

CANADIAN JOURNAL OF

# Disability Studies

Published by the Canadian Disability Studies Association · Association Canadienne des Études sur l'Incapacité

*Canadian Journal of Disability Studies*

**Published by the Canadian Disability Studies Association  
Association canadienne d'études sur le handicap**

**Hosted by The University of Waterloo**

[www.cjds.uwaterloo.ca](http://www.cjds.uwaterloo.ca)

## Disability and Contractual Expectations

### Handicap et attentes contractuelles

Jonas-Sébastien Beaudry, DPhil  
Faculty of Law & Institute for Health and Social Policy  
McGill University  
[jonas-sebastien.beaudry@mcgill.ca](mailto:jonas-sebastien.beaudry@mcgill.ca)

#### Abstract

This is a précis of the forthcoming book, *The Disabled Contract: Severe Intellectual Disability, Justice and Morality*. It examines how people with severe intellectual disabilities (PSID) fare within the social contract tradition. More specifically, it contends that even recent strategies that attempted to integrate disability within the realm of contractual justice and morality are not entirely successful. These strategies cannot convincingly ground a robust moral status for PSID; or, if they do so, it is at the cost of making this status merely derivative or contingent. The failure of social contract theory to bring severe disabilities within its purview should not be seen as a marginal theoretical defect affecting only a small segment of human populations. At best, it reveals a gap that should impel moral and political theorists to give fiduciary and caring ideals their due weight next to contractual ideals. At worst, the social contract tradition is not only incomplete, but necessarily creates and oppresses the ‘disabled subject’.

The goal of this précis is to introduce readers to some of the conclusions I reach in the book in an accessible, short format. The arguments are therefore illustrative rather than exhaustive.

#### Résumé

Cet article est un précis de mon prochain livre, *The Disabled Contract : Severe Intellectual Disability, Justice and Morality*. Ce livre examine la situation des personnes ayant une déficience intellectuelle sévère dans la tradition du contrat social. Plus précisément, il soutient que même les stratégies récentes qui ont tenté d’intégrer le handicap dans le domaine de la justice contractuelle et de la moralité n’ont pas complètement été couronnées de succès. Ces stratégies ne parviennent pas à faire émerger de manière convaincante un statut moral fort pour les personnes ayant une déficience intellectuelle sévère; ou, si elles y arrivent, c’est en le rendant simplement banal ou contingent. L’échec de la théorie du contrat social à inclure les handicaps sévères dans son champ d’application ne doit pas être considéré comme un défaut théorique marginal affectant seulement une partie des populations humaines. Au mieux, cela révèle une lacune qui devrait pousser les théoricien·nes moraux et politiques à donner aux idéaux fiduciaires et bienveillants le poids qui leur revient à côté des idéaux contractuels. Au pire, la tradition du contrat social est non seulement incomplète, mais crée et opprime nécessairement le « sujet handicapé ».

Le but de ce précis est de présenter aux lecteurs certaines des conclusions auxquelles je parviens dans le livre dans un format court et accessible. Les arguments sont donc illustratifs plutôt qu’exhaustifs.

**Key Words:** Social Contract; Contractualism; Contractarianism; Rawls; Disability; Intellectual Disability.

## 1. The Ubiquity of Social Contract Theory

Social contract theories predicate the authority of rules that govern society on the idea that these rules are the product of a contractual agreement struck between members of society. Theories of the social contract assume the moral, political, and strategic importance of certain contractual features (for instance, equality and reciprocity between contractors), and they also take for granted that certain characteristics are held by the parties (for instance, mutual disinterest and rationality) (Rawls, 1999). These theories are appealing because of the value they place on these features. Social contract theories employ a normative or descriptive narrative about the origins of society, presenting parties to the social contract as endorsing certain rules and principles when they set up basic social institutions. Contractual procedures may also be used to assess the morality of smaller scale interactions. For instance, a relationship that is not mutually beneficial may be deemed to be morally problematic from a contractual perspective (Dimock, 2008: 279).

This theory is a venerable philosophical tradition dating back to ancient thought: for example, in Socrates' decision not to escape his death sentence, as it would be unfair of him to disobey laws from which he has benefitted and that he endorses, only when those laws do not benefit him (Plato, 1937: 50a–53a). However, social contract theory is best characterized as modern;<sup>1</sup> it shares the Enlightenment's ideal of relying on reason, rather than on "an order antecedent and given to us" (Rawls, 1980: 519), such as scriptures, to justify and delineate our moral and political obligations. Rather than a fixed set of moral norms, the social contract is an intellectual procedure through which contractors can reach an agreement on such moral content. This

---

<sup>1</sup> And indeed became a full-fledged political theory in the 17th and 18th century, in the works of Thomas Hobbes, Jean-Jacques Rousseau, and John Locke.

procedure capitalizes on people's capacities to think autonomously and to recognize whether particular normative principles are reasonable, such that they are "congruen[t] with our deeper understanding of ourselves and our aspirations" (Rawls, 1980: 519).

Social contract theory has been usefully divided in two variants: *contractarianism* and *contractualism* (Darwall, 2003).<sup>2</sup> The former is traditionally characterized by the writing of Thomas Hobbes (1651), and a contemporary illustration is the work of David Gauthier (1987). The latter is associated with Immanuel Kant (1785), with Thomas Scanlon (1998) as a contemporary representative. Contractarianism lays out a prudential approach to morality and politics, according to which people are self-interested bargainers who see an advantage in negotiating mutually beneficial terms of coexistence with other citizens, since others can both harm them and benefit them. Contractarianism extends the ordinary tit-for-tat logic of contracts to an entire society, which would design state apparatuses to ensure that everyone compromises and benefits from social arrangements. Contractualist theories, by contrast, focus on honouring personal autonomy. They rationalize authority by setting up social institutions and imposing norms that are reasonable and justifiable to the parties bound by them, thus respecting citizens' capacity to self-legislate.

Non-philosophers may not be familiar with the social contract, or may think of it as an antiquated metaphor (such as Thomas Hobbes's *Leviathan's Frontispiece* or John Rawls's "veil of ignorance"). However, while moral and political affairs are surely not guided exclusively by

---

<sup>2</sup> These traditions have been described in various ways: as Hobbesian and Kantian (Hampton, 2006); as "subject-centered justice" and "justice as reciprocity" (Buchanan, 1990); as theories of justice "founded on the notions of impartiality and individual well-being" and as theories of justice "founded on the notions of self-interest and mutual advantage" (Becker, 2005: 9).

one single moral theory (may it be egalitarianism or consequentialism), the influence of ‘contractual’ thinking in public affairs is undeniable. Both strands of the social contract tradition are appealing precisely because they rely on widely shared individual traits that also happen to be important values of the liberal ethos, namely rationality, reasonability, prudence, self-interest, autonomy, as well as shared intuitions that fair social arrangements require reciprocity and impartiality. These values and intuitions permeate our political culture, rules of governance, laws, and other social institutions such as healthcare and education.

## **2. The Oppressive Potential of Contractual Theory**

If contractual intuitions are, indeed, structuring our social and political arrangements, we have cause for concern if they fail in important ways.<sup>3</sup> Notably, contractual thought may not suffice in making moral and political sense of the whole human experience, and the ideals it conveys may even insidiously become a palatable ideological veneer for oppressive social structures. For instance, some have criticized social contract theories for neglecting injustice within the institutions of the family, as well as the unequal treatment of people (mostly women) caring for dependents in and out of the family (Okin, 1989; Kittay, 1999). Liberal approaches, beginning with the fiction of a “[nation] as an association of free and independent equals” (Kittay, 1999: 4), seem to forget that vulnerability and dependency are universal characteristics of human beings to which society must respond in a socially fair way. By contrast, an ethics of care would suggest that properly responding to human vulnerability and interdependency is a more compelling ethical foundation for moral and political theories, as opposed to ideals of reciprocity between

---

<sup>3</sup> As is well known, John Rawls’s influential theory of justice revived the social contract tradition—if not political philosophy at large—in the seventies, but it also garnered an abundance of critiques (Mulhall and Swift, 1996).

independent bargainers (Noddings, 1984; Tronto, 1993). In sum, the neutral language used to describe the subject in contractual theories may conceal differences that justice ought to take into account. In doing so, social contract theories may condone relations of exploitation and domination, such as patriarchy (Pateman, 1988) and white supremacy (Mills, 1997).

The social contract tradition is especially problematic for people with severe and profound intellectual disabilities.<sup>4</sup> This is because at least some false assertions about supposed ‘lesser’ contractual capacities of some groups (e.g. the alleged primitivity of Native Americans), for instance, can be empirically corrected. By contrast, people with severe intellectual disabilities (PSID), may actually lack the capacities that enable one to be a contractor (Nussbaum, 2006: 105). From a contractarian, “scratch my back, I’ll scratch yours” perspective, PSID do not seem to be a threat, and collaborating with them does not seem to be beneficial from a self-concerned and mutually disinterested point of view. In fact, a political community conceived as a joint venture would only welcome “fully cooperating members of society over a complete life” (Rawls, 2001: 18–19). From a contractualist perspective, PSID seem to lack the cognitive capacities required to be rational, reasonable, and autonomous. From both those contractual

---

<sup>4</sup> “Intellectual disability” here refers to the neurodevelopmental disorder defined in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* as “deficits in general mental abilities, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. The deficits result in impairments of adaptive functioning, such that the individual fails to meet standards of personal independence and social responsibility in one or more aspects of daily life, including communication, social participation, academic or occupational functioning, and personal independence at home or in community settings” (American Psychiatric Association, 2013: 31). Severely and profoundly intellectually disabled persons require constant support and are more limited in their ability to participate in their communities. For example, both groups have limited verbal skills that are used primarily to communicate rather than to explain, and the profoundly intellectually disabled person “has very limited understanding of symbolic communication in speech or gesture” and expresses her “desires and emotions largely through nonverbal, non-symbolic communication” (American Psychiatric Association, 2013: 36) Likewise, neither group can “make responsible decisions regarding well-being of self or others” and ongoing support is necessary to allow them to participate in vocational or recreational activities, when such participation is possible (American Psychiatric Association, 2013: 36).

perspectives, PSID may well be the object of care or charity, but would fall short of being full moral and political subjects, with whom it is advantageous to negotiate or who imperatively deserve respect, if respect is understood as a kind of deference toward people's capacity to formulate and pursue a conception of the good life. People unable to reciprocate, cooperate, or devise a conception of the good life may not even be 'persons' in this cooperative political sense, nor in the moral sense of being able to exercise freedom (Rawls, 2001: 18–19). While it is possible to stretch the meaning of 'mutually beneficial' relations, some contractual thinkers therefore admit that PSID fall beyond the realm of justice (Rawls, 2005: 20–21)—and even of morality (Gauthier, 1987: 268)<sup>5</sup>—altogether.

The exclusion of this group of people is detrimental to social contract theories because the adequacy of theories of justice—as Lawrence Becker notes—“is now measured partly by [their] success in dealing with justice for the disabled” (2005: 9). Some innovative contractual thinkers have therefore put forward a variety of arguments to ensure that people with disabilities are protected within social contract theories. It is important to assess how compelling these 'integrationist'<sup>6</sup> arguments are, and whether their conclusions can also justify the inclusion of PSID. Understanding how these theories fail, even when they only partially fail, teaches us about the nature of a “Disabled Contract”, that is, the ableist ideology underlying contractual thought that parties to the contract are trained to not even detect. Like Charles Mills argued, the oppressive dimensions of our social arrangements are naturalized in such a way as to make it epistemologically and affectively difficult for most of us to see that some cognitively impaired

---

<sup>5</sup> Dimock asserts that relationships in which mutual benefits are impossible, “such as those between infants and mothers, or the completely infirm and their caregivers” are “perhaps... beyond the realm of morality” (2008: 285).

<sup>6</sup> I call them 'integrationist' because they propose to integrate severe disability within the domain of contractual justice and morality.

human beings are treated as sub-persons, and that those treatments are not necessarily warranted by the natural order of things.<sup>7</sup>

### **3. Contractual Strategies of Integration**

#### *1. Inclusive Contractarianism: Persons With Severe Intellectual Disabilities Within a Society of Self-Interested Contractors*

The most obvious contractarian argument to bring PSID into our political community is by showing that it is advantageous for other members of the community to include them in their ‘cooperative venture’. This inclusion can be done either directly—by thinking of PSID’s social input differently—or indirectly—by showing that the integration of PSID into the community would indirectly benefit other members, even if PSID were mostly passive beneficiaries.

However, the first kind of (direct) justification seems empirically dubious, and the latter offers a problematically derivative or contingent status to PSID.

Consider the direct justification: following the social model of disability’s key insight that disability is socially constructed,<sup>8</sup> one could argue that PSID are merely ‘unprofitable’ contractors because of current social arrangements that prevent them from being productive and cooperative. After all, many organizations offer vocational activities and training to people with intellectual disabilities. However, if profitability is to be the guiding principle, rather than

---

<sup>7</sup> Mills explains how the “epistemology of ignorance” established by exploitative social contracts “produc[es] the ironic outcome that [the dominating group] will in general be unable to understand the world they themselves have made” (1997: 18).

<sup>8</sup> On the nature and scope of the social model of disability, see e.g., Oliver (1996) and Beaudry (2016).



ensuring that people with intellectual disability have a flourishing life, some disabled people would still not be profitable enough to cooperate with.

We might then point to other ways of contributing to society than through traditional work. For instance, we could say, first, that PSID help to create jobs, such as caretaking professions. Second, we could say that weak and vulnerable people help their community to develop more comprehensive healthcare institutions and new technologies that will benefit all members of the community, as they may all become dependent upon such institutions at some point in their lives. Third, we could say that the vulnerability of PSID and other people with profound disabilities teaches us about our own vulnerability, which can be seen to be a ‘profitable’ insight. Social cooperation is surely not limited to the marketplace and is as varied as the concept of society itself.

However, all these suggestions assume, in one way or another, what needs to be proven. The first argument assumes that we ought to subsidize care work for people with severe disabilities rather than considering the bleak alternative of not doing so, or of letting the costs of such caretaking be assumed by those who are personally attached to PSID. It may also subtly assume that developing a caring self is a more valuable objective than pursuing other preferences or conceptions of the good life.<sup>9</sup>

At worst, it treats PSID just like any other source of work, implying that care work for PSID could be replaced by another kind of work or industry that would achieve similar social results.

---

<sup>9</sup> This is problematic within contractual theories, which endeavor to stay clear of substantive conceptions of the good life when designing social institutions. Their ability to overcome disagreements in doing so—assuming they can—is a major strength of the social contract tradition.

Their status is too contingent to count as having even a kind of ‘contingent importance’—like that of more able contractors if, by ‘importance’ one merely means a Hobbesian understanding of dignity as the “public worth of a [human being]... set on him by the commonwealth” (1839: 76) and marked out by titles and offices.

The same goes for the second argument. If contractarian society found a way to develop scientific knowledge and caring institutions without PSID, then this society could do without these disabled people. Thus, their inclusion relies on an empirical gamble. At best, the view that would make people with disabilities the necessary object of job-creating policies is that there is something more meaningful about engaging in caring roles than about, say, producing yoga mats. This view seems correct, but it assumes the existence of a moral pull prior to, or co-existent with, the self-interests of contracting parties.

The same objection can be made in relation to the third hypothesis, which does not assume a concern for PSID, but only for our (non-severely intellectually disabled) selves. However, the way in which it voices this concern—acknowledging our vulnerable and dependent nature and the importance of this fact on our happiness—seems to imply a social theory of justice that goes beyond the core assumptions of contractarianism. More precisely, the realization that vulnerability and dependence matter so much in our lives would, because of the implications of these rich concepts, imply a normative relational stance. According to such a stance, the goods required to deal with our vulnerability and dependency-related needs cannot be properly socially pursued within a contractarian framework that is founded on self-interest (Kittay, 1999).

## *2. The Capacity to Trust as a Contractual Basis For Robust Moral Status*

In my view, Leslie Francis and Anita Silvers (2005) make the best contractarian case to include PSID among the rank of contributing contractors.

They insist on abandoning the misleading metaphor of the social contract as a tit-for-tat exchange. Instead, they argue that society is more accurately conceived of as a complex net of transactions that fundamentally requires a climate of trust in which any being able to trust or be trustworthy can participate. PSID's contribution to fostering a climate of trust can be said to occur not in spite of their disability and its corollary vulnerability and exploitability, but partly because of it. In their words:

What better way to gain faith in others' willingness to be fair, and thus to be induced to cooperate with them, than by observing their willingness to commit and honor commitments to people unable to proffer material incentives or impose penalties, or by learning of their reputation for doing so? (Francis and Silvers, 2005: 69)

However, trust is a complex phenomenon with cognitive, affective and conative dimensions (Baier, 1991: 111), and can give rise to different meanings. For instance, I 'trust' that a purse would be taken if I left it on the platform of a busy metro station, because I 'trust' in the predictability of people's untrustworthiness. Silvers and Francis use the concept of trust in two different contexts, whereby trust could be reasonably expected to imply different features: the

trust that members of a society want to foster in order for cooperative endeavors to take place, and the trust that people with intellectual disabilities can give or receive. It is essential that these two notions overlap—or are connected in a causal way—if Silvers and Francis’s argument that fostering the latter kind of trust is desirable because fostering the former kind of trust is desirable, is to succeed.

The kind of trust necessary to stabilize social cooperation may have attitudinal and behavioral elements that are different from the ones taking place in relations with PSID. For instance, if trust is taken to mean an expectation that people will behave a certain way, all that should be needed to secure stable cooperation would be inductive confidence in the ability to predict someone’s behavior. This would be a different understanding of trust from the kind that a PSID has towards her caregiver—namely, that the caregiver has her best interests at heart. Certain understandings of trust may have other-regarding or personal features that may not be required to instill trust in a social climate.

One could insist that a trust-infused society would benefit from a more other-regarding understanding of trust. However, we may then wonder if the reasons for interpreting the social contract tradition through this lens are necessarily (or even best) expressed through contractual thought. A more ‘prudential’ conception of trust would better correspond to a mutually beneficial bargaining paradigm and a culture of promoting self-interestedness and individualism. Revisiting contractarianism, detaching it from a bargaining paradigm, or infusing it with other-regarding attitudes or principles may be driven by moral or political pulls that perhaps precede or subordinate contractual ones. Those ethical pulls (like concern for the well-being of vulnerable

people) are certainly worth pursuing. My point is only that theorizing them as ‘contractual’ may mischaracterize them and fail to give them their due importance when they clash with traditional contractual pulls (such as ensuring reciprocity, even when reciprocal relations are understood in a collectivist, multi-partite way).

These tensions tend to confirm that contractarian theories have difficulty genuinely accommodating people with particularly severe disabilities. Let me now turn to two categories of contractualist revisionist strategies.

### *3. People with Severe Intellectual Disabilities as Active Citizens*

Contractualist thinkers have put forward at least five strategies to conceptualize PSID as active participants of the social contract. These focus on: (1) PSID’s talents; (2) their capacity to have a conception of the good; (3) their ability to engage with others or play a part in society; (4) their potential to develop (further) contractual capacities; and (5) their need for assistance by ‘collaborators’ or ‘cognitive prostheses’ in the nurturing and exercising of these capacities.

These strategies attempt to ‘normalize’ PSID by modifying the benchmark requirements for counting as a contractor, or by arguing that PSID do meet these requirements, despite appearances to the contrary.

For instance, Anita Silvers proposes a dichotomy between people with disabilities (PWD) as vulnerable, dependent and burdensome and PWD as potential social participants. The operational

goals of justice associated with the former conception are distribution, separation, special treatments, and accommodations, whereas the operational goals associated with the latter conception are integration, similar treatment, and neutrality (Sillers, 1998; 2009).

The conceptual shift that Silvers makes is part of her contractualist-integrationist strategy of conceptualizing PWD as active contractors and citizens as opposed to passive beneficiaries. On her account, focusing on redistribution at a later stage of the social contract procedures (as well as at a later stage of social cooperation and production) has inherently exclusivist consequences. Comparatively, by emphasizing social integration instead of accommodation or compensation, she characterizes disabled people as active participants or contributors, bringing them closer to the model of active contractors.

Although Silvers criticizes cases of wrongful normalization, such as capping PWD's social support relative to the level of 'average talents' or to the lower threshold of a basic minimum, her own characterization of PWD has normalizing features. In some respects, forcing PWD into the traditional liberal model of the person (or the contractualist model of the social member) risks denying the fact that central aspects of certain PWD's lives—and of the relationships they have with non-disabled people—sometimes have as much, if not more, to do with caring for them as dependents as with enabling their participation and expression of talents to contribute to the common good. If it does not broaden its reach, Silvers' "justice for talents" risks excluding a category of severely disabled individuals for whom available accommodation measures will not suffice.

A response to this objection may be to limit the reach of such integrationist contractual theories to people with less severe disabilities, and make PSID a special case. This response would, however, concede the theory's inability to justify the robust moral status that some of the most vulnerable human beings would have within our communities.

It remains that many arguments offered to include people with less severe intellectual disabilities amongst the ranks of contractors are quite convincing. These arguments lower the cognitive standards required to count as 'autonomous' or to cooperate with others, or suggest ways of supporting PSID in developing and pursuing a conception of the good life. They also debunk the myth that autonomy implies independency (Francis and Silvers, 2007; 2010; Francis, 2009; Southwood, 2010; Silvers 1998; 2009; Hartley, 2009).

These integrationist strategies are extremely meritorious. Yet, they appear to share an unspoken moral background. They assume that PSID are already members of society, even though they all rely on PSID's supported abilities or assets as the requirements for membership, either as a contractor or an active citizen. Accommodating or supportive social measures seem warranted on the basis that PSID already belong to our society and are entitled to equal consideration. This implied or assumed membership seems to be grounded in a kind of concern for PSID which cannot be explained on contractual terms. If we analyze contractualist and contractarian strategies without taking this concern into account, they begin to look like conceptual stretches or dubious empirical wagers. No matter how severe a person's disability, revisionist contractualist authors seem to assume that we must give her some concern as a person—that is, as a member of our society to whom robust duties are owed. In this sense, contractualist and

contractarian thinkers may find it natural to frame PSID not only as persons, but also as contractors. Otherwise they must concede that the normative concept of ‘person’ is not exhausted by that of a ‘contractor’. Doing so without abandoning a contractual stance is part of the next strategy.

#### *4. People with Severe Intellectual Disabilities as Passive Citizens*

If PSID cannot be active contractors, the next best thing integrationist contractual thinkers can do is to argue that one need not be a contractor to benefit from the social contract.

This is not as obvious as it seems, as parties to, and beneficiaries of, the social contract are often conflated. Under the contractualist/Kantian tradition, the conflation is best understood by considering Kant’s theory that only moral legislators—those able to enact the moral law—are owed non-derivative respect, i.e. are subjects of this moral law (2012: 42–43). To put this another way, only respecters need be respected. A similar idea is found in Rawls’s theory of justice when he says that only those able to “give justice are owed justice” (1999: 446). The basic contractualist logic behind this conflation is that the only beings worthy of intrinsic respect are persons *qua* enactors of the rational law. What is worth respecting in these persons is their embodiment of the moral law: their rational, autonomous self. Respect of autonomy is so central to this interpretation of the contractualist tradition that nothing else warrants granting a strong moral status when we think in terms of the status that members of a moral and political community have.<sup>10</sup>

---

<sup>10</sup> Martha Nussbaum talks of a ‘Kantian split’ between Kantian reasonable and rational persons and “everything else in nature” (2006: 13).



Nonetheless, there are a few strategies to secure PSID's status within a community in more indirect ways. The most promising of these arguments assimilate PSID to full contractors. In other words, PSID do not have what it takes to participate in traditional versions of the social contract as active subjects, but they are meaningfully similar enough to active subjects so as to share their moral and political status.

A common version of this argument would ground moral status in the fact that a being belongs to a kind or a *genus*—such as the human species—whose members normally develop capacities that meet contractual expectations. However, this variant of human exceptionalism does not clearly belong to the social contract tradition, which makes use of specific cognitive capacities to justify personhood, rather than mere humanity.

A Kantian version of this strategy would connect autonomous beings with non-autonomous beings by suggesting that autonomous beings would legislate over human needs—needs that are shared by people with disabilities, and even some animals. As a result, contractors would issue rules that would apply to any entity with those needs. What is more, contractors, as 'valuers' and 'value-givers', could grant intrinsic value to beings possessing those needs. In other words, being a value-giver does not necessarily make us more valuable. We can give as normatively stringent a value to non-rational beings as we give ourselves and other rational agents. This is coherent if we hold the view that we give value to entities rather than detect it in them.<sup>11</sup>

---

<sup>11</sup> Consider, *mutatis mutandis*, Korsgaard (2004).

This approach explains why PSID would be contractually given a robust kind of value, but it does not clearly delineate their moral and political status and the set of rights they would enjoy, unless we assume that all beings sharing our ‘natural good’ will have such status and rights, provide an account of the relative normative stringency of different moral statuses, or give an account of why and how certain intrinsically valuable beings make certain demands upon certain moral agents. Although I can imagine some non-contractual criteria to do so, I cannot think of a contractual criterion that would satisfactorily delineate what is owed to PSID and distinguish it from what is owed to other living entities. This argument nonetheless succeeds in showing that Kantians can endorse the idea that beings partaking of human goods are intrinsically valuable. This would make PSID important ‘like us’ instead of important ‘for us’.

Other integrationist arguments for the passive inclusion of PWD on the contractualist side have been offered within a Rawlsian framework. The most obvious argument would be to extend Rawls’s “veil of ignorance”<sup>12</sup> so that contractors would not know whether they might themselves be PSID and may therefore want to make provisions for the benefit of PSID (1999). However, on a Rawlsian account, the veil is justified because it expresses the moral claim that certain facts about people should not matter when setting up a system of distributive justice—their skin color or religion, for instance. While parties behind the veil of ignorance can make provisions for the worst that could happen to the people they represent, they are limited by these parameters—that is, what could happen, precisely to the people they represent. These represented people are defined as fully cooperating throughout a lifetime which excludes people so severely disabled that they may not cooperate in such a way, such as the PSID. To circumvent this constraint

---

<sup>12</sup> Which keeps parties to the social contract ignorant of their distinctive personal and social traits and talents, like gender and intelligence, and of their specific conceptions of the good (Rawls, 1999: 11,118–123).

without abandoning Rawlsian commitments to contractualist ideals is no small challenge, considering that the main idea behind justice as fairness is to secure conditions for a “mutually advantageous cooperative venture” (Rawls, 1999: 96).

Most theorists tinkering with, or interpreting, a Rawlsian framework to integrate PSID assume some kind of bond between traditional contractors and their fellow PSID. For instance, Adam Cureton suggests that Rawls’s theory of distributive justice is only a “limited project”, but that this limited project rests on a Rawlsian framework that can be extended to the disabled. He suggests asking parties to choose principles of justice that would apply to “a society that also includes radically and moderately cognitively impaired people” (Cureton, 2008: §7). Actual human societies do, after all, comprise many permanently dependent and non-autonomous people. That said, it is not clear why the fact that PSID are born in every society would warrant that they would come within the purview of contractual justice. The idea that a “human bond” would be normatively compelling may be intuitive, but it is not (at least evidently) a distinctively contractualist assumption. Another Rawlsian argument is Cynthia Stark’s suggestion that PSID deserve what I call ‘passive citizenship’ because “being a non-contributor and simply having needs, especially unusual needs, is also a reason for being owed a particular share of the social product” (2007: 135). This need-based argument is reminiscent of the previously mentioned Kantian argument. Such arguments do not justify the placement of some sort of ‘Need Principle’ within the contractualist framework, so much as they technically allow it. This lack of justification makes this allowance seem arbitrary or *ad hoc*. What accomplishes the real justificatory work—may it be benevolence, care, or duties toward humanity—seem to lie beyond contractual theory.

These attempts to explain the robust moral status PSID have as passive citizens of our communities not only ultimately rely on non-Rawlsian or non-contractualist values. They also risk being too indeterminate or not sufficiently fleshed out to provide PSID and other PWD with the care they actually need. This is partly because their needs risk being assimilated to the needs of non-disabled contractors.

Contractarian arguments to integrate PSID in our communities do not fare better. PSID and other PWD could be given some guest or honorary status within our community, depending on what those who love them (i.e. family members or others holding humanist beliefs) demand from their society. This would make their status rather contingent, and it also reduces their worth to being a contractor's preference, rather than an independent source of moral and political obligation.

#### **4. Beyond Contractual Relations**

I have briefly surveyed some strategies that social contract theorists could adopt to either include PSID specifically (and PWD more generally) in the category of full subjects of justice, or to confer a robust moral status upon them:

1. Observing that they do possess the requisite contracting capacities, contrary to what has been assumed. This takes the form of an empirical argument that focuses either on PSID's actual capacities, or on the social structures that prevent or fail to facilitate people with disabilities from exercising the necessary contracting capacities.

2. More clearly explaining, reinterpreting, broadening, or conceptually modifying the nature of these contracting capacities—or the values underlying them—so as to explain why people with profound mental disabilities actually possess these capacities.
3. Conceding that PSID do not have the required capacities to contract, but maintaining that there are other reasons to justify their representation in contractual procedures. The argument is that these reasons support a case for conferring a robust moral status upon this group and comply with contractual assumptions inherent to these contracting procedures.

Those integrationist strategies suggest that social contract theory has the potential to justify a robust moral status and meaningful social integration for many people with cognitive impairments.

However, these strategies have two main shortcomings: (1) they cannot convincingly ground a robust moral status for PSID; and (2) they attempt to do so at the cost of making this status merely derivative or contingent. Moreover, their integrationist drive points to an unspoken foundation which may be profitably developed using non-contractual arguments and ideals (such as caring, concern, hospitality, or a variant of human exceptionalism).

Let me conclude by examining the implications of contractual theories' failures to satisfactorily justify the robust moral status of PSID.

A possible implication is that PSID should be excluded from our moral and political communities. Widespread intuitions about the wrongness of eliminating vulnerable, disabled people would tend to turn this implication into a *reductio ad absurdum* counting against contractual theory. I have not been concerned here with arguing that PSID *ought* to enjoy, or do have, a robust moral status. A minority of revisionist theorists would endorse such a suggestion (McMahan, 2008; Singer, 2011),<sup>13</sup> but responding to their arguments must wait for another time. Most contractual thinkers, like Rawls, are uncomfortable with this implication, and concede that disability poses a problem that contractual thought must eventually deal with. In his words:

How deep a fault [the exclusion of fully cooperating members of society from the realm of justice] is must wait until the case itself can be examined. Perhaps we simply lack the ingenuity to see how the extension may proceed. In any case, we should not expect justice as fairness, or any account of justice, to cover all cases of right and wrong.

Political justice needs always to be complemented by other virtues (2005: 21).

Rawls's comment also explains why the social contract tradition should not be jettisoned. Contractual justice is far from a broken idea; it is simply a narrow one intended to deal with a limited variety of interpersonal relations. The idea is so intuitively compelling, so traditionally important in philosophy, and such a natural fit for a capitalist bargaining ethos, that it has

---

<sup>13</sup> Such thinkers conclude that human beings with significantly lower than average cognitive capacities have lower moral statuses, based on the supposed lesser value of their lives. They reject a kind of human exceptionalism, according to which being a member of the human species would suffice to justify granting a robust moral status upon an individual. They are committed to inter-species impartiality and propose that moral status should supervene on traits, capacities, or interests that should matter regardless of the entity (human or non-human) in which they occur. We find this commitment in Singer's "principle of equal consideration of interests" (2011: 20) and in James Rachels' commitment to "moral individualism" (1990: 173), endorsed by Jeff McMahan (2005: 354).

unsurprisingly overreached and yet fallen short of meeting the demands of disability policy.

Other moral and political theories could better guide our never-ending social endeavour to conceptualize bodies and minds that defy norms commonly used by scholars and policymakers.

My conclusions do not, therefore, encourage me to reject social contract theory altogether, nor suggest that an alternative theory to explain our duties toward PSID (like care ethics) should be expanded to the whole of society (like some care ethicists have suggested). On the contrary, my findings only urge different moral theories to stay within the boundaries of the relationships, people, and circumstances to which they apply, and to refrain from claiming that they cover all morality. These theories must also avoid expelling other normative sources to its ‘margins’ into the realm of the supererogatory and (non-moral) emotions.

This claim strikes me as the most plausible and constructive way of criticizing the social contract tradition in terms of its failure to provide a complete and satisfactory account of PSID’s moral and political status.

The argument that it points to would require: (1) defending a relational or role-based theory of morality; and (2) defending the position that the moral relationships that our community has with PSID are not primarily contractual, but are instead (at first glance) fiduciary or caring relationships. Such a pluralist account of what is owed to human beings with varying degrees of autonomy, dependency, and needs would also have to (3) provide a principled way to adjudicate between competing claims or values that derive from these relationships.

To be sure, a pluralist relational account would face daunting objections. First, if drives to endorse a role or to participate in a relation would be partially explained by emotions toward others, it may grant undue moral weight to psychological phenomena, such as affective dispositions or responses. Second, even if we allow that the psychological facts central to fiduciary relations are morally relevant, they may not be relevant to justice. Third, pluralist accounts seem to make it hard to adjudicate between competing moral pulls experienced by a moral agent wearing different ‘moral hats’. For this reason, some may be tempted to explain the value of these fiduciary relations in the kind of reductionist way that a pluralist approach tries to resist, for instance by reducing their value to ‘quality of life’ assessments or autonomy.

Yet, I contend that such conceptual challenges are well worth addressing and that the complexity they raise is part and parcel of morality. Reductionist approaches (contractual or others) do not solve morality’s messiness, but rather sweep it under the rug.

Importantly the failure of social contract theory should not be interpreted as a failure affecting only a small segment of human populations. To cite Raymond Geuss’s critique of other shortcomings of contractual theory, overlooking the phenomenal reality of PSID “is not a tiny mole that serves as a beauty spot to set off the radiance of the rest of the face, but the epidermal sign of a lethal tumour” (2008: 94). People with the most severe disabilities may contribute to our understanding of human vulnerability and of the importance of caring relations in human life. They may lighten our existential burdens by playing their role, even though the roles they have been assigned to play in our ‘human comedy’ are often not those of bargainers, soldiers, or moral philosophers, and, further, even though their ‘contribution’ hardly makes sense in the



contractual idiom of mutual advantage or mutual justifiability. Reducing the morality of human relations to their contractual aspects is a mistake, though it is a promising political strategy of procedural reconciliation between disagreeing strangers.

A bolder conclusion, and a less friendly one to the social contract tradition, would take its cue from disability studies' cultural critiques by arguing that the social contract tradition is not only incomplete, but also inevitably part of the problem, insofar as any discourse that can be highjacked by a dominating group will serve to reassert their superiority.

While I do not reject the social contract tradition wholesale, I agree with many theorists that the myth of the autonomous, independent, fully-cooperating subject who lies at the heart of the social contract fails to take into account the reality of vulnerability and dependency that characterizes the human condition. The social contract tradition is also inevitably complicit in the construction of the 'disabled subject' and lacks the conceptual resources to self-criticize in that regard. The philosophical discourses asking what is owed to PSID are simultaneously narratives that construct PSID and assert specific personal characteristics (e.g. a sense of justice) and social relations (e.g. mutually-beneficial bargaining) as natural starting points. If we took a different starting point—for instance, the social model of disability—we would not ask “what is owed to people with disabilities as a matter of fairness?” but rather, “what are the elements that socially disable them in the first place?” A ‘systemic turn’ heralded by political theorists like Iris Marion Young would rather seek to redress the roots, not only the symptoms, of injustice (1990; 2011). This systemic turn gives disability theorists the agenda of detecting structurally-oppressive

dimensions of societies, including the very problems constructed by liberals intending to redress them with the best of intentions.

Yet, the same practical concern with oppressive uses of theoretical discourses might warrant that we preserve integrationist contractual arguments. This is because contractual values like reciprocity, impartiality, mutuality, equality, etc. are politically powerful within liberal rhetoric. Telling a story according to which we owe, as a matter of justice and morality, important duties to PWD may be more convincing if we manage to show how ‘the disabled’ are, in fact, a category of differently embodied people that were conceptualized from the get-go to be justifiably disempowered and dispossessed. This is so because repairing society’s fault will likely seem to be a more pressing, a less optional, and a more morally and politically stringent duty than helping those in need.<sup>14</sup> These are practical and cultural considerations that disability theorists must take into account. A specific political framework to manage ‘disability’ may be more morally accurate in the abstract, but not as practically efficient as an imperfect fiction. The

---

<sup>14</sup> Consider, for instance, that we must alleviate extreme poverty in other countries—not just because some human beings have dire needs, but because we are indirectly responsible for their misery. A utilitarian would find an argument urging to move \$10 from the hands of a privileged first-world person to the hands of someone who is extremely poor as morally pressing on consequentialist grounds (as the poor hands would maximize the utility of the \$10). However, the notion that repairing a harmful fault is less optional than maximizing a good outcome to have-nots may still have greater appeal in various political cultures. This is an empirical and polemic issue; the reader may test her intuitions on this by contrasting e.g., Unger (1996) and Young (2006). At any rate, it is a common feature of tort law in common law jurisdictions and of *droit des délits* in civil law jurisdictions to more easily hold people responsible for the harm they cause others rather than for the good they (harmfully) do not provide to them. Some may also point out how potentially demanding principles of beneficence, in bioethics, are sometimes taken to be less stringent than more demanding principles of nonmaleficence (though whether they should is controversial). Since the caveat in the last paragraph of this essay is concerned with political, social, and rhetorical strategies, the point is not to find out which position is closer to the moral truth, but rather which one is most likely to produce a desirable outcome, according to the disability community’s political agenda(s). This opportunistic use of theories and discourses in the arena of public policies surely raise other issues of ethics or coherence, as does the notion of a ‘disability community’ as a public agent. My point is only that disability activists and theorists have already made (and acted on) the argument I am making—about the weight of certain notions within certain political cultures, and that their experiential wisdom should be given consideration alongside idealized arguments when transferring theoretical arguments into the public sphere, all things being equal. Consider, e.g., Oliver (2013).

social model of disability, still immensely politically important in spite of its theoretical imperfections, is a worthy illustration of this.

## References

- American Psychiatric Association (2013). *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*. 5<sup>th</sup> ed., Arlington, VA: American Psychiatric Association.
- Baier, A.C. (1991). Trust. Tanner Lectures on Human Values, Princeton University, March 6-8. Online. <tannerlectures.utah.edu/\_documents/a-to-z/b/baier92.pdf>.
- Beaudry, J.S. (2016). Beyond (Models of) Disability?. *The Journal of Medicine and Philosophy*, 41(2), 210-229.
- Becker, L.C. (2005). Reciprocity, Justice, and Disability. *Ethics*, 116(1), 9-39.
- Buchanan, A. (1990). Justice as Reciprocity versus Subject-Centered Justice. *Philosophy and Public Affairs*, 19(3), 227-252.
- Cureton, A. (2008). A Rawlsian Perspective on Justice for the Disabled. *Essays in Philosophy*, 9(1), 55-76.
- Darwall, S. (Ed.) (2003). *Contractarianism / Contractualism*. Malden, MA: Blackwell.
- Dimock, S. (2008). Why All Feminists Should Be Contractarians. *Dialogue: Canadian Philosophical Review*, 47(2), 273-290.
- Francis, L.P. (2009). Understanding Autonomy in Light of Intellectual Disability. In K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage* (pp. 200-215). Oxford: Oxford University Press.
- Francis, L.P. and A. Silvers (2005). Justice Through Trust: Disability and the “Outlier Problem” in Social Contract Theory. *Ethics*, 116(1), 40-76.

- Francis, L.P. and A. Silvers (2007). Liberalism and Individually Scripted Ideas of the Good: Meeting the Challenge of Dependent Agency. *Social Theory and Practice*, 33(2), 311-334.
- Francis, L.P. and A. Silvers (2010). Thinking About the Good: Reconfiguring Liberal Metaphysics (or Not) for People with Cognitive Disabilities. In E.F. Kittay and L. Carlson (Eds.), *Cognitive Disability and its Challenge to Moral Philosophy* (pp. 237-259). Malden, MA: Wiley-Blackwell.
- Gauthier, D. (1987). *Morals by Agreement*. Oxford: Oxford University Press.
- Geuss, R. (2008). *Philosophy and Real Politics*. Princeton: Princeton University Press.
- Hampton, J. (2006). *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (D. Farnham, Ed.). New York: Cambridge University Press.
- Hartley, C. (2009). Justice for the Disabled: A Contractualist Approach. *Journal of Social Philosophy*, 40(1), 17-36.
- Hobbes, T. (1839). *The English Works of Thomas Hobbes of Malmesbury, Vol 3: Leviathan*. (W. Molesworth, Ed.). London: John Bohn, 1<sup>st</sup> ed.: 1651.
- Kant, I. (1996). *Kant: The Metaphysics of Morals* (M. Gregor, Ed.). Cambridge: Cambridge University Press, 1<sup>st</sup> ed.: 1797.
- Kant, I. (2012). *Kant: Groundwork of the Metaphysics of Morals* (M. Gregor and J. Timmermann, Eds.). Cambridge: Cambridge University Press, 1<sup>st</sup> ed.: 1785.
- Kittay, E.F. (1999). *Love's Labor: Essays on Women, Equality and Dependency*. New York: Routledge.

Korsgaard, C.M. (2004). *Fellow Creatures: Kantian Ethics and Our Duties to Animals*. Tanner Lectures on Human Values, University of Michigan, February 6. Online.

<tannerlectures.utah.edu/\_documents/a-to-z/k/korsgaard\_2005.pdf>.

McMahan, J. (2005). Our Fellow Creatures. *Journal of Ethics*, 9(3-4), 353-380.

McMahan, J. (2008). Challenges to Human Equality. *Journal of Ethics*, 12(1), 81-104.

Mills, C.W. (1997). *The Racial Contract*. Ithaca: Cornell University Press.

Mulhall, S., and A. Swift (1996). *Liberals and Communitarians*. 2<sup>nd</sup> ed., Oxford: Wiley-Blackwell, 1<sup>st</sup> ed.: 1992.

Noddings, N. (1984). *Caring: A Feminine Approach to Ethics & Moral Education*. Berkeley: University of California Press.

Nussbaum, M.C. (2006). *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge: Harvard University Press.

Okin, S.M. (1989). *Justice, Gender, and the Family*. New York: Basic Books.

Oliver, M. (1996). *Understanding Disability: From Theory to Practice*. New York: Palgrave Macmillan.

Oliver, M. (2013). The Social Model of Disability: Thirty Years On. *Disability and Society*, 28(7), 1024-1026.

Pateman, C. (1988). *The Sexual Contract*. Stanford: Stanford University Press.

Plato, (1937). Crito. In B. Jowett (Trans.), *The Dialogues of Plato*. 3<sup>rd</sup> ed., New York: Random House, 1<sup>st</sup> ed.: 1871.

Rachels, J. (1990). *Created From Animals: The Moral Implications of Darwinism*. Oxford: Oxford University Press.

- Rawls, J. (1980). Kantian Constructivism in Moral Theory. *Journal of Philosophy*, 77(9), 515-572.
- Rawls, J. (1999). *A Theory of Justice*. Revised ed., Cambridge: Harvard University Press, 1<sup>st</sup> ed.: 1971.
- Rawls, J. (2001). *Justice as Fairness: A Restatement* (E. Kelly, Ed.). Cambridge: Harvard University Press.
- Rawls, J. (2005). *Political Liberalism*. Expanded ed., New York: Columbia University Press, 1<sup>st</sup> ed.: 1993.
- Scanlon, T.M. (1998). *What We Owe to Each Other*. Cambridge: Harvard University Press.
- Silvers, A. (1998). Formal Justice. In A. Silvers, D. Wasserman and M.B. Mahowald (Eds.), *Disability, Difference, Discrimination* (pp. 13-145). Lanham, MD: Rowman & Littlefield.
- Silvers, A. (2009). No Talent? Beyond the Worst Off! A Diverse Theory of Justice for Disability. In K. Brownlee and A. Cureton (Eds.), *Disability and Disadvantage* (pp. 163-199). Oxford: Oxford University Press.
- Singer, P. (2011). *Practical Ethics*. 3<sup>rd</sup> ed, New York: Cambridge University Press, 1<sup>st</sup> ed.: 1980.
- Southwood, N. (2010). *Contractualism and the Foundations of Morality*. Oxford: Oxford University Press.
- Stark, C.A. (2007). How to Include the Severely Disabled in a Contractarian Theory of Justice. *Journal of Political Philosophy*, 15(2), 127-145.
- Tronto, J. (1993). *Moral Boundaries: A Political Argument for an Ethic of Care*. New York: Routledge.

Unger, P. (1996). *Living High and Letting Die: Our Illusion of Innocence*. New York: Oxford University Press.

Young, I.M. (1990). *Justice and the Politics of Difference*. Princeton: Princeton University Press.

Young, I.M. (2006). Responsibility and Global Justice: A Social Connection Model. *Social Philosophy and Policy*, 23(1), 102-130.

Young, I.M. (2011). *Responsibility for Justice*. New York: Oxford University Press.