive disabilities.

In regard to the question of what conditions for transparency might look like, following Tobin as well as other feminist theorists,⁹⁸ I presume that conditions for transparency can be interpreted in terms of trust. As feminist theorists frequently note, trust is a central feature of the functioning of any community and implicit in the relations members of moral and social communities have. Sentiments of injustice or feelings of misrecognition clue us into the fact that such conditions for trust may not be met. They are an invitation for analysis. Certainly, trust and distrust can be misguided. Yet, as Naomi Scheman (2001) argues, trust is not merely a sentiment but something that, in addition, can be “rationally grounded.” To say that a given political conception is trustworthy is to say that the trust of those who are subject to it, or at least could be, “rationally grounded.” In this case reasons could be provided in order to establish why a particular, understanding or practice is or is not conducive to equality, well-being, autonomy etc. In short, conditions for transparency maintain when the specifications of a given conception of justice are trustworthy.

⁹⁸ See Baier (1986), Walker (1989)

Like Rawls's understanding of "fairness," I understand "trustworthiness" to imply that the entire political conception (i.e. the principles of justice as well as the approach to justification) is unbiased and reliable. Since, however, on Tobin's view moral analysis must commence from the "ground-up," clarifying the extent to which a given conception is trustworthy will include considering reasons for which individuals including citizens with cognitive disabilities do or do not trust. It will include addressing why or what reasons the individuals have for feeling the way they do and clarifying whether, how, and to what extent they are well founded as well as whether and to what extent they may be distorted. Finally, rendering a theory of justice trustworthy will not only include rendering a set of understandings transparent and perhaps modifying policies and practices in a given circumstance so that trust is grounded and can flourish, it will also require continually pressing beyond immediate concerns to create the sorts of relationships in which trust can flourish. In other words, rendering a theory of justice trustworthy will require reducing bias through what Lisa Heldke and Stephen Kellert (1995) describe as,⁹⁹ *acknowledging, fulfilling, and expanding responsibility*.¹⁰⁰ In what follows, I will offer a few remarks toward how conditions of transparency and "transparency testing" facilitate political equality while providing justification for citizens with cognitive disabilities.

8.3.1 Upholding political equality for citizens with cognitive disabilities

In chapter 1 I argued that cognitive disability is not an anomalous condition and that citizens with cognitive disabilities ought not to be excluded from the scope of justice without explicit and

⁹⁹ See also Heldke (2001)

¹⁰⁰ While Heldke (and Kellert's) primary focus concerns epistemic justification the notion of objectivity they articulate is quite suitable for moral justification as well.

compelling reasons. In chapter 2, I suggested there are at least three areas of concern a normatively adequate theory of justice must address if it is to give equal political consideration to citizens with cognitive disabilities. These concerns involve equal treatment for citizens with cognitive disabilities who have medical impairment, equal treatment for citizens with cognitive disabilities who have been socially and politically excluded and equal treatment for citizens with cognitive disabilities who have been stigmatized.

Since transparency testing is a critical tool, it does not (in advance of evaluation) exclude any individual from the scope of justice. By contrast, it can be used to check whether and to what extent the scope of justice extends adequately to all those whom it should extend to in a given moral social context. And because it is a critical tool, it places the burden of proof not simply on those who are excluded to prove they should be included but on those who wish to deny equal justice to a given constituency to provide reasons for the exclusion. A conception of justice compatible with transparency testing cannot summarily exclude citizens with cognitive disabilities from the scope of justice. Instead, it would presume (at least *prima facie*) the issues of medical impairment, social and political exclusion and stigmatization to be relevant concerns of justice. Given that transparency testing can require a shift in the interpretation of the moral understandings under review (in this case principles of justice or recognition) as well as the social policies, practices etc. they justify, a conception of justice that is justifiable via transparency testing should be capable of addressing issues of justice that have hitherto gone unaddressed or inadequately addressed.

Now, although transparency testing does not deprive citizens with cognitive disabilities of political equality without a strong rationale, some might find transparency testing worrisome. One might wonder, for instance, if practically speaking transparency testing is warranted only once a normative claim (to justice or to recognition) has been raised, in which case for prolonged periods of time citizens who are not in a position to advance a claim may endure injustice. Unfortunately, members of marginalized social groups, including citizens with cognitive disabilities, are quite frequently silenced due to social deterrents that make speaking out a high risk, or in some instances practically impossible. If this is the case, then one might worry whatever conception of justice employs transparency testing or something like it will permit structural inequality between members of marginalized social groups and other citizens.

While I sympathize with the sort of concern, this practical problem may arise in the case of any political regime, no matter how the conception of justice that governs it has been justified. For instance, considering Rawls's account, one who has been deprived of the primary good of self-respect may have to rely on another, better situated individual to advance her claims to justice according to the difference principle. Similarly, citizens of a society that does not guarantee for them the minimum threshold level of capability may need one who is better situated to advance their claims to capability. Fortunately, there is ample evidence to suggest that individuals do often feel or at least have partial awareness they have suffered an injustice in face of what from at least some third person perspective can be regarded as a violation of some shared moral understanding (i.e., some legitimate moral or social expectation or expectation for justice).

Oppressed or marginalized people typically have some awareness of the fact that they are disrespected, valued inappropriately, burdened, or otherwise do not get what they are entitled to or deserve. In fact debates over “internalized oppression” serve as evidence of awareness or the perception/experience, what have you, of some that legitimate expectations are being denied to certain individuals. They have what, W.E.B. Dubouis (1903) has referred to as a “double-consciousness” or an awareness of both who they are and how others (mis)perceive them. Consider Gloria Yamoto’s description of internalized racism,

Internalized racism is what really gets in my way as a Black woman. It influences the way I see or don’t see myself, limits what I expect of myself or others like me. It results in my acceptance of mistreatment, leads me to believe that being treated with less than absolute respect, at least this once, is to be expected because I am Black, because I am not white. “Because I am (*you fill in the color*), you think, “Life is going to be hard”(from Anderson & Collins, 2004, p.101).

What we may note here is that the subject has dim or partial consciousness of some form of misrecognition, injustice, or oppression. She simultaneously finds herself accepting and failing to challenge it. Nevertheless, some awareness is generally there. This dim or partial consciousness of injustice, then, is enough to warrant evaluation as it marks a lack of trust uncharacteristic of transparency.

To render the context transparent then would require making the requirements of justice trustworthy, which maintains objectivity by what Heldke and Kellert (1995) describe as “responding” to others claims. Indeed, as Heldke (2001) states “to acknowledge responsibility is simply to recognize the demands made by others in the inquiry context, whether or not one

chooses to respond to them... [It] would *minimally* require all the participants to note that other participants *do* exist, and that these participants have perspectives that at least *may* be relevant to the task of understanding the conflict” (86). This brings us to the question of justification.

8.3.2 Upholding political liberty for citizens with cognitive disabilities

As of all previous approaches we must consider whether and to what extent contextual transparency aspires to the liberal standard of justification. Roughly speaking the liberal standard of justification requires that a normative theory of justice be justifiable to all those who fall within its scope. Because contextual transparency requires a critical approach to justification, transparency testing has more potential for meeting the liberal standard of justification than original position reasoning (at least as specified by Rawls or Kittay) or than informed desire (which is viciously circular). In this way, although contextual transparency is a method of justification aspires to the liberal standard of justification on its own, a conception of justice that rests on contextual transparency will be a likely candidate for emerging over others in wide reflective equilibrium.

First and foremost, transparency testing is an approach to justification that does not marginalize or neglect perspectives. Indeed, anyone capable of advancing a claim can do so. Moreover, one can presumably advance a claim on behalf of another who is incapable of doing so. In either case, these claims will have to be acknowledged and addressed. As should be evident from section 8.3.1 above, acknowledging responsibility requires recognizing others’ claims and that

others have perspectives that might be important to understanding what justice requires. In turn, acknowledging responsibility would appear to require that the perspectives of citizens with cognitive disabilities be considered *prima facie* relevant to the process of interpreting what the principles of justice require. This means, their perspectives could not be cast aside without consideration upon the basis of any uncritical assumption about normalcy, rationality, reciprocity, disability, or the like. Assumptions about normalcy, rationality, reciprocity, disability, and the like are also relevant to the task of understanding conflict. Indeed, insofar as they challenge the legitimacy of a given political regime, they are central to discerning the validity of the political conception governing the regime and, indeed, what genuine political equality and liberty social justice actually requires.

To fulfill responsibility would move beyond merely acknowledging that citizens with cognitive disabilities have perspectives that should be heard. It would require the actual extension of justification for whatever conclusions are arrived upon in the process to citizens with cognitive disabilities. As Heldke states, fulfilling responsibility requires “meeting the demands made upon one, or otherwise accounting for a decision not to meet them” (87). It means listening to others claims and, as she suggests, acknowledging one’s role in the creation of others frustrations. It therefore acknowledges the relational nature of autonomy, and requires in light of this that all are accountable to others for the decisions that arise out of the process of evaluating those claims that have been acknowledged.

Lastly, according to Heldke expanding responsibility includes “transforming existing inquiry projects as a result of identifying and incorporating new areas of concern.” This could mean

acknowledging ways in which one's own role or individuals' roles are structured in and facilitate the structure of just as well as unjust social contexts. So, for example, it could require acknowledging how certain assumptions about normalcy and disability may facilitate the stigmatization of individuals associated with the social category "cognitively disabled," not simply in one social milieu (e.g. context or sphere) but various ones. It would push for consideration and evaluation in these other contexts as well. Given this, transparency testing would not appear to exclude citizens with cognitive disabilities from the scope of justification. It would however appear compatible with background theories like those endorsed by Honneth, which include a conception of human autonomy as relational and an understanding of the human condition as "connected."

In addition to being a likely candidate for WRE, I believe contextual transparency has the potential to provide for some stability as well. For a theory of justice to be justifiable in OC, not only must the principles of justice be compatible with the variety of comprehensive conceptions of the good that characterize contemporary liberal democratic societies but it must represent an artifact of "public reason," in which case all have reason for believing that the conception is one that others could reasonably endorse. While I acknowledge that the principles of justice will evidently play a substantial role in determining the extent to which a given conception of justice could provide for stability, it will certainly not harm a theory of justice in terms of its ability to form the basis of an overlapping consensus to endorse methods of reasoning about justice that promote inclusion.

8.4 Concluding Remarks

Liberal theories of justice start from the presumption of political equality. In the words of John Rawls:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interest. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice (1999, 3).

Following Rawls, in chapter 1 I suggested that the burden of proof lies on the theorist who wishes to violate a standard of political equality to demonstrate either (a) that we have no better way of dealing with issues of justice, or (b) the injustice is tolerable only in the instance that it is necessary to avoid a greater injustice.

Given the fact of cognitive disability as a stable feature of the human condition, I then raised the question of whether there might be a lurking bias in the very structure of certain normative theories of justice, which fail to address the issues of justice that arise in light of cognitive disability. There I also suggested that this bias might only become evident in light of alternative theories of justice, which are less biased or which can uphold the political equality and liberty of citizens with cognitive disabilities. Over the course of this dissertation I have assessed several of

the most prominent contemporary liberal theories of justice, showing how in each case the theorist's construction of the conception of justice, including the presumptions she makes about human nature and society or, the method she uses in justifying the principle she advances or, both preclude the theory from meeting the normative standards of adequacy. I concluded my analysis by clarifying how a conception of justice in terms of recognition and an approach to justification in terms of contextual transparency provide the foundation for a theory of justice that holds great potential for respecting both the political equality and liberty of citizens with cognitive disabilities.

While differentiated recognition may, in the end, deny certain and few citizens with profound cognitive impairments political equality and liberty, it would not do so in absence of justification. And while certain and few citizens with cognitive disabilities may not be able to comprehend justification, any claim to justice they may have would not be neglected in advance and upon the basis of some not-yet justified presumption about their ability to participate in relations of reciprocity, or recognition, or to reason. Admittedly, the general picture of justice I advance could benefit from further analysis and specification. For instance, we could compare it against the others to see whether and to what extent each can provide equal justice as well as justification for caretakers as well as for citizens with cognitive disabilities. Only in light of a more broad analysis could we then contend which account is most preferable. Nevertheless, my analysis does demonstrate how the structure of at least three of the contemporary normative theories of justice may be biased against citizens with cognitive disabilities. It also suggests that there is a plausible alternative, which has the potential to recognize justice for citizens with

cognitive disabilities. It therefore is an alternative approach to justice theorists should continue to develop.

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American Association of Intellectual and Developmental Disabilities:

<http://www.aaidd.org/>

Center for Disease Control and Prevention:

<http://www.cdc.gov/>

National Down Syndrome Society:

<http://www.ndss.org/>

The Autistic Self Advocacy Network:

<http://www.autisticadvocacy.org/modules/smartsection/category.php?categoryid=8>

The National Institutes of Health:

<http://www.nih.gov/>

The US Census Bureau

<http://www.census.gov/>

