

# Justice through Trust: Disability and the “Outlier Problem” in Social Contract Theory\*

*Anita Silvers and Leslie Pickering Francis*

## I. SOCIAL CONTRACT THEORY AND ITS DISCONTENTS

During the past quarter century, commentators concerned about justice for women and racial minorities have argued that social contract theory is inherently flawed. Far from offering a firm foundation on which to build comprehensive concurrence about justice, these critics contend, the contract model enables mutual agreement only within the boundaries of an “in-group/out-group” frame.<sup>1</sup> Pateman, for example, has argued that the contract model reaches only a restrictive mutuality that privileges men and denies recognition to women.<sup>2</sup> Mills has similarly claimed that contract theory positions African Americans at a disadvan-

\* Silvers gave a brief version of this article at the American Philosophical Association Pacific Division meeting in San Francisco (March 2003) during a panel on Martha Nussbaum’s Tanner lectures. We then wrote “(Re)modeling Social Contract Theory: Resolving the ‘Outlier’ Problem with Trusteeship and Trust” for the Law and Society Association meeting (Pittsburgh, June 2003). “Justice through Trust” expands on these presentations, which were both stimulated and informed by Nussbaum’s Tanner lectures. We are very grateful to Carlos Ball and Jonathan Wolff for commenting on versions of “Justice through Trust” and for the enormously helpful advice received from participants at the workshop on disability conducted by Christopher Wellman and Andrew Cohen at the Jean Beer Blumenfeld Center for Ethics at Georgia State University in May 2004. We are grateful to Martha Nussbaum for her clear, powerful, and innovative framing of challenges that disability poses for political theory. Special thanks are due to Larry Becker for patient readings, penetrating observations, and productive suggestions that carried us through several drafts.

1. For example, Patricia Williams addresses consequences of the “in-group/out-group” frame in “On Being the Object of Property,” in her *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991).

2. Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1989).

*Ethics* 116 (October 2005): 40–76

© 2005 by The University of Chicago. All rights reserved. 0014-1704/2005/11601-0005\$10.00

tage where justice is concerned.<sup>3</sup> These authors contend that the social contract model places “outliers,” either individually or collectively, in “out-groups” beyond the reach of equal justice.

More recent versions of the “outlier problem” charge that social contract theory stands between people with disabilities and justice.<sup>4</sup> The complaint is that social contract theory, understood as a process of bargaining for mutual advantage, is so flawed that it cannot do justice to persons with disabilities. The faults are intrinsic and not repairable from within social contract theory itself. Injustices that disabled people suffer—and that impinge on their intimates, allies, and advocates—may not even be acknowledged in principle unless social contract theory is replaced. Prompted by such concerns, social contract critics have advanced an ethics of care (Kittay), or a capability theory of the good (Nussbaum), as preferable to social contract theory because more responsive to the situation of the disabled.<sup>5</sup>

This line of objection is understandable and important, for it could reveal an unfortunate exclusivity in social contract theory. To learn whether the “outlier problem” does discover such narrowness, we begin by explaining why understanding the initial interaction between contractors as a bargaining process opens social contract theory to the charge of abandoning “outliers.” The idea that justice is mainly a matter of distributing benefits produced by mutual cooperation among those capable of contributing exacerbates the difficulty.<sup>6</sup> Justice so construed seems aimed at (re)allocating resources in a manner that is sufficiently

3. Charles Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997). And see also Ann Cudd, “Contractarianism,” in *The Stanford Encyclopedia of Philosophy*, online at <http://plato.stanford.edu/>.

4. Cudd, “Contractarianism.”

5. Eva Kittay, *Love’s Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999), and “When Care Is Just and Justice Is Caring: The Case of the Care for the Mentally Retarded,” *Public Culture* 13 (2001): 557–79. See Martha Nussbaum’s “Beyond the Social Contract: Toward Global Justice,” Tanner Lectures in Human Values, Australian National University, Canberra, November 12–13, 2002, full text at <http://philruss.anu.edu.au/tanner/>. Nussbaum’s incisive analysis of why contemporary social contract theory excludes the disabled inspired the present article.

6. Many contemporary philosophical discussions of justice do not venture beyond distributive justice. But narrowing justice to the distribution of resources is a luxury reserved to “in-groups” already granted full procedural inclusion in society. *Tennessee v. Lane*, 541 U.S. 509 (2004) illustrates why “outliers” may wish to seek procedural justice first. Plaintiffs complained about their inability to access Tennessee courtrooms. One wheelchair user was jailed when he failed to crawl back up the stairs after a recess, while county officials stood by laughing. Another, also unable to reach a courtroom upstairs, lost a civil suit brought against him by a neighbor. The exclusion of wheelchair users from access to the courts is a fundamental injustice but not initially a matter of resource distribution. However, not everyone sees denial of access to the justice system as a prima facie injustice, as Justice Scalia made clear by his statements during oral argument.

agreeable to the parties who produced them to prolong their mutual cooperation. This picture divides “in-groups,” people who participate in cooperatively productive activities, from “outliers,” people who do not. If justice flows at all across the line from the former to the latter, it may be only a trickle when it arrives.

The line marks the exclusion from which women and racial minorities have been said to suffer. Falsehoods about biological inferiority have fueled biased beliefs about their limited capacities to bargain strategically or to reciprocate contractual benefits. Of course, rejecting the erroneous assumptions that formerly limited opportunities for women and racial minorities can bring us to recognize that they too may be bargainers. The “outlier problem” thus may be resolved in their cases by assimilating them to successful bargainers, possibly compensated for past bias to permit bargaining on a more equal basis (although assimilation may shroud properties they value in themselves).

Not so the disabled, whose differences seem to defy assimilation.<sup>7</sup> In Section III, consequently, we explore how construing the social contract as a bargaining process has been thought to distance disabled people—either collectively or as individuals whose differences impede or preclude bargaining—from contract-based justice. More specifically, in Sections IV, V, and VI, we consider Nussbaum’s challenging arguments that the history of social contract theory, and its core moral and political ideas, exclude the disabled from the contracting process that gives rise to justice.

To rectify these problems, Nussbaum would replace contract theory’s emphasis on procedural justice with goals for distribution of the good. To the contrary, we argue in Section VII, contract theory by itself does not constitute disabled people as “outliers.” The problem is the imposition of a successful bargainer paradigm on contracting. But social contract theory need not embrace the bargainer paradigm.<sup>8</sup> Indeed,

7. See Anita Silvers, David Wasserman, and Mary Mahowald, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Lanham, Md.: Rowman & Littlefield, 1998).

8. On the contemporary legal understanding of contracts, it may be hard to imagine a contract that has been forged without bargaining. Consideration, required in all U.S. states except Louisiana, is at the core of the bargaining model. On pre-nineteenth-century understandings, however, exchange of consideration is not the only cause or reason parties may come together in contractual agreement. A contract may grow out of agreement for which there is sufficient cause but not necessarily reciprocal consideration, as in traditional social contract theory. Unlike the nineteenth-century requirement that each contractor receive something in exchange (consideration), the older, broader notion is more tolerant of contractors agreeing to act mutually because of other-regarding reasons. A strength of the new idea of a contract, which requires mutual consideration, is to protect excessively other-regarding individuals from the enforcement of arrangements that categorically dismiss their own interest. A strength of the older version, which requires only cause, is to

this interpretation bears the mark of a comparatively recent, nineteenth-century legal theory of contracting, one that has continued to be influential but has also been the subject of ongoing criticism.<sup>9</sup> Nor must philosophical understanding of the social contract, which is supposed to be prior to and foundational for the state, conform to prevailing definitions of a legally enforceable contract.

Nor need the human interaction from which the social contract is supposed to emerge be thought of narrowly as a process of bargaining. The broader conception we introduce, akin to Hampton's reading of the social contract in terms of social conventions,<sup>10</sup> sees social contracting as more like a project for engendering trust than a bargaining session. Principles of justice educed with an eye toward promoting a trust culture and a climate of trust may not differ dramatically from the ones idealized strategic bargainers would adopt. Yet their source is not an exclusionary "in-group" process.

In pursuit of these themes, in Section VIII we explore how developing consensus through mutual trust is not like reaching such agreement through bargaining. Disabled people who cannot bargain still can trust. And they can play a central role, not merely a peripheral or partial one, in strengthening a climate of trust from which covenants for cooperation come.<sup>11</sup> In Section IX, we address the political progressiveness

---

enable other-regarding individuals to render non-self-interested arrangements systematic and reliable.

9. State control of the terms of contracting took hold around 1870. See Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003), 118. To guard especially vulnerable individuals against exploitative contractual arrangements and thereby to further the state's interest in protecting them, the law typically sets standards for participation in the contracting process and for the content of the agreement itself. Protecting disabled people (and others who are vulnerable as well) from being duped or coerced into contracting by stipulating standards that exempt them is consistent with the well-documented nineteenth-century movement that removed disabled people from civic and commercial participation by institutionalizing them for their own good. As with other paternalistic provisions of the law, such exemptions result in a complex mix of benefits and harms. We should notice, however, that this legal definition is of "contractual activity [that] is pursued within a framework which is largely created, and the boundaries of which are largely defined, by the state" (*ibid.*, 125). We surely need not assume that a legal definition of contract designed by the state to serve its purposes exhausts ideas of contracting that may be invoked in our moral and political understanding of the foundation of the state. And, in any case, a good deal of recent legal scholarship on contract law aims at broadening the idea of contracting.

10. Hampton regarded this kind of contract as a matter of the parties expressing tacit or implicit consent through discretionary participation in convention-guided social or political interactions rather than through explicit and direct exchange of reciprocal benefits. See Jean Hampton, "Contract and Consent," in *A Companion to Contemporary Political Philosophy*, ed. Robert Goodin and Philip Pettit (Oxford: Blackwell, 1995), 379–93, 383.

11. A climate of trust supports people's depending on the economic, political, or legal system and therefore contributes to social stability.

that contracting through cultivating trust promises disabled people and other outliers.

A central theme of a trust culture, as distinct from a bargaining culture, is that no one should have to be an “outlier.”<sup>12</sup> In a trust culture, unlike in a bargaining culture, disabled and nondisabled people can be equally important participants in, and equally important beneficiaries of, the systematically fair treatment that is the goal of social contracting. Further, as Baier observes, “A system—economic, legal, or political—requires trust. . . . Without trust it cannot stimulate supportive activities in situations of uncertainty or risk. . . . Where the societal and institutional conditions of trust are met, there will be willingness to take risks to support the structure and also to venture to try to improve it.”<sup>13</sup> Contracting with trust thus seems to be a promising way of pursuing progressive justice for “outliers,” including disabled people.

Central to the point of contracting is that each party is respected as in some broad sense being a chooser. Consequently, each also stands as a source for justifying political and moral claims and for the self-motivation to comply with them. Such engagement on the part of the parties induces them to be more reliable and facilitates the stability of the whole society as well. Making individual reliability and social stability integral to achieving justice for all is an especially attractive prospect for disabled people, whose limitations leave them less resilient and more vulnerable to social disorganization and discord. The challenge disabled people pose for social contract theory has been misplaced and misunderstood. To embrace them, philosophical theory need not discard the ideal that justice in principle should emerge from committed participation by all. Meeting the challenge requires instead letting go of the presumption that cooperative human behavior reduces to reiterations of reciprocal dyadic interactions between similarly positioned individuals.

Cooperation can range from rudimentary personal encounters between individuals to sophisticated collective political interactions that are prompted by historically entrenched expectations and by the social and cultural practices of groups. Interpersonal connections of the first sort—specifically, primitive personal experiences of trusting and being trusted—are very important to the development of justice. But the pro-

12. A culture of trust supports people’s depending on each other and therefore supports individual reliability.

13. Annette Baier, “Trusting People,” *Philosophical Perspectives: Ethics* 6 (1992): 137–53, 151. Baier’s analysis of trust, in “Trust and Antitrust,” *Ethics* 96 (1986): 231–60, and in other writings of hers cited throughout this essay, deeply influences our discussion. We do not, however, follow Baier in exiling contracting to the margins of morality. That is because Baier’s critique adopts a needlessly narrow idea of contracting, one that construes it as exchange among similarly situated bargainers.

cess is reflexive because the occurrence of spontaneous basic trust relationships in turn is facilitated by the assurance of justice.

Justice reigns, we argue, in virtue of having been shaped in response to the need of “outliers” to achieve successful personal trust relationships.<sup>14</sup> From their flourishing comes a climate of general confidence in the comprehensive embrace of justice. Central to cooperative schemes are relationships that do not necessarily produce dyadic exchanges of benefits between pairs of parties but that result importantly in beneficial social by-products that are secured because parties with different levels and kinds of vulnerability successfully cooperate. On this more complex picture, the discretionary commitment to trusting each other by parties whose capabilities differ sustains cooperation not because the parties necessarily reciprocate directly to each other but because their interactions enrich another kind of entity, the cooperative scheme (or the social climate, the community culture, or society itself).

Disabled people and other “outliers” can participate actively in such triadic relationships. In doing so, disabled people and other “outliers” not only entrust themselves to, but also are trusted by, the rest of the community. Such relationships can be transformative for all parties.

Care and capability theories, the alternatives most often proposed as better able to provide for disabled people than contract theory, divide people into sharply different roles. Care theory’s focus is to support active caregiving. Capability theory’s focus is activating the contributions people with surplus capability can make to capability-deficient people. On both accounts, “outliers” typically are confined to the role of passive recipient. If “outliers” attain status as parties in social contracting, however, they are drawn into the active mutuality inherent in the contracting process, an effective antidote to the isolation of being an “outlier.”

## II. BRINGING THE “OUT-GROUPS” IN

Contemporary justice theory often envisions social contracting through a Rawlsian lens, in terms of conversations among parties who choose mutual accommodation through a process of coming to agreement about justice. To make the prospect of reaching agreement plausible, the parties participating in the process are presumed to be roughly equivalent to each other in strength, skills, smartness, sensibilities, and status and to resemble each other both in being capable of and in seeking sovereignty over themselves. All parties are therefore similarly well positioned to convince the others to accept their ideas about the basic tenets of justice. The homogeneity of the parties induces each to

14. Historically, members of groups such as racial minorities, women, and the disabled have been “outliers,” but in principle anyone might be exiled to the margin of society and thereby become an “outlier.”

take the others as seriously as each takes himself, so that the ideas themselves, rather than their proponents, can be said to decide the outcome.

On a Rawlsian account, the similarity of the parties enables the contracting process to proceed in good faith. In the tough case in which the parties are posited as potential adversaries whose interests at least in principle might conflict, Rawlsian cooperation through contracting relies on the parties being sufficiently similar to underwrite their good faith in both the bargaining process and the agreements it achieves. If the parties are presumed to be motivated by self-interest alone, their homogeneity with each other still can prompt each to understand the others in the same terms each understands him or herself. Their likeness to each other can explain how even the most self-absorbed parties are attracted to agreements to act in concert. Even in the absence of other-regarding motivation to connect with each other, their homogeneity facilitates each party's not entertaining doubts about the legitimacy of the others (legitimizing others very like one's self is like legitimizing one's own self), not imposing unilateral limits on exchanging ideas (those like one's self likely have ideas one will like), and not harboring reservations about the value of cooperating with the others (working together with similar parties is like being in the company of one's own productive self). Accepting others as legitimate, inviting their ideas, and committing to the value of joint enterprise are expressions of the good faith needed to arrive at a contract in adversarial bargaining.<sup>15</sup>

At least some scholars concerned with justice for nondominant social groups demur from this picture of the process from whence justice comes, however. Given the emphasis on the homogeneity of the contracting parties, they object, social contract theory cannot help but be exclusionary and thereby likely to promote what from an "outlier" perspective will seem unfair. Groups are "outliers" because they do not possess the properties presumed essential for contracting or at least do not possess some of them to a sufficient degree. The homogeneity requirement makes it difficult for such "outliers" to shape and therefore to subscribe to the principles that emerge from contracting. The requirement invites doubts about their legitimacy as participants, deflecting attention from their ideas and attenuating the value of reaching mutual agreement with them. As a result, dominant insiders may engage with "outliers" in ways that violate good faith. Yet it is precisely such "outliers"—people who are most vulnerable because of their differences—who seem most to be in need of justice.

15. Ann Knowles and James Ritchie, "Good Faith Bargaining in North America: Report of Study Tour to USA and Canada, 19 February–2 March 2001," <http://www.businessnz.org.nz/doc/17/GoodFaithBargaininginNorthAmerica>.

Granted that justice, as conceptualized by “in-groups” deemed qualified for contracting, may be too narrow or restrictive to serve “out-groups” or individual “outliers” either fairly or well. For example, women and racial minorities historically have been defined as biologically defective and still suffer from the social sequelae of such disregard. Justice arrived at through “in-group” contracting may fail to reflect their perspectives and, consequently, may condone oppressive practices. Pateman and Mills make cases of this sort, illustrating extensively how current social arrangements embed gender and racial bias at a level untouched by the usual workings of justice because bias has touched justice itself. To Pateman and Mills, justice operates as if people who have been historically marginalized did not participate in agreeing to its principles. Historically, “outliers”—imagined to be unprepared or otherwise unfit to succeed in contracting—have been excluded at the level of principle from influencing the specification of the terms of social cooperation. In their absence from the conversation, terms inimical to them, or inconvenient or ineffective for them, may have seemed to other people to be compatible with justice.

Feminist and minority-oriented scholarship readily identifies the social history that explains how likely this is to be so. In many historical periods, the ideas with which women or racial minorities find affinity were not respectfully weighed. In such biased circumstances, the needs and interests of women and minorities would not be represented in collective reflection about justice. The absence of certain kinds of people from the process of conceptualizing justice may have condemned them to suffer on a practical level from chronic social and political disadvantage.

These challenges to social contract theory grow out of a commonplace supposition about how mutual consent is achieved through the fashioning of contracts. Social contracting is supposed to proceed through bargains struck by similarly smart, strong, and strategically minded parties with one another. By collectively engaging in give-and-take to find a common core of agreement, such individuals produce justice. Negotiation among equals results in a conceptualization of justice that promises the greatest achievable personal advantage for each of the parties compatible with whatever socially and self-imposed constraints the other parties accept.<sup>16</sup>

16. This characterization is to be found in both contractarian and contractualist strands of social contract theory. Contractarianism, identifying its origins in Hobbes, holds that rational assessment by itself shows that maximization of the joint interest of parties engaging in mutual cooperation is the best strategy for achieving the self-interest of the parties. Contractualism begins with Kant and holds that rationality also involves a non-strategic respect for the parties of social contract theory.

Social contract theory modeled on bargaining thus posits an idealized dynamic among agents pursuing individual interests in a context in which none initially is in a superior or inferior position to anyone else. In these ideal circumstances, personal advancement is best assured by political and social policies acceptable to all alike. But contracting cannot provide similar security for people who have differences that diminish their chance of accomplishment in bargaining. When contracting is equated with bargaining, the disadvantage is to people whose opportunities have been truncated. For whether nature or social convention has limited their opportunities, such individuals likely suffer from diminished capacity to present or pursue their interests effectively in the give-and-take of the bargaining process.

Some such complaints can find a ready answer. Social contract theory surely provides that inequities whose source lies in the biases of the past can and should be rectified when it is not rational to exclude their victims. Nor is prudence served by the continued absence of people whose full inclusion as parties to the contract would benefit both themselves and others. As Cudd observes, on the assumption that nonwhites and women can benefit and reciprocate benefits, social contract theory can show the fundamental irrationality of contracts unresponsive to how interests are inflected by race or sex.<sup>17</sup>

### III. THE DISABLED AS IRREDEEMABLE "OUTLIERS"

Cudd goes on to posit, however, that not all "outliers" are redeemable in this way. Rawls's approach reserves the power to shape justice to individuals whose mental and physical abilities enable them to participate fully and equally in bargaining about contractually cooperative schemes, without offering any redemptive means to permit participation by less able people.<sup>18</sup> For Rawls, "specifying the terms of social coop-

17. Cudd, "Contractarianism."

18. In "How to Include the Severely Disabled in a Contractarian Theory of Justice," *Journal of Political Philosophy* (forthcoming), Cynthia Stark offers the following very helpful note: "This assumption is discussed by Brian Barry [*Theories of Justice* (Berkeley: University of California Press, 1989), 41–54, and *Justice as Impartiality* (Oxford: Clarendon, 1995), 28–51]; by Alan Gibbard in his review of Barry ["Constructing Justice," *Philosophy & Public Affairs* 20 (1991): 264–79, 271–73]; by Allen Buchanan ["Justice as Reciprocity versus Subject-Centered Justice," *Philosophy & Public Affairs* 19 (1990): 227–52, 230 n. 6] and by Rex Martin ["Poverty and Welfare in Rawls's Theory of Justice: On the Just Response to Needs," in *Economic Justice*, ed. Kenneth Kipnis and Diana T. Meyers (Totowa, NJ: Rowman & Allanheld, 1985), 161–75]. The fully cooperating assumption has been ignored by a number of critics. For instance Ronald Dworkin states that the difference principle 'seems insufficiently sensitive to the position of those with natural handicaps, physical or mental, who do not themselves constitute a worst-off group, because this is defined economically, and would not count as the representative or average member of any such group.' This remark overlooks the fact that Rawls does not intend the difference principle to be sensitive

eration between citizens regarded as free and equal,”<sup>19</sup> as he also puts it, “means that everyone has sufficient intellectual powers to play a normal part in society and no one suffers from unusual needs that are especially difficult to fulfill, for example, unusual and costly medical requirements. . . . At this initial stage, the fundamental problem of social justice arises between those who are full and active and morally conscientious participants in society, and directly or indirectly associated together throughout a complete life.”<sup>20</sup>

Rawls proposes an idealized approach to conceptualizing justice that considers “normal and fully cooperating members of society over a complete life.”<sup>21</sup> People who cannot reciprocate benefits to others fall beyond the scope of justice. 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.

Rawlsian theory consequently appears to banish disabled people, who as a group are believed unable to engage with others as the bargaining paradigm demands and who individually sometimes really cannot do so, beyond justice. Social contract theory that is tied to a competitive bargaining process in which people with disabilities cannot succeed thus casts them as a political underclass, to be governed without

---

to the position of those with handicaps, at least insofar as those handicaps prevent such individuals from being fully cooperating. Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), 113. See also Richard Arneson’s discussion of the debate between Rawls and Dworkin, which uses examples of individuals with physical handicaps in comparing Rawls’s difference principle to Dworkin’s hypothetical insurance scheme. [Richard Arneson, “Equality and Equal Opportunity for Welfare,” *Philosophical Studies* 56 (1989): 77–93.]”

19. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 20 (henceforth cited as *PL*).

20. John Rawls, “Kantian Constructivism in Moral Theory,” in *John Rawls: Collected Papers*, ed. Sam Freeman (Cambridge, MA: Harvard University Press, 1999), 303–58, 332; *Collected Papers* is hereafter cited as *CP*. Rawls has been consistent on this matter since publication of the original edition of *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 83–84, “A Kantian Conception of Equality,” in *CP*, 254–66, 259, “Justice as Fairness: Political Not Metaphysical,” in *CP*, 388–415, 397, and *PL*, 272 n. 10, 183.

21. Rawls, *PL*, p. 20. We note that this Normalcy Provision is more than a mere corollary of the application of the veil of ignorance, for it stipulates what properties agents behind the veil substantively possess. The veil prevents (some kinds of) properties from influencing the conceptualization of justice, whereas the Normalcy Provision imposes (other kinds of) properties as influential.

principled regard for their consent or their interests. And as Kittay has pointed out, whoever is closely associated with individuals assigned to an underclass—for example, family caregivers—may be relegated to the underclass as well.<sup>22</sup>

In her Tanner lectures, Nussbaum offers the most recent and comprehensive version of this critique in an exegesis of social contract theory that lays bare the roots of the “outlier problem.”<sup>23</sup> She criticizes social contract theory for denying physically and mentally disabled persons participation in the group of those by whom and for whom political principles are chosen. According to Nussbaum, those best served by the design of principles of justice are those who have designed them. But social contract theory’s developmental account of justice denies access to the disabled, she thinks, by invoking standards of rationality, moral capacity, and ability to communicate, which many disabled people cannot satisfy, as conditions for participating in designing the principles of justice.

On Nussbaum’s understanding of the process, social contracting presupposes that (1) self-regarding, rather than other-regarding, motivation is the most plausible explanation and the most compelling justification for people’s giving over some liberty and that (2) the relevant self-regarding considerations are those that guide rationally calculating individuals in shaping mutually advantageous outcomes. Therefore, (3) political principles and practices cannot help but (3*a*) be shaped mainly to the interests of individuals capable of representing themselves through the rational calculation of their own interests and (3*b*) privilege mainly people whose calculated cooperation is believed to contribute to other people’s advantage.

Statement 3*a* relates to the design of justice, that is, to the formulation of principles that direct how people should interact. A design for justice uninformed by the perspectives of disabled people may result in a justice that leaves them out, just as buildings that are designed absent consultation with disabled people often lack accessible entrances.<sup>24</sup> Statement 3*b* relates to the operation of justice, that is, to the practices through which people actually do interact. Operations of jus-

22. Kittay, *Love’s Labor*.

23. We do not disagree with Nussbaum’s diagnosis of the exclusionary nature of social contract theory as she pictures it. But her picture reflects the narrowness of the prevailing view of contracting. We urge instead a broader and richer understanding of the process of contracting, one prompted by Nussbaum’s insights about the importance of regard for others. By holding that contracting does not necessitate self-interested bargaining, we give other-regarding reasons a much wider scope in contracting than does the prevailing narrow notion.

24. Current federal and state accessibility standards for building design were developed through extensive consultation with disabled people.

tice that calculate how to realize mutually advantageous outcomes may dismiss people whose contributions to those outcomes are considered nugatory. Similarly, a building may be designed accessibly but in operation may turn out not to be so. For example, once the building is in use, a side door entrance identified on blueprints as an entry for people who cannot climb stairs may be kept locked to better control what is brought into or taken out of the building. Although access for “outliers” who cannot climb stairs has been included in the building’s design, in operation a security issue takes precedence.

If *3a* influences the design of justice, then the interests of people with intellectual disabilities or other limitations that impede their representing themselves are less likely to be well served by the form justice takes than are the interests of clever people. If *3b* influences the operation of justice, then implementing justice will marginalize all those people whose biological impairments limit how much they can contribute to others. A democracy that adopts *3a* will treat the minority of people with intellectual disabilities badly, while a democracy that adopts *3b* will treat badly the larger minority of people who are perceived to have any disabling physical or mental condition. Our social and political history is replete with examples of such bad treatment.

Nussbaum identifies premises 1 and 2 as sources of the defective theoretical and practical conclusions that fail these groups. She offers three lines of argument for her critique: one drawn from the history of disabled people, another concerning the representation of disabled people, and a third about establishing motivation for nondisabled people to engage with the disabled.

#### IV. THE HISTORY ARGUMENT

Nussbaum situates her concerns about the logic of contract theory in the context of its historical origins. Contract theory’s conceptual disregard of disability can be traced, she suggests, to social disregard for disabled people in the historical period when thinking of justice as the product of a social covenant began. She thinks that during the initial development of social contract theory “in the seventeenth and eighteenth centuries, such people were simply not included in society.”<sup>25</sup> There is room for debate about her historical claims, however.

Contemporaries’ descriptions of seventeenth- and eighteenth-century people do not apply the discursive category of disability, although they do refer in detail to biological deficits or ill health. Unlike in later eras, such impairments did not usually render individuals socially unfit or invisible, as the example of Samuel Johnson amply illustrates. Dr. Johnson was blind in one eye, had limited vision in the other, was deaf

25. Nussbaum, “Beyond the Social Contract,” lecture 1, 9.

in one ear, was badly pockmarked, picked compulsively at his skin, suffered from spasticity or palsy and later in life from severe arthritis, and seems sometimes to have been so depressed as to remain bedridden.<sup>26</sup> Nevertheless, as literary scholar Lennard Davis observes, “his contemporaries refer to his disabilities only in a casual and literary manner—tending to see him as a brilliant man who had some oddities rather than a seriously disabled person.”<sup>27</sup> Indeed, biological states that since the nineteenth century have been subjected to therapeutic intervention or eugenic control were in the seventeenth and eighteenth centuries accepted as inescapable features of ordinary life.

Nussbaum’s description of the historical segregation of disabled people thus better reflects attitudes of the nineteenth century, when social status became biologized. Contrary to her picture of the era in which social contract theory was born, individuals with economic, political, or social power could and did hold sway in society despite overt infirmities of body or mind. Physical and mental deficits and deterioration were not regarded as abnormal but as widely encountered elements of the course of life.

Nussbaum herself notes Hobbes’s insistence that nature makes people equal in the ways that promote mutual agreement, even though they differ one from another in strength of body or mind. She also cites Rousseau’s proposal that what humans have in common are their weaknesses and vulnerabilities. Both historical context and textual evidence thus suggest that, as its originators understood social contract theory, people with disabilities were not categorically positioned beyond its scope.

## V. THE REPRESENTATION ARGUMENT

The core moral idea in contract theory is respect of like people for each other, Nussbaum says. Specifically, whoever cannot represent themselves in the process will not be respected as parties to the contract, as asserted in 3*a* above. People with some kinds of disabilities cannot represent themselves in deliberations about the design of justice. Nussbaum’s second argument thus is that the conditions of contracting exclude those people with mental and physical disabilities who do not have the strength or skill to bargain.

26. See Hester Thrale, *Dr. Johnson by Mrs. Thrale: The “Anecdotes” of Mrs. Piozzi in Their Original Form*, ed. Richard Ingrams (London: Chatto & Windus, 1984), 5; Walter Jackson Bate, *Samuel Johnson* (New York: Harcourt Brace Jovanovich, 1978); and James Boswell, *Life of Samuel Johnson*, ed. George Birkbeck Hill, rev. Lawrence Fitzroy Powell (Oxford: Clarendon, 1934–50), 1:485.

27. See, e.g., Lennard Davis’s analysis of how Dr. Johnson’s contemporaries reacted to his many serious impairments, *Bending Over Backwards: Disability, Dismodernism and Other Difficult Positions* (New York: New York University Press, 2002), 47–66, and esp. 49.

In response, Nussbaum suggests that contract theory conflates being the subject of justice (the chooser of just principles) with being the object of justice (the beneficiary of just principles).<sup>28</sup> Especially problematic for contract theory are people with what we might call representational disabilities, impairments of reasoning or communicating, who are ruled out as subjects of justice because they cannot participate successfully in the contracting process. If justice's objects must also be its subjects, Nussbaum contends, contract theory mistakenly also deprives these individuals of being objects of justice.

One response would be that all moral subjects are parties to the contract but that trustees can choose for people with representational disabilities. In so choosing, trustees should be guided only by the interests of those they represent. But Nussbaum dismisses trusteeship as a solution to the problem of representational disabilities in the process of social contracting.<sup>29</sup> Although trusteeship is a common legal practice, Nussbaum fears that in a process of bargaining to a social contract trustees could not help but represent their own interests rather than the interests of the beneficiaries of the trust relationship.

It is easy to see how Nussbaum's concerns about trusteeship arise. For trustees or other stand-ins are parties to the contract and therefore would be bargaining in their own right as well. There would be conflicts of interest—their own interests against the interests of those whom they represent. The safeguard of selecting them as decision makers because they take an interest in their beneficiaries, as well as because they are in an epistemologically favorable position, could fall prey to such conflict. Worse still, if there is no independent way of understanding what the interests of the beneficiaries are, there is no way of judging whether the conflict has corrupted the contracting process. We agree with Nussbaum that this fear is fundamental. For Nussbaum, however, assuaging it necessitates a solution that goes beyond social contract theory.

Nussbaum turns to capabilities as a substantive alternative to the proceduralism of traditional social contract theory. Her capabilities theory specifies what goods are fundamental to all humans' interests and thus are core human entitlements that a just society has an overriding obligation to honor. To give substance and direction to fulfilling entitlements to capabilities, Nussbaum "adopts the idea of a *threshold level of each capability* beneath which it is held that truly human functioning is not avail-

28. Nussbaum, "Beyond the Social Contract," lecture 1, 10.

29. For purposes of this article, we lay aside the question of who are moral subjects. We simply assume that all human beings are moral subjects on any relevant account of moral subjects and leave open whether nonhuman animals or other entities might also be regarded as moral subjects, with a trusteeship proposal developed on their behalf. See, e.g., Christopher Stone, *Should Trees Have Standing? and Other Essays on Law, Morals, and the Environment* (Dobbs Ferry, NY: Oceana Publications, 1996).

able to citizens.”<sup>30</sup> Rather than being content with contract theory’s faith that the procedures for justice will “generate an adequately just outcome,”<sup>31</sup> she directly designates good outcomes, understood in terms of threshold levels of capabilities. Nussbaum’s capabilities approach distributes abilities that enable individuals to convert resources into the functionings that are of central importance for their flourishing.<sup>32</sup>

Some individuals may need more resources than others to achieve roughly equivalent functionings, however. Someone who cannot use her legs may need more resources than someone who can walk to enable mobility. She may need expensive medical intervention to restore leg function. Or she may need a wheelchair and specially equipped van to travel from home to work, while most people use commonly available forms of public transportation.

On the capabilities approach, society’s obligation to achieve these goods reaches to people unable to be parties to a contract or otherwise represent themselves effectively. Yet this idea may not be as generous as hoped to people with disabilities. The capabilities approach advocates altering people by allocating resources sufficient to compensate for deficits and to rise to the minimal standard of necessary capability or at least to achieve the greatest capability possible if they cannot rise to that standard. This goal can extract high costs from recipients who otherwise might seem to be its beneficiaries.

In principle, of course, people are free to have capabilities that meet the standard for the species without exercising them. Nevertheless, setting thresholds for capabilities encourages oppressively judgmental practices. First, those who irremediably fall short of standard (normal) capabilities are ripe for stigmatization. In practice a capabilities approach that values meeting threshold standards cannot also remain positive or even neutral about whoever cannot be brought up to these standards. Second, however generous society may be in allocating resources so that people deficient in capabilities can acquire them, recipients often must pay their share with hard work or pain for the acquisition. Both these considerations are dangers an assimilation strategy

30. Nussbaum, “Beyond the Social Contract,” lecture 1, 26.

31. *Ibid.*, 33.

32. Nussbaum explains the difference between capabilities and functioning as follows: “Sen also insists however, that the need to focus on capability becomes especially clear when we consider cases in which individuals are hampered in various atypical ways in their attempts to turn resources into actual functioning. A person in a wheel chair, for example, needs more resources than does a person who can walk, in order to get from place to place. Similarly, a culture that traditionally discourages women from becoming educated will need to devote more resources to female literacy than to male literacy. Therefore the really revealing thing to look at, the real measure of social position, is each individual’s actual capability to function in a variety of areas.” *Ibid.*, lecture 2, 43.

poses for individuals who cannot be assimilated or for whom assimilation is excessively strenuous.

Nussbaum's warning against "segmenting off the disabled as if they belonged to a different (and lower) kind" initially may mitigate these fears.<sup>33</sup> But she so eloquently portrays core capabilities as crucial to human dignity that either real or imagined deficiencies may give permission for less than respectfully dignified treatment. She claims, for example, that anyone for whom some of the core capacities are not attainable suffers a tragedy.<sup>34</sup> If only it could, she declares, a decent society should bring tragically capability-deficient individuals "up to the capabilities level . . . because it is good, indeed important, for a human being to be able to function in these ways."<sup>35</sup> An unfortunate, but all too familiar, corollary is that a decent society also grieves for individuals who cannot be brought up to level and regrets the people they can never be rather than accepting them as the persons they are. Further, history shows that being designated as a tragic sufferer, and thereby as burdensome to self and others, makes disabled people vulnerable to social disapprobation and harm.<sup>36</sup> Nussbaum herself does not go down this road, but a capabilities account could facilitate those who would.

Nussbaum advises us to "keep the species norm fully in view" in directing distributive policy.<sup>37</sup> She sets outcome standards for necessary capabilities in order to create guidelines and obligations for distributing benefits: individuals who suffer from deficits are owed being brought up to the capabilities threshold dictated by the species norm. So, on her capabilities approach, just treatment of the disabled seems to mean permitting, encouraging, or obligating the nondisabled to relate to the disabled primarily by improving them, whether or not they can be improved and whether or not they prefer to be improved. This approach is hazardous for disabled people because it privileges the normal. Certainly elevating all citizens to a minimally adequate capability level is a very worthy ambition. But to make achieving such an outcome the goal of justice revives risks to disabled people's status that in Nussbaum's view mar social contract theory.

For example, a society that measures justness in terms of the re-

33. *Ibid.*, 54.

34. In a later version (in the possession of one of the authors) Nussbaum no longer characterizes the lives of individuals for whom the development of capabilities to the level of the species norm is impossible as tragedies. But she does not abandon her initial evaluation. She describes their lives as unfortunate and as causing sadness in the lives of their caregivers.

35. Nussbaum, "Beyond the Social Contract," lecture 2, 56.

36. The Nazi euthanasia program was fueled by characterizing the lives of disabled people as burdensome to themselves, their families, and society.

37. Nussbaum, "Beyond the Social Contract," lecture 2, 56.

sources applied to “curing” disability is more likely to see no wrong in coercing, shaming, or beguiling disabled people into accepting supposedly curative interventions, regardless of the risks incurred.<sup>38</sup> Parenthetically, such tactics are accepted as ways of handling patients by the medical culture many disability advocates reject.<sup>39</sup> In general, however benign the intentions, capabilities accounts seem inherently disposed to elevate the nondisabled over the disabled by assigning resource priority to altering the latter to be more like the former.

Capabilities accounts thus may no more readily invite disabled people to “come as they are” to the table of conceptualizing and arranging justice than the social contract model that Nussbaum criticizes. In principle, disabled people who are unable to represent themselves may be fairly represented by trustees under the guidance of an adequate idea of the good, a conception that is substantive but not too tightly scripted. But a capabilities approach that takes the species norm as a standard of the good cannot help but appear inflexible and constrictive from a disability perspective.<sup>40</sup> Nor is it apparent that other attempts to construct a substantive idea of a guiding good without full participation by disabled people would better reflect their realities and preferences.

Whether a justice theory’s emphasis is procedural or substantive, therefore, the question of participatory roles for disabled people remains. The problem is exacerbated by the successful bargainer paradigm. For there to be a bargain, there must be parties to it, and these parties must represent themselves or be represented. If participation means having a role in bargaining, the difficult issue of representation by a trustee recurs. Some disabled people cannot represent themselves and therefore in principle would require representation. And practical concerns may suggest that other disabled people, able to represent themselves but only awkwardly and at a social cost of discomfiting nondisabled people, should be brought under trusteeship so that negotiations may proceed smoothly.

Participation through a trustee is, however, by proxy and therefore figurative only. In effect, trusteeship might prevent disabled people’s

38. For illustrations of how people with disabilities are subjected to social pressure to comply with medical judgments that are risky and may render them even less functional than before, see Anita Silvers, “Bedside Justice: Personalizing Judgment, Preserving Impartiality,” in *Medicine and Social Justice: Essays on the Distribution of Health Care*, ed. Rosamond Rhodes, Margaret Battin, and Anita Silvers (Oxford: Oxford University Press, 2002), 235–47, and “On the Possibility and Desirability of Constructing a Neutral Conception of Disability,” *Theoretical Medicine and Bioethics* 24 (2003): 471–87.

39. Silvers, “Bedside Justice,” and “On the Possibility and Desirability of Constructing a Neutral Conception of Disability.”

40. See Anita Silvers, “‘Defective’ Agents: Equality, Difference and the Tyranny of the Normal,” *Journal of Social Philosophy* 25 (1994): 154–75.

presence from being fully felt by the nondisabled parties to the contract.<sup>41</sup> As a result, disabled people's standpoints might not be adequately influential in the practical operation of justice because nondisabled people could be insufficiently motivated to engage with them.

## VI. THE MOTIVATION ARGUMENT

The core political idea of contract theory is reciprocal benefit between people who must live together, Nussbaum says. Here Nussbaum seems to be swayed by the narrow conception of contracts as requiring direct reciprocity. But to be disabled is to be unable to contribute to others' welfare in at least some of the normal ways. The prevailing definition of "disability" as preventing normal achievement compels this characterization, even though some disabled people are limited from contributing in inconsequential ways compared to their residual power to do so. At least some disabled people need greater contributions from others than they can reciprocate, while some cannot reciprocate directly at all.

Reciprocity of benefits enters social contracting as an explanation of why contractors seek to co-associate. A standing criticism of social contract theory, echoed by Nussbaum, is that the contracting choosers are envisioned as egoists. Of course, in real life we are not all egoists, or at least not all egoists always. Many of us are committed to the good of others or to ideals that are not related in any obvious way solely to our own interests. If the parties in the bargaining process make choices solely to further their own self-interest, so the criticism goes, other-regarding values will be underrepresented in our social compact and the principles that regulate its implementation.

Although a stock criticism of contract theory, this hits its target only if all versions of the theory assume what might be called the egoist account of contractors pursuing their narrowly defined self-interest. On other versions, however, contractors are seen as trying to maximize whatever is important to them. To be sure, what is important might be what furthers their own narrow benefit. But it might not be, for they are trying to do what they see as best by their own lights.

Central to the general point of contract theory is that when each party is positioned as a chooser, each also stands as a central source of the justification of political claims and the motivation to comply with them. Giving an account of why choosers make (or should make) their selections is a central problem for contract theory. On the one hand, there is the Hobbesian assumption that all are vulnerable to the dep-

41. This problem has its analogue in the development of labor unions. It surfaces when union officials, who represent the union during bargaining, have not come up from being rank and file workers and therefore do not understand working conditions in the same way.

redations of others and so are mutually subscribed to provisions for security as the collective goal of contracting. The Rawlsian assumption, on the other hand, takes mutually acceptable principles for the distribution of the benefits and burdens of social cooperation as the paramount goal. Common to these readings is the notion that parties to the contract directly benefit each other through political association.<sup>42</sup>

Nussbaum objects that “outliers” and dependents—such as disabled people usually are thought to be—cannot rise to the level of full beneficiaries as specified by contract theory because they are, at best, limited contributors. On a practical level she will be right if the core idea of contract theory is reciprocal benefit between people who live together. Some disabled people are globally dependent on others. Some are barely able to care for themselves, let alone for others. At the very least, being disabled is understood to mean that people must rely more than usual on other individuals in one or more aspects of their lives.

Rawls’s response is that people who are so dependent, whether because of physical or because of mental disabilities, are not subjects of justice. Nussbaum rightly objects to this dismissal and then broadens the criticism, saying that the theory has no place for people who, for long stretches or even their whole life, are markedly unequal in productivity or who live in conditions of asymmetrical dependency.<sup>43</sup> But this critique assumes a version of contract theory flawed by features that are not essential to the contracting process. The model against which the criticisms are directed ignores crucial dimensions of how individuals contracting with one another mutually relate. The model goes astray in these respects because it is centered on the successful bargainer paradigm.

## VII. CONTRACTING WITH TRUST

Must contracting be reduced to either individual or collective bargaining? If social contracting instead is understood along the lines we will suggest, the importance of representation, and especially self-representation, for eliciting respect from others during the process diminishes. So the worry about ignoring people with representational disabilities recedes. Nor need the basic relationship among the parties be construed as a process of negotiating reciprocal benefits among those who are able to bestow them.

An alternative way to construe this relationship acknowledges and

42. Rawls says as much in *PL*. This claim is the basis of the criticism that Rawlsian contract theory marginalizes people with disabilities.

43. Nussbaum, “Beyond the Social Contract,” lecture 1, 19. For a discussion of the challenges of asymmetrical dependency for the ethics of care, see Anita Silvers, “Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities,” *Hypatia* 10 (1995): 30–55.

even foregrounds the human conditions of vulnerability and dependence while preserving the idea that important moral and political relationships between people are illuminated by the contracting model. Understanding contracting not in terms of people jockeying for position against one another but in terms of people developing bonds of confidence with each other dissipates the challenges made to social contract theory on behalf of disabled “outliers.” On the latter interpretation, which we develop here, social contracting helps map understandings (typically but not necessarily articulated as a set of principles) that facilitate parties’ awareness of each other’s expectations about how each will behave. Such mutual comprehension can be induced by shared feelings or by common reasons. It can be forged without being negotiated.

The familiar contemporary reading of social contract theory is that a process in which the governed bargain with each other is necessary to securing consent to be governed and confidence in the system. But bargaining is by nature adversarial,<sup>44</sup> so only those who can take part in strategic give-and-take between adversaries qualify for roles in building consent. Only those who take part can be assumed to subscribe to the mutual conceptualization of justice that results from the contracting process. Further, only those who can give something worthwhile to others will deserve others reciprocally giving over to them. From such considerations comes the view that only those who participate by reciprocally contributing can be subjects of justice.

On this interpretation, threshold levels of ability to present one’s viewpoint, to strategize against others so as to promote one’s viewpoint, and to contribute to others so they value one’s viewpoint are required for successful participation in social contracting. This is how the requisite representation and reciprocation capacities seem to be understood, for example, in Rawlsian versions of contract theory.<sup>45</sup> As we have seen, the perspectives of the disabled and others who have difficulty meeting these conditions may be doomed to ineluctable disregard by social contract theory so understood, as well as by political systems that thusly interpret the theory.

Some commentators—Becker and Reath, for example—believe the problem is surmountable because rational self-interested parties engaged in bargaining will provide for contingencies in which they them-

44. See n. 9 above.

45. Andrews Reath contends that Nussbaum misreads Rawls by attributing the bargaining model to him: “But Justice as Fairness is not a bargaining theory and the agreement in the Original Position is not motivated by mutual advantage.” Reath, response to Martha Nussbaum’s “Justice for Citizens with Disabilities: Contractualism versus the Capabilities Approach,” at the American Philosophical Association, Pacific Division, 2003; manuscript in the authors’ possession.

selves, or people with whom they have affectional ties, are disabled.<sup>46</sup> Undoubtedly, prudence may decree this result. Nevertheless, Nussbaum presses an important point against this defense of contracting. She thinks that adequate reassurance about vulnerable individuals being embraced by justice demands that other-regarding, rather than self-regarding, reasons prevail. Too much uncertainty, she points out, attends whether the parsimonious starting point of self-regard “will even lead in the same direction as a more sympathetic and other-involved starting point. Nor is it clear whether the rabbit of justice can really be pulled out of the hat of rational self-interest.”<sup>47</sup>

Social contract theory aims fundamentally at an account of how social cooperation (far more than simply sharing resources) justly may be sustained. In this light, it seems counterproductive to construe the foundational contracting process as essentially adversarial. To the contrary, the benefits of mutual agreement are much better achieved by promoting stable compliance with mutual expectations.<sup>48</sup> So a foundational process that disposes participants to be constant seems more effective for stabilizing cooperation than a process in which the parties remain motivated not to comply when they can disadvantage other parties without harming themselves.<sup>49</sup>

To be sure, the assumption that the contracting process must be conflictual seems plausible on egoist assumptions about the parties and their interests. But, as already indicated, contract theory is not wedded to assumptions of selfishness and is indeed compatible with very different assumptions about motivation and people’s conceptions of the good.<sup>50</sup>

46. Lawrence Becker, as well as Reath, argued thusly at the APA Pacific Division invited symposium on “Beyond the Social Contract,” cited in n. 45 above (Becker, “Social Contract Theory and the Tough-Crowd Problem: Comments on Martha Nussbaum’s ‘Justice for Mentally Disabled Citizens,’” manuscript in the authors’ possession).

47. Nussbaum, “Beyond the Social Contract,” lecture 1, 43.

48. Transactional theorists of contract law have explored possibilities for the development of trust within ongoing contractual relationships. See, e.g., Ian Macneil, “Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a ‘Rich Classificatory Apparatus,’” *Northwestern University Law Review* 75 (1981): 1018–63, 1018.

49. See Jean Hampton, *Political Philosophy* (Boulder, CO: Westview, 1998). In “The Sense of Justice,” Rawls identifies this problem as a main source of instability for cooperative schemes, but his remedy is to invoke a psychological account on which feelings of “association guilt” are supposed to motivate compliance. Rawls does believe, however, that the culture created by a cooperative scheme may “generate . . . inclinations that further support it,” an observation that points in the direction of the approach we are urging (*Philosophical Review* 72 [1963]: 281–305, 290–91).

50. We note here Becker’s “tough crowd” argument in his commentary on Nussbaum, previously cited. Even if willing to deal with each other, people may have irreconcilable views about human good and the good life. Becker, “Social Contract Theory and the Tough-Crowd Problem,” observes that rational self-interest is the most inclusive piece of common ground, capable of generating stable political arrangements. A similar point is made by Becker in “Reciprocity, Justice, and Disability,” in this issue (13).

Even those versions of contract theory most parsimonious about attributing motivation presume that people are capable of being sufficiently other-regarding to bind themselves to one another in relationships with both contractual and fiduciary force.<sup>51</sup> Rawls himself, in early writing, regards the workings of affectional attitudes and capacities such as trust, expressed through other-regarding reasons for acting, as a basic presumption of justice and as fundamental to “the notion of humanity.”<sup>52</sup>

As Fukuyama observes, people who do not trust each other can cooperate only under rules that must be negotiated, agreed to, and enforced. This legal apparatus imposes transaction costs, Fukuyama reminds us.<sup>53</sup> Trust-enhancing systems can be more flexible and responsive to individualized situations than rule-enforcement systems are, and they do not impose operational costs on participants in the same way. Although contracting sometimes is thought of as an instrument of authority, the practice would not survive in authoritarian systems without room for the parties to exercise the free mutual agreement that is characteristic of contracting.

Entry into contracts may be thought of as more protective than reliance on trust, but closer attention to practice reveals much more nuanced facts. Contracting sometimes is erroneously thought to be itself an enforcement mechanism. To the contrary, contracting is a process with an executable product that parties may not always need enforcement to secure. Conventions, covenants, compacts, and contracts are outcomes of processes of developing trust. Once forged, they in turn further buttress trust. Such instruments cultivate a culture of trust by strengthening the degree to which it is conventional to treat others fairly.<sup>54</sup> Lack of trust, however, prompts disruptive feedback in the form

51. For the claim that a relationship cannot be both fiduciary and contractual, see Margaret M. Blair and Lynn A. Stout, “Trust, Trustworthiness, and the Behavioral Foundation of Corporate Law,” *University of Pennsylvania Law Review* 149 (2001): 1735–1810; and Oliver E. Williamson, “Calculativeness, Trust, and Economic Organization,” *Journal of Law and Economics* 36 (1993): 453–86, 463. For the claim that a relationship can be both fiduciary and contractual, see Frank H. Easterbrook and Daniel R. Fischel, “Contract and Fiduciary Duties,” *Journal of Law and Economics* 36 (1993): 425–46, 425, and, by the same authors, “The Corporate Contract,” *Columbia Law Review* 89 (1989): 1416–48, 1416. Our claim is instead that there are political and psychological expectations, and pragmatic ones as well, that are dimensions of the social connections established in the process of contracting. Incongruence between the legal and social understandings of this connection is disruptive of both.

52. Rawls, “The Sense of Justice,” 299.

53. Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995), 27.

54. See Henry Fountain, “Study of Social Interactions Starts with a Test of Trust,” *New York Times*, national ed., Friday, April 1, 2005, A19, for a report of neurological studies that suggest that there is a biological mechanism connecting being treated in a way one regards as fair with building trust. In conversation with one of the authors, Gillian Brock

of suspicion-generated practice that inflates the cost of trust, including the trust that initially comes into play when we are about to enter into contractual relations with others. Conventions, covenants, compacts, and contracts also facilitate a climate of trust by strengthening commitment to the system. The more trust-facilitating the culture and the climate, the less need for enforcement to be the aftermath of contracting and the lower the transaction costs of contracting. So our making (imperfect) provision to enforce contracts in case trust is betrayed by no means proves us to be so fundamentally, endemically, and inescapably suspicious as to make enforcement the reason for contracting.<sup>55</sup>

To trust, Baier says, is to accept “vulnerability to another person’s power over something one cares about, in the confidence that such power will not be used to harm what is entrusted.”<sup>56</sup> Concomitantly, Baier advises, the entrusted should selectively disempower themselves so as to invite and not abuse confidence.<sup>57</sup> Baier reminds us that the handshake, the signal that the mutuality of a contract-like agreement has been reached, originated from individuals’ disempowering themselves by mutually placing their weapon-wielding hands within the control of the other party.<sup>58</sup> From the handshake to the treaty, we have many ways of signifying that a compact has been reached. Some methods describe the expected outcomes in greater detail and therefore are better guides for fulfilling expectations. But formal documents that assign powers and performances to each party by no means exhaust the expression of such agreements.

Hardin comments that “the legal system of contract enforcement enables me to trust you in some formal exchange.”<sup>59</sup> But this way of looking at contracting may put the cart before the horse. Contracts are instruments rather than causes of trust. We do not seek out those whom we distrust in order to make contracts. To the contrary, distrust is a reason to avoid entering contractual relationships. It seems more appropriate to say that trusting you encourages me to contract with you (perhaps with only a handshake), and that the legal system of contract enforcement mitigates the costs of misplaced trust. Legal contract enforcement thus may facilitate being generally a trusting rather than a

---

suggested that the aftermath of the long history of unfairness to women shows how robust the crucial link between trust and fairness is. For, as their analyses of practices pertaining to gendered roles has revealed these to be unfair, women have withdrawn their trust in those who are advantaged by such arrangements.

55. See nn. 12 and 13 above for the difference between a culture of trust and a climate of trust.

56. Baier, “Trusting People,” 152.

57. *Ibid.*

58. *Ibid.*, 147.

59. Russell Hardin, “Trustworthiness,” *Ethics* 107 (1996): 26–42, 31.

suspicious person, but specifically it is at least some degree of trust that underwrites entering a contractual arrangement in the first place.

Contracting does call upon the parties to exercise good faith. Good faith is important because no contract can extract exact agreement about what compliance will require in every circumstance. Trust sustains the parties' good faith efforts in unforeseen situations, even between very different sorts of individuals. As Bukspan writes, "The legal system will thereby promote a culture of trust in the context of contract law that will encourage ease, increase safety and confidence levels, and improve planning ability at the level of interaction and commitment."<sup>60</sup> That contracting is practiced in everyday commercial and civic life evidences our capacity to forge a culture and foster a climate of trust.<sup>61</sup>

Eliminating social practices that endanger or erode trust, such as the exploitative ones of which Mills and Pateman complain, is called for in principle on a conceptualization that treats trust as a foundational element for the development of a system of justice. In this regard, Foucault insists that there can be no trust in exploitative societies.<sup>62</sup> Trust invoked to ground or enable exploitative agreements means trust diminished. In principle, therefore, trusting contractors should be at least as concerned about exploitation as bargaining contractors are, although they may be less focused on protecting themselves and more on guarding others.

Pateman and Mills, who see the bargaining model of social contracting as biased, portray this procedure as complicit in social injustice that extinguishes its victims' trust. Nevertheless, others consider the procedure of bargaining among equals to be a platform from which condemnation of exploitation can be launched.<sup>63</sup> The bargaining model supposes that agreements between equals definitively bar exploitation of parties by each other. Equals are presumed unable to impose exploitative terms on each other: equally strong parties ostensibly cannot bargain an agreement where some take advantage of others. Further, parties who are equally ignorant of which among them will be strong

60. Eli Bukspan, "The Notion of Trust as a Comprehensive Theory of Contract and Corporate Law: A New Approach to the Conception That the Corporation Is a Nexus of Contract," George Washington Law School, Public Law and Legal Theory Research Paper no. 53, 12–13. Published on the Social Science Research Network Electronic Paper Collection, [http://ssrn.com/abstract\\_id=363440](http://ssrn.com/abstract_id=363440).

61. Kimel, *From Promise to Contract*, argues that there is an important difference between trust that pertains to promises, which "flows from a certain favorable perception of the promisor's personality" (19) and impersonal trust that can hold between strangers (58–60). We account for this difference by invoking the notions of a culture of trust and a climate of trust to explain what nurtures confidence in cases of trust between strangers.

62. Barbara Misztal, *Trust in Modern Societies: The Search for the Bases of Social Order* (Cambridge: Polity Press, 1996), 26.

63. We are grateful to anonymous reviewers for pressing this concern.

are presumed to bargain so the initial agreement protects against being exploited in case they turn out to be too weak to protect themselves.<sup>64</sup>

In contrast, parties whose agreement emerges from trusting each other rather than bargaining against one another may seem less likely to fashion agreements cast in such self-protective terms. Agreements issuing from trust therefore may be feared to permit, or even enable, exploitation of the weak by the strong or, more precisely, of the trusting by the duplicitous. Of course, trust by itself is unlikely to prompt a party to embrace an agreement that she sees only as harming herself.<sup>65</sup> For such a feature would contravene a necessary element of her trusting, namely, that the arrangement contributes directly or indirectly to something she cares about sufficiently to associate with her welfare.<sup>66</sup>

Where she trusts the other parties as partners rather than bargains against them as adversaries, however, she might not press for optimal or equal benefit for herself. Because she relies on their concern for what she cares about, she might accept being a means to the other parties' ends without finding the arrangement unfair or feeling exploited. The process of reaching cooperative agreements through the cultivation of trust thus may appear to permit, or even to ground, exploitative arrangements, as adversarial bargaining is thought not to do.

Yet once attention is directed beyond bargaining between homogeneous parties to the need for very different kinds of people to agree, the situation appears more nuanced and the bargaining model less effective. There is an inherent limitation in the bargaining model's ability to address exploitation, for the integrity of the process whereby bargaining agents come to agreement about terms depends on the problem of vulnerability not arising. All choosers are so similar that none has a threat advantage, so there may appear to be no risk of any imposing terms permissive of exploitation on the others. But without additional premises this appearance is misleading.<sup>67</sup>

Suppose these parties expect to be in a real world where some are sufficiently powerful to exploit while others are vulnerable enough to be exploited. The bargaining procedure cannot presume the parties to

64. See Lawrence Becker, "Reciprocity, Justice, and Disability," in this issue, for an excellent exploration of this argument.

65. Being trustful may make her less suspicious of false claims that the arrangement is good for her, but here her mistaken beliefs, not her trust, prompt her agreement.

66. See Baier, "Trusting People."

67. Brian Barry makes the point that further premises are necessary to determine the choices of ideally rational choosers: "Of course, it is open to anyone to object that we do not get fairness by asking what ideally rational actors would finish up with if they bargained with each other. But it is not even worth asking that question unless we think it makes sense to produce a formula and say that this tells us what ideally rational bargainers would finish up with in any given situation," *Theories of Justice*, 11.

uniformly prefer principles for protecting themselves in case they are vulnerable over permissive principles that advantage them should they be strong. The bargaining among equals model thus appears to need an additional criterion-generating premise—that the parties to the agreement are not risk takers but are risk averse—to generate principles condemnatory of exploitation.

A general methodological issue is in play here.<sup>68</sup> Rawlsian social contract theories aim at a purely proceduralist grounding for justice.<sup>69</sup> They construct a procedure—contracting—and consider what principles of justice that procedure would generate. Justification is question begging if it tests the procedure in terms of principles of justice that the process is employed to justify. A difficulty for any purely proceduralist view, including Rawlsian contract theory, is to defend the procedure in a manner that does not beg the question this way.<sup>70</sup>

Arneson observes that there are as many ideas of exploitation as there are views on what constitutes fairness.<sup>71</sup> Particular judgments about exploitation thus presuppose some idea of justice and so offer no independent test of any proceduralist view. Nonetheless, an adequate proceduralist view must provide for distinguishing permissible from exploitative advantage-taking and must show the latter to be inimical to the fundamental procedure. We cannot here offer a full account of how justice through trust conceptualizes exploitation, weighing the persuasiveness of the model against potential objections. But social contracting through trust is not a “one shot” deal, and the account is “constructivist” in the quite literal sense of a building process. So we can consider conditions that, given the parties’ differences, enable their cooperative interaction and thereby shape agreement among them as well as practices that nourish their agreement.<sup>72</sup>

One condition is that procedure and practices should be inclusive, for to trust an agreement the parties must have standing in its devel-

68. In discussions of models of the social contract, this problem has been underexplored. Barry’s work is a noteworthy exception; see *ibid.*

69. Rawls distinguishes between pure proceduralism, on which there is no independent criterion of the right result, and perfect (or imperfect) proceduralism, in which a procedure is constructed to give the right result (or give the right result as frequently as possible). *A Theory of Justice*, 85. See also Barry, *Theories of Justice*, 152.

70. Barry, *Theories of Justice*.

71. Richard Arneson, “Exploitation,” in *Encyclopedia of Ethics*, ed. Lawrence Becker and Charlotte Becker (New York: Routledge, 2001), 515–17.

72. With space to give a fuller account, we would treat exploitation in terms of misplaced trust, with misplacement explicated in terms of violations of these conditions. Like Rawls, for us “the most fundamental idea in this conception of justice is the idea of society as a fair system of social cooperation over time from one generation to the next,” *A Theory of Justice*, 4; John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, Belknap Press, 2001), 5.

opment. Second, procedure and practices should recognize and respond to people's differences without disadvantaging them for being so, for to trust an agreement the parties must feel free to be (and reveal) who they are while participating in its development. Third, procedure and practices should enable participants to strengthen each other's involvement and commitment, for the parties need to embrace principles that enable their interactions to be ongoing. To trust an agreement the parties thus must be able to promote the stability of its influence.<sup>73</sup> (As a senior researcher into the role of hormones in facilitating the "approach behavior" required for trust puts it: "If I abuse your trust once or twice, you are not going to trust me a third time even if I give you a high dose of oxytocin."<sup>74</sup>)

To illustrate, these constraints (not an exhaustive list) can be seen at work in the changed attitude toward sheltered workshops. Disabled people are subject to excessively high unemployment rates,<sup>75</sup> so sheltered workshops were created to put them to work, but such employment paid a much lower wage, or assigned them to much less esteemed work, than regular (integrated) employment provided both nondisabled and disabled people. Blind people were sent to sheltered workshops to make brooms, for example. (Intellectually impaired people still sometimes are employed through sheltered arrangements.<sup>76</sup>) With the advent of laws that invited disabled people into ordinary workplaces, however, sheltered workshops came to be condemned as exploitative.<sup>77</sup> Urging their abolition, Jacobus tenBroek, founder of the National Federation of the Blind, observed that the National Labor Relations Board refused to assert jurisdiction over sheltered workshops and that Congress failed to extend unemployment insurance or minimum wage protection to people who worked in them. The system of sheltered workshops made the exclusion of disabled individuals from the regular workforce palatable while denying disabled workers benefits and protections enjoyed

73. This is a point about the process that grounds principles of justice, as distinct from Rawlsian arguments about the stability of just institutions. See *A Theory of Justice*, 491; see also Restatement, 195–98.

74. Benedict Carey, "Hormone Dose May Increase People's Trust in Strangers," *New York Times*, national report, Thursday, June 2, 2005, A12.

75. See "Access to Disability Data," funded by the National Institute on Disability and Rehabilitation Research, at [http://www.infouse.com/disabilitydata/workdisability/2\\_1.php](http://www.infouse.com/disabilitydata/workdisability/2_1.php), for U.S. census employment data comparing nondisabled and disabled working-age people.

76. See Leslie Pickering Francis, "Employment and Intellectual Disability," *Journal of Gender, Race, and Justice* 8 (2004): 299–325.

77. Steven J. Taylor, "Disabled Workers Deserve Real Choices, Real Jobs," Web page of the Center for an Accessible Society, <http://www.accessiblesociety.org/topics/economics-employment/sheltereddwksp.html>, citing data showing that mainstreamed workers with cognitive impairments earn about four times as much as those similarly disabled but employed in sheltered workshops.

by other workers. The system corroded employers' dispositions to honor commitments to disabled workers and disabled people's confidence in the labor system. TenBroek further condemned sheltered workshops for taking advantage of disabled people in a way "America . . . can ill afford to perpetuate," commenting that the practice eroded trust in the nation's professed commitment to democratic principles.<sup>78</sup>

In modeling the agreement process, contracting through bargaining supposes the principles for cooperation to be put immediately in place. The parties are portrayed as articulating, examining, and then selecting basic principles. In contrast, contracting through trust emphasizes that cooperation-facilitating conditions develop over time, as social activity evolves to exemplify principles of cooperation that strengthen and systematize people's natural proclivities to depend on each other. People need not be able to articulate these principles, or to ponder them, to be committed to them.<sup>79</sup>

Still, bargaining might be thought to be more basic to human social interaction than trust.<sup>80</sup> Trust is, however, a fundamental social motivator.<sup>81</sup> As we have argued, such trusting motivation is a foundational element in bargaining itself, as well as in the development and preservation of the sort of procedural fairness characteristic of justice. There is good reason to believe that trust and our perception of justice rise and fall together. Baier observes that aiding people with fewer powers

78. Jacobus tenBroek, "The Character and Function of Sheltered Workshops," copyright 1995 by the National Federation of the Blind, posted on the Web site of A Blind Net, <http://www.blind.net/bg380001.htm>.

79. Philosophical formulations of these principles will draw upon experience with trust-strengthening (and trust-destroying) practices, as well as the rapidly expanding understanding of the biology of cooperative interaction. These principles will be aspirational, however, because they systematize commitments to realizing conditions for inclusive cooperative interaction.

80. See Baier, "Trust and Antitrust," for an account of primitive and basic trust. Baier identifies basic trust as "infant trust," the trust between babies and their parents. "To suppose that infants emerge from the womb already equipped with some ur-confidence in what supports them . . . is plausible enough" (244). See also Carey, "Hormone Dose May Increase People's Trust in Strangers," for an account of how the level of the hormone associated with trust rises when individuals need to depend on other people, such as when a woman approaches childbirth.

81. See Mojdeh Mohtashemi and Lik Mui, "Evolution of Indirect Reciprocity by Social Information: The Role of Trust and Reputation in Evolution of Altruism," *Journal of Theoretical Biology* 223 (2003): 523–31, for an evolutionary analysis of the importance of information about trustworthiness in achieving the stability of cooperative social interaction. They argue that indirect reciprocity, where agents' trustworthiness enhances their reputation with third parties who thereby are induced to cooperate, is more rewarding than direct reciprocity, where the benefits accrue just to pairs of agents through mutual exchange. See also Fountain, "Study of Social Interactions Starts with a Test of Trust."

to advance, as justice usually is thought to enjoin us to do, invites trust.<sup>82</sup> Her interpretation of Hume reconstructs “his account of the artifices of justice as an account of the progressive enlargement of a climate of trust.”<sup>83</sup> But assistance to the more vulnerable must maintain dignity all round. Baier reminds us of Hume’s thought about mutual deference that serves a “purpose similar to the rules of justice, and gives rise to informal rights or dues” being a key to maintaining trust.<sup>84</sup>

So principles of justice that promote respect for others and prohibit treating them as mere means are likely to be as significant for people concerned to facilitate a culture of trust as for people seeking their mutual self-interest, or even more so. Similarly significant for people concerned to sustain a climate of trust will be principles calling for fair liberty and fair opportunity. Justice often has been seen as the minimal individual commitment to which equally strong, smart, and strategically minded self-interested agents can accede. Justice also may be seen, however, as a principled practice that will be agreed to by other-regarding agents of very different abilities, depending on one another and seeking relationships that can be sustained. The greater the proportion of individuals in the population who do not abuse each others’ trust, and are so perceived and afforded reputations for constancy by others,<sup>85</sup> the more widely distributed is the kind of social information about trustworthiness that undergirds cooperative behavior.<sup>86</sup>

#### VIII. TRUSTING (DISABLED) PEOPLE

Unlike bargaining, trusting is a human interaction that neither requires sophisticated ratiocination, nor relies on others’ material contributions, to compel constancy.<sup>87</sup> Small children can sense the consequences of

82. Baier, “Trusting People,” 153.

83. Annette Baier, “What Do Women Want in a Moral Theory?” *Noûs* 10 (1985): 53–63, 57.

84. Annette Baier, “Trust,” in *The Tanner Lectures on Human Values*, vol. 13, ed. Grethe B. Peterson (Salt Lake City: University of Utah Press, 1992), 109–74, 131–32.

85. A detailed exploration of how actions come to be perceived as fair is beyond the scope of this article. We should notice, however, that even small children who cannot articulate moral and political principles are sensitive to whether the treatment meted to them, and to others, is fair. Specifying principles derivable from the idea of justice through trust could be advanced, and nuanced, by empirical studies that supply information about how the recognition of differences in people and of their different situations affects judgments of fairness. We should not assume, of course, that how people do judge fairness is how they ought to do so, but it is important, at the very least, for philosophers to engage with the differences that people think make a difference.

86. See Mohtashemi and Mui, “Evolution of Indirect Reciprocity by Social Information.”

87. The title of this section echoes the deliberate ambiguity of Baier’s title, “Trusting People,” 137.

being inconstant, unreliable, or dishonest—that is, of being untrustworthy—well enough to be deterred by them. So can most people with reduced cognitive capacities. Trusting is essential to contracting but, unlike bargaining, is accessible to almost everyone, whether disabled or nondisabled.<sup>88</sup>

Even the most vulnerable individuals may be parties to trust.<sup>89</sup> The trustworthiness of their social and political situations will affect whether trusting is easy for them or is, instead, terrifyingly difficult in virtue of their vulnerability.<sup>90</sup> Indeed, those least able to bargain successfully or secure their own interests may be the most important participants in cooperative schemes where trust rather than competition is the most important element. In this regard, in “Trust, Collective Action, and the Law,” Kahan reports empirical research that shows:

When they perceive that others are behaving cooperatively, individuals are moved . . . to contribute to public goods even without the inducement of material incentives. When, in contrast, they perceive that others are . . . taking advantage of them . . . [they] will withhold beneficial forms of cooperation even if doing so exposes them to significant material disadvantage. . . . Individuals who have faith in the willingness of others to contribute their fair share will voluntarily respond in kind.<sup>91</sup>

Trust carries not only an element of risk but also an element of anticipatory confidence. 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?<sup>92</sup>

88. Individuals in sufficiently deep comas or persistent vegetative states, who are unable to engage in any interaction or responsiveness to others, presumably cannot trust.

89. Severely intellectually impaired individuals still are capable of actively shaping relationships with others. See, e.g., Eva Kittay's "Not My Way, Sesha, Your Way, Slowly: Maternal Thinking in the Raising of a Child with Profound Intellectual Disabilities," in *Mother Troubles: Rethinking Contemporary Maternal Dilemmas*, ed. Sara Ruddick and Julia Hanigsberg (Boston: Beacon Press, 1999), 3–30.

90. It may be thought that certain kinds of disabilities, such as autism and paranoia, preclude trusting. This is not so, although it may take much more of an effort for people with these conditions to trust and an even greater effort for others to deserve the confidence of people with these conditions. No such hesitation should occur in regard to severely cognitively disabled people like Eva Kittay's daughter Sesha, who clearly can trust and also withdraw trust when she finds it is not deserved.

91. Dan M. Kahan, "Trust, Collective Action, and Law," *Boston University Law Review* 333 (2000): 333–34.

92. Alasdair MacIntyre gives a communitarian version of this argument in *Dependent Rational Animals* (Chicago: Open Court, 2000). In "People with Disabilities," in *The Oxford Handbook of Practical Ethics*, ed. Hugh LaFollette (Oxford: Oxford University Press, 2002),

So practices that strengthen trust do not exclude people with disabilities to the extent that practices associated with bargaining do. Further, the mutual deference elicited by the dynamic of trusting and being trusted should induce contractors to deal respectfully rather than paternalistically with whoever becomes dependent, for however short or long a time. Indeed, a principle calling for the most capable to give, or give over, to the least capable and describing the circumstances thereof well might be called for to nourish a climate of trust by strengthening fairness and extending justice to everyone. This principle would encourage indirect reciprocity, acting with the expectation that one will be benefited not by the actual recipients of one's own good deeds but by stimulating an environment in which people are disposed to help each other.<sup>93</sup> Such indirect reciprocity may be more important than direct reciprocity in the evolution of justice.<sup>94</sup>

A similar showing cannot be made for schemes of distributive justice that proffer entitlements to the disabled. Such schemes can breed resentment by the most capable, required to transfer valuable resources to the less capable without experiencing any added value for themselves. Resentment on the part of those called upon to give is a problem for redistributive theories with goals such as achieving threshold levels of capabilities for everybody. It is not similarly problematic for theories where other-regarding conduct is promoted by and strengthens a generally beneficial trust culture's hold.

Children prize trustworthiness in their adults, nor need adults calculate the future benefits of giving their offspring this kind of security

---

Anita Silvers shows that, given a procedural rather than a distributive reading, social contract theory can be compatible with communitarian versions of virtue theory.

93. See Richard D. Alexander, *The Biology of Moral Systems* (New York: Aldine de Gruyter, 1987); and Mohtashemi and Mui, "Evolution of Indirect Reciprocity by Social Information," for discussions arguing for the centrality of indirect reciprocity, rather than tit-for-tat exchanges, in the evolutionary stability of cooperative schemes.

94. Bargaining usually is construed as a reciprocal dyadic interaction, and thus the cooperative schemes that are supposed to be bargained usually are thought to be constituted by repetitions of reciprocal dyadic interactions. But cooperative schemes involve more than multiple instances of direct reciprocity. To rationalize cooperation, indirect reciprocity is also required. Indirect reciprocity promotes cooperative behavior absent expectations of direct recompense. Indirect reciprocity thus does not depend on interactions between equals or comparables able to benefit each other directly. Instead, the stability of a system of indirect reciprocity depends on emergent properties that can be the product of interactions between unequals. The view of justice presented in this and succeeding sections takes justice to come from the complex and nuanced relationships that promote indirect reciprocity rather than simple and straightforward direct reciprocity. See Mohtashemi and Mui, "Evolution of Indirect Reciprocity by Social Information," for more on indirect reciprocity.

in order to be trustworthy.<sup>95</sup> Being invested with a child's trust is often sufficient consideration to bind an adult to keep promises and to secure fidelity to the child's welfare. Concomitantly, being honored with an adult's trust can have an analogously salutary influence on a child.<sup>96</sup> Good faith here does not depend on like recognizing like, as on the bargaining model, but instead is a matter of different kinds of individuals bonding with each other.

How individuals can shape principles without bargaining is suggested by considering humans' interactions with animals. It is a stretch to think that animals can bargain for or even understand mutual advantage,<sup>97</sup> but none at all to recognize that they can and do trust. Pitcher's marvelous story of *The Dogs Who Came to Stay* describes how a feral animal comes to trust people and, as important, be trusted by them.<sup>98</sup> From this and other accounts of developing trust between people and animals, we learn the importance (on both the parties' parts) of mutual reliability and mutual deference to each other's unintelligible (from the other's perspective) ways. The parties learn what behaviors they must exhibit to gain and hold the other's trust. An animal's participation in such trust building therefore shapes the principles that guide the relationship despite the animal's inability to reflect on and articulate those principles. Some nonhuman animals thus can be active

95. Some writers define trusting in terms of calculating probabilities that others will perform as expected. See Diego Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (New York: Blackwell, 1988), 217; and Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge: Cambridge University Press, 1999), 25. If this is a correct definition, people with reasoning capabilities so limited that they cannot calculate, cannot trust. Notice, however, that we have no trouble supposing that small babies and large animals are capable of trust. Even people with severe cognitive deficits are capable of trust. Consequently, if trust, rather than bargaining, is the fundamental way in which individuals participating in social contracting need to relate, even severely disabled people are capable in principle of participating.

96. See Gregory Pollock and Lee Alan Dugatkin, "Reciprocity and the Emergence of Reputation," *Journal of Theoretical Biology* 159 (1992): 25–37.

97. The practice of inducing animals to perform for a reward may verge on being a kind of bargaining. The psychologist who reneges on the established payment of grapes is unlikely to keep his lab chimps problem-solving for long. The dog trainer who omits the expected treat or praise won't long have a properly performing animal. Like humans, however, some animals work for the pleasure of the activities rather than the rewards, as anyone watching a border collie keeping its sheep in line can readily observe. Young dogs are selected to be trained for herding on the basis of the enthusiasm they initially show for bossing around sheep.

98. George Pitcher and Tom George, *The Dogs Who Came to Stay* (New York: Penguin, 1996). Thanks are owed to Jeff McMahan, who first mentioned this book in regard to an earlier version of the article and who urged the article's enlargement to say more about how justice through trust may account for our obligations to animals. Pitcher's technique for gaining the dog's trust included self-constraints reminiscent of the deference and self-disempowerment Baier recommends for trust building among humans.

participants in shaping principles that nurture a climate of trust, despite their inability to reason about the principles their behavior both suggests and endorses.

What, then, is owed to nonhuman animals that are capable of trust? We humans intentionally permit and encourage animals to place their trust in us. In some cases, such as with dogs, we selected wild animals to domesticate by bringing the young into our communal sites so they came to trust a human family as a replacement for their pack or herd. In other cases, animals more actively choose to be in the relationship. For example, as humans turned to agriculture, cats began to patronize human communities to dine on the mice populating human food repositories. Only animals positioned to trust humans can be owed trustworthiness in humans, but we should notice that we humans position animals so by placing ourselves in close enough conjunction to them to alter their predatory or defensive behavior.<sup>99</sup> In this regard, the clearest case for the injustice of eating animals pertains to the individual animals with which we have forged the strongest bonds of trust, namely, our pets.

Children who torture animals often grow into adults who treat other people cruelly. The man who whips his malnourished fallen carthorse strikes us as someone to avoid in doing business. These examples suggest that humane treatment afforded animals contributes to a trust climate and thereby enhances humans' confidence in how other humans will treat them. Justice for animals thus can be seen as important to building confidence in and commitments to human justice.

Basing justice on contracting with trust makes the justice of eating animals depend on what influence doing so has on our trusting each other and on animals trusting us. People differ about whether killing animals for food is so categorically inhumane that it shakes a climate of trust to the core or whether the practice mainly affects trust when executed cruelly.<sup>100</sup> This deep division of opinion about the social impact

99. On the understanding of justice based on contracting with trust, we can't talk about there having been obligations of justice to animals in precivilized times before the domestication of animals. Further, we can't talk about obligations of justice to animals extending to preservation of their species, although we may have obligations to others that contingently commit us to biodiversity and therefore to preservation of species. We might in justice have such a duty to individual dogs, although not to the canine species.

100. We draw the line differently in the case of humans, for (almost) no one thinks that killing humans escapes being inhumane. Nevertheless, people differ in regard to this matter as they do in regard to animals, with some claiming that all killing of humans is inhumane, while others hold that in rare situations of unbearable pain it is the humane thing to do. That contracting with trust reflects society's current collective indecision about such matters is no objection to it.

of eating animals partly explains the profoundly unsettled state of judgment about the justice of eating animals.

#### IX. (RE)MODELING THE SOCIAL CONTRACT

In sum, a social contract approach to justice need not turn to bargaining to model the human interaction basic for social cooperation.<sup>101</sup> Bargaining sometimes occurs during contracting but need not. In contrast, strengthening trust is a crucial element of contracting.<sup>102</sup> And trust is a relationship that can be forged not only between equals but also between individuals who fit the successful bargainer paradigm and individuals who do not fit the paradigm because they are temporarily or permanently powerless or are much more limited than is species-typical for humans.

Proper principles of justice can strengthen trust, even for individuals who, in Hume's words, do not have any kindness for one another.<sup>103</sup> The importance of allaying the fears of Hume's famous farmer with the yet-to-ripen corn illustrates why social cooperation is so bound up with trust and why justice in the service of trust must provide for individuals in dependency. Absent trust, the farmer in Hume's story refuses even temporarily to tolerate a position of dependence and powerlessness. He simply will not cooperate in the harvest—because he cannot tolerate putting himself in a position very like the one occupied by many disabled people. By enabling his neighbor with already ripened corn to complete harvesting, he gives the neighbor independence while remaining himself dependent on the neighbor for help when the time for his own harvest arrives. Absent a culture and a climate of trust, he will not help to harvest his neighbor's already ripened corn, for doing so would upset the balance between his own and his neighbor's power.

As Hume's instructive story shows, dependency is at the heart of trust. Cultivating trust enables cooperation in circumstances of unequal power, just where Nussbaum places the disabled. Nussbaum understands humans as political animals whose interests are bound up with each other despite the asymmetry of their dependencies and powers. This emphasis is well taken, as much so when justice is viewed from the perspective of social contract theory as for the capabilities approach.

101. We think that many well-known versions of social contract-based justice will be compatible with, although slightly or even greatly changed by, (re)modeling the contracting process to make trusting, rather than bargaining, the paradigmatic human relation. But for this article we must put aside exploring these implications.

102. For a useful account of the role that trust, and especially the venerable rendering of it as *fides*, plays in the political thought of Locke and other theorists of his time, see John Dunn, "Trust and Political Agency," in Gambetta, *Trust: Making and Breaking Cooperative Relations*, 73–91.

103. David Hume, *Treatise*, bk. 3, pt. 2, sec. 5.

Ball reminds us that contract theory in its earliest historical form was motivated by the fact that all are vulnerable to all and therefore individuals' interests are bound together in pursuit of a protective social order.<sup>104</sup> The vulnerabilities of people with disabilities are not a special case, he argues. Our discussion here adds to Ball's the thought that disabled individuals can have special significance in cooperative schemes. For people's trust in whether a society really understands and is committed to justice is influenced by whether inferior treatment of the disabled and other "outliers" is prohibited or permitted.<sup>105</sup> This is not to make the disabled into a special case but to point out why the way they typically are treated is important to social contractors generally.<sup>106</sup>

As O'Neill argued in her 2002 Reith Lectures, placing trust well and refusing it wisely are crucial to maintaining a progressive political culture.<sup>107</sup> O'Neill's assessment of the political importance of trust accords with Baier's arguments about its moral importance. Even though trusting and trustworthiness are risky and hard, practices that build public trust are basic to democracy because they model justice on interactive citizenship rather than passive citizenship with state-delivered entitlements.

Replacing bargaining with building trust may not seem like a radical political move because it retains the frame of traditional social contract theory. Nevertheless, prizing and promoting a culture of trust more passionately prompts practical progress toward improving justice. The principles of justice formulated through and for trust will not be concerned with equally enriching the individual interests of the parties but with effectively strengthening the bonds between them. For the process of committing to the contract, so understood, disinclines the parties to be dominated by self-regarding reasons and facilitates the primacy of other-regarding motivation in their political as well as their moral lives. Thus, when contracting with trust, contractors will not ask what they have to give over to other people to secure advantage. They will instead

104. Carlos Ball, "Autonomy, Justice, and Disability," *U.C.L.A. Law Review* 47 (2000): 599–651.

105. Nussbaum points out that both Rawls and Gauthier feel called upon to explain away their disregard of the disabled. See Nussbaum, "Beyond the Social Contract," lecture 1, 9 and 20. Their defensiveness suggests tacit recognition that a theory of justice which affords the disabled inferior status is inadequate.

106. See Becker, "Reciprocity, Justice, and Disability," for a different argument about why the disabled are important to contractors.

107. The Reith Lectures can be found on the Web page of BBC-Radio 4-Reith Lectures 2002: <http://www.bbc.co.uk/radio4/reith2002/>; see, esp., Onora O'Neill, "Spreading Suspicion," "Trust and Terror," and "Trust and Transparency." The lectures are published in book form as *A Question of Trust* (Cambridge: Cambridge University Press, 2002).

ask what they must change about themselves (and about the political structure that positions them) so that others can be confident in them.

## X. CONCLUSION

Only rarely do early versions of social contract theory explicitly portray the principles of justice as produced by swapping, trading up, tit for tat, or other bargaining activities. To a large degree, the bargaining model is an emendation by more recent writers who may have been influenced by narrow legal definitions of contracts as exchange relationships. Once liberated from the bargainer paradigm, social contract theory gains the potential to do justice for disabled people without giving way to care theory or capability theory (although both care theory and capability theory still may be very useful supplements<sup>108</sup>).

Nevertheless, we may ask how justice through trust would fare in regard to the original objective of social contract theory. Does trust promotion, like successful bargaining, provide reasons for giving up liberties to facilitate social cooperation? Bargaining offers the opportunity to shape a society so agreeable as to reduce needs to exercise the liberty to demur. Yet if agreeable arrangements are the aim, the bargaining model permits us to reserve the liberty to act as I wish, rather than as I should, as long as doing so does not jeopardize contracted cooperation. So the bargain seems only provisional, a concern for both opponents and proponents of social contract theory.<sup>109</sup>

Reduce the culture of suspicion by cultivating trust, however, and Hume's farmer will be less likely to react suspiciously to giving over his liberty. What Humean farmers and the rest of us will find is that doing others justice because of their trust in one's own self, and having confidence that justice will be done to us for the same reason, feels like gaining rather than giving up power.<sup>110</sup> In this regard, trusting and being trusted may be an especially intense experience for people with disabilities and for other outliers.

From the perspective of being especially vulnerable, as most disabled people are, giving over trust to others is risky and hard, yet liberating. Concomitantly, to be trusted rather than controlled despite

108. See Elizabeth Anderson's "What Is the Point of Equality?" *Ethics* 109 (1999): 287–337, for an account of how a capabilities theory has a role in a procedural approach to justice.

109. See Cudd, "Contractarianism," for a survey of various versions of this objection, which is often raised against the bargaining model of social contract theory.

110. Compare Elinor Ostrom, "A Behavioral Approach to the Rational-Choice Theory of Collective Action," *American Political Science Review* 92 (1998): 1–22.

being vulnerable is empowering. The solution to the “outlier problem” thus is a society that empowers vulnerable people both to trust and to be trusted. In such a society, “outliers” as well as ordinary people can be free.