CAN SOCIAL CONTRACT THEORY FULLY ACCOUNT FOR THE MORAL STATUS OF PROFOUNDLY MENTALLY DISABLED PEOPLE?

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ABSTRACT

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My hypothesis is that social contract theory does not satisfactorily explain why we owe a serious concern or respect to profoundly mentally disabled individuals (PMD). This is a problem for social contract theories if we assume, like I do in this dissertation, that the PMD possess a robust moral status (RMS).

My dissertation will explore the main strategies deployed by contractarian and contractualist theorists to bring the PMD within the purview of the social contract, in order to clarify why some aspects of their claims are promising but why they nonetheless fail to fully explain the robust moral status of the PMD. I notably find that they leave morally important dimensions of human relations out of the contractual frame, which means that they exclude the PMD from the scope of justice and morality when they claim that this contractual frame offers the only valid explanation to be a subject of justice and a moral patient.

I do not conclude that this requires us to reject social contract theory altogether, nor do I count it as a reason to question whether the PMD have a robust moral status. In my concluding chapter, I will rather suggest a theoretical frame that has the potential of incorporating both contractual and non-contractual relations within the spheres of morality and justice, because both kinds of relation vehicle important intuitions about what is of value in human life.

This dissertation will contribute to orientate future research on the moral and political grounds for the rights of profoundly mentally disabled people, as well as question or curtail the breadth of certain key assumptions of social contract theories.

(Thesis length: 99,955 words)

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‘Agents who are not party to, and cannot be party to, the contract because they are not autonomous are not directly protected by it. In consequences, they cannot but have a lower moral status than autonomous agents.’

Peter Byrne (2000)

‘This criticism underestimates the resources available to contractarian accounts of moral standing. Contractarianism can both justify and explain the direct moral consideration [...] owed to them [...]’

Andrew I. Cohen (2007)

‘George still stared morosely at the fire. “When I think of the swell time I could have without you, I go nuts. I never get no peace.” (...)
“If you don’ want me I can go off in the hills an’ find a cave. I can go away any time.”
“No—look! I was jus’ foolin’, Lennie. ‘Cause I want you to stay with me."’

John Steinbeck, *Of Mice and Men*

1 INTRODUCTION

1.1 A Challenge to the Social Contract Tradition

Professional philosophers and readers of philosophy would agree that John Rawls' *A Theory of Justice* is one of the most important philosophical works of the 20th century.[1] It singlehandedly revived political philosophy, resuscitated the social contract tradition and adapted it to the values of contemporary liberalism. While this thesis focuses on a particular recent inclusivist branch of social contract theory rather than on Rawls, it seems fitting to quote how the most influential contemporary representative of the social contract tradition justified excluding the PMD from its scope to state the problem that this thesis will be addressing.

Rawls presents the 'fundamental question of political justice' in these terms: 'What is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?'[2]

Rawls' focus on social cooperation influences him (and traditional social contract theory) in putting aside the problem that some people are facing: namely, that they are unable

[1] The three monographs stating his theory of justice as fairness are: John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999); *Political Liberalism*, (2nd rev edn, Columbia University Press 2005); *Justice as Fairness: A Restatement* (2nd rev edn, Harvard University Press 2001).
[2] Rawls, *Political Liberalism* (n 1) 20.

to ‘cooperate’ due to permanent and severe mental disorders. Rawls considers that this exclusion may be remedied by extension, though he confesses to ‘lack[ing] the ingenuity to see how the extension may proceed’. Should justice as fairness fail, Rawls considers the possibility that other accounts of justice or morality may explain the ‘problem’ of the PMD’s exclusion and supplement his account of justice as fairness. ‘How deep a fault [among other exclusions, that of the PMD] is [for his contractualist theory] must wait until the case itself can be examined.’[3]

This is the challenge that Rawls left in the social contract tradition’s hands: could it ground a robust moral status for the PMD? If not, how deep a fault is it for the tradition and can it be supplemented by alternative accounts?

Although Rawls assumes that not providing an account of why wronging the PMD is wrong is in itself a failure, neither all contractual thinkers nor all moral philosophers do. This sends us back to a more fundamental question.

Do we owe something to people with profound mental disability (the group of people to which I shall refer as the ‘PMD’, which I will describe with more precision in section 1.3 of this introduction)? It is doubtful that anyone would answer ‘nothing at all’. Most of us would feel obligated - morally obligated - to intervene if they came across helpless human beings with extremely low cognitive capacities, such as an infant or a PMD erring in the middle of the street. Most of us are particularly appalled when we read about the

[3] ibid 21.

mistreatment of such individuals in institutions set up for their care. Has society indeed failed them, in a way that implies a prior entitlement on their part?

Up to a point, the problem of exclusion I am interested in could be thought of as practical one about people's exaggerated reactions to otherness and the need to mitigate these reactions to avoid monstrous forms of mistreatments. However, without denying the importance of the contingent dimension of the problem, I am interested in the philosophical problem of why this counts as mistreatment.

There are two broad areas of ethical, social and medical investigation that are essential to policymakers dealing with the PMD. The first one concerns the nature of the social responsibility, or (social) contract, we hold towards PMD individuals. It requires us to find what we can do to help the PMD: what, from a subjective vantage point, will improve their well-being. Their significant lack of communicative capacities and the uniqueness of each individual as well as the wide variety of cognitive disabilities represent important obstacles to this first line of inquiry. Another aspect of this inquiry is the normative nature of these duties: how stringent or optional are they? Is it merely good, or also morally mandatory to help the PMD?

The second issue concerns the basis for such duties. For instance, do we owe help, nurturing, care or respect to the PMD because they are equal citizens? In what sense are they citizens if they will never be able to vote? Or do we have ‘robust’ duties toward them because they belong to the human species, or because they have a soul, or because they are

our siblings and children or those of our friends? Perhaps we can naturally empathize with them because we share their form of life? The list of potential grounds go on and all of them have been met by philosophical objections.

This dissertation owes to the second line of investigation. It explores one particular moral and political ground for owing the PMD robust duties or for their robust moral status, which is the corollary of such duties.

I take for granted that we owe 'robust' duties to the PMD for the purpose of my argument and I intend to define with more precision what I mean by 'robust' obligations or robust moral status (RMS) in section 1.4 of this introduction. It notably implies more than mere charity and no less weighty a moral consideration than that owed to all non-disabled citizens. This is not an uncontroversial assumption, as moral revisionists challenge it on the ground that the PMD's moral status should be deflated proportionally to their lack of cognitive capacities, but it is still a plausible starting point as we generally grant it, as a matter of ordinary moral intuition, and use it, philosophically, as a test case to reveal the failing of a moral or political theory.

The question that my thesis addresses is whether a contractualist or contractarian theory can justify that we owe robust obligations to the PMD. I am not really concerned with distinguishing between obligations of morality and justice as my focus is whether the PMD have a robust moral status (RMS); as I will explain later in this introduction this implies duties of justice because having a RMS should normally imply being a subject of justice, but

whether it does so or not is a secondary concern for me, as it belongs to the first line of inquiry mentioned above.

Social contract theories generally rest the authority of the rules ordering society on the idea that they can be understood as the product of a contractual agreement between members of that society. They reflect and assume the moral, political and strategic importance of certain contractual features (for instance, equality and reciprocity between contractors) and of certain characteristics of the idealized parties to this contract possess (for instance, self-interest and rationality). They draw their appeal from the importance of these values and conceptions. They deploy a (generally counterfactual) story about the origins of society according to which parties to the social contract have endorsed certain rules and principles to set up basic social institutions.[4] The two main variants of social contract theories have been called 'contractarianism' and 'contractualism' and they can also be ethical theories applying to discrete situations rather than political theories legitimizing social structures which could have been agreed to through this contractual process. This moral and political tradition is most famously represented by Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant and, in contemporary times, by David Gauthier, John Rawls and Thomas Scanlon. I will distinguish 'contractarian' and 'contractualist' theories later in this introduction. To refer to both, I will use the generic adjective 'contractual'.

1.2 Specific Thesis Hypothesis

[4] Rawls, *A Theory of Justice* (n 1) 10.

My specific hypothesis is that social contract theory does not satisfactorily explain why we owe a serious concern or respect to the profoundly mentally disabled.

My dissertation will explore how far attempts to do so succeed or fail, in order to determine, ultimately, which morally important dimensions of human relations they leave out. The last portion, roughly a fifth of my thesis, will elaborate on these missing moral dimensions and suggest which theoretical frames can best incorporate them. I will not develop any of these frames in depth, but rather focus on answering some preliminary criticisms that stand in the way of developing them.

This endeavor should contribute to orientate future research on the moral and political grounds of respect for profoundly mentally disabled people, as well as question or curtail the breadth of certain key assumptions of social contract theories.

1.3 Who Are the PMD?

1.3.1 Defining the group of PMD

Two Difficulties with Defining the PMD: Heterogeneity and Stereotyping

The very idea that there are sound moral generalizations to be made about 'the PMD' should be questioned. Defining the category of profoundly mentally disabled individuals is notoriously difficult. It faces two main challenges. First, the characteristics of this group are

hard to pin down, because they vary through time, and from individual to individual. Moreover, PMD sometimes possess capacities, talents, aptitudes, tastes and modes of communications which are not typical for non-disabled human beings to have, or rather these traits may be central to a particular PMD's flourishing while they are barely noticed or given importance in the typical lives of non-disabled people and are, as a result, undervalued or under-explored by social engineers, moral philosophers and political theorists. We may call this the heterogeneity problem: the PMD's group is so diverse in terms of traits - including 'contractual capacities' - that many generalized assessments purporting to apply to the group as a whole runs the risk of ignoring morally relevant differences. Strategies to overcome this problem consist in acknowledging the heterogeneity of the PMD group by either exercising caution in making generalized statements or recommendations about the group as a whole, or leave room for case-by-case adjustments. It is still possible to make comments about the fact that the PMD generally lack certain capacities, or possess them in a lower degree, as long as we take into account cases where these capacities may in fact be present (though perhaps not exercised as autonomously) and also remain aware that in other cases these same capacities are radically absent. This thesis reflects this strategy by highlighting many ways in which PMD have more capacities than they are presumed to have. While correcting a common 'leveling down' generalization, it also avoids a leveling up one, by pointing out that in some cases, these capacities are absent, or insufficient for contractual integrative strategies to work and that we must consider these hard cases.

The second challenge to defining the category of PMD has to do with the very action of defining mental disability within particular social contexts. The idea that mental

disabilities are conditions that are no more socially constructed than, for instance, measles and chickenpox, is untenable. It is also obvious why the construction of categories of mental disabilities are ridden with moral evaluations. The lives of most people who we consider as 'non-disabled' are filled with activities, such as taking part in family life or earning money, valued differently within different valuation systems. People who can do more of these activities will have access to more of this value; people who can do less will have access to less. Below a certain threshold, it seems that the incapacity to access to some valuable activities calls for moral and political responses of a special order. Getting these responses right is extremely difficult, not only because it is hard to isolate the morally relevant factors, but also because 'non-disabled' people may be of bad faith and/or epistemologically situated in a way that limits the quality of their assessments. It may be less threatening or costly, for instance, to categorize some people as an aberration rather than to question one's beliefs about valuable activities, blameworthiness and responsibility. The strategy to deal with this problem is, again, to remain aware, as we are using any such category, of its social dimensions and implications, and try to see whether it is possible to phrase 'objective' statements about the PMD in terms of comparative or relational ones so as to avoid concealing, for instance, that systematic advantages are given to another group, or that such advantages are not the result of natural or inevitable states of affairs but of social choices based on power or values that ought to be brought out into the light.

Definitions found in medical and philosophical literature are criticized on both counts described above: (1) over-generalization or failure to assess holistically all relevant criteria

and (2) failing to recognize the elements of social constructivism at work in a definition or failing to recognize their potential prejudices.

For instance, a prominent medical set of definitions of mental disorders, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), defines an intellectual disability as involving 'impairments of general mental abilities that impact adaptive functioning in three domains, or areas' of skills: conceptual ('language, reading, writing, math, reasoning, knowledge, and memory'), social ('empathy, social judgment, interpersonal communication [...], friendship' and similar relational capacities, and practical ('self-management [...] such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks').[5]

The DSM, including in its most recent update, has faced the longstanding criticisms of encouraging over-diagnosis, false positives, and the 'pathologizing' or 'medicalization of all problem behaviors and relationships' and of using 'intrinsically normative' (rather than 'purely factual') biomedical terms.[6] The British Psychological Society, among others, note that the former issue can cause the stigmatization and isolation of individuals by casting their differences in a pathological or negative light. This problem is worsened by the fact that the evaluative criteria are 'symptoms that all rely on subjective judgements' and vehicle the values associated with 'current normative social expectations'. Moreover, mental problems

[5] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-5 (5th edn, American Psychiatric Association 2013), <http://dsm.psychiatryonline.org> accessed 24 July 2013.
[6] See Massimiliano Aragona, 'The concept of mental disorder and the DSM-V' (2009) 2(1) Dialogues in Philosophy, Mental and Neuro Sciences 4 and 6; Joel Paris, 'Preface' in *Making the DSM-5* (Joel Paris and James Phillips (eds.), Springer 2013).

are not subjectively examined within a relational frame but as being 'located within individuals', which does not so much 'miss the relational context of problems and the undeniable social causation of many such problems', like the Society suggests, as it assumes a specific kind of unchallenged relational frame, that is, the kind of relations taking place between people without disorders (thus begging the question insofar as the notion of disorder is defined by a failure to be able to partake of relations between people without disorders).[7] Another factor aggravating the use of a quasi-legislative categorizing instrument such as the DSM are that they could be unduly influenced by 'powerful interests, both corporate and public, that could profit from a highly inclusive diagnostic system.'[8] These interests, it has been argued, may not only include an influence from actors who ought not to be legitimate parties to the debate, like pharmaceutical companies, but by actors at the very center of it, like psychiatrists. Writing about the biopolitics of defining 'mental disorders', Warren Kinghorn argues that 'the project to define 'mental disorder' arose in the 1970s and early 1980s as a way to burnish the authority of psychiatry and specifically of DSM-III' and the DSM-5 also attempts 'to persuade (...) that there exists an appropriate, safe, and nonthreatening clinical 'space' within which diagnosis and treatment can be rightfully exercised.' Some, like Kinghorn, go on to conclude that that there is no such 'safe space', that the DSM cannot aspire to - nor be formulated in terms that assume that it can - categorize mental disorders as natural kinds.[9]

[7] The British Psychological Society, 'Response to the American Psychiatric Association: DSM-5 Development' (The British Psychological Society 2011) <http://apps.bps.org.uk/_publicationfiles/consultation-responses/DSM-5%202011%20-%20BPS%20response.pdf> accessed 24 July 2013.
[8] Paris (n 6) vi.
[9] Warren Kinghorn, 'The Biopolitics of Defining "Mental Disorder"' in *Making the DSM-5* (n 6) 48.

From Medical to Philosophical Definitions

The same criticisms surface within philosophical literature on mental disability, about over-generalization, implausible essentialism, stereotyping, the disregard of relational components and of too individualistic an approach to the condition of lacking certain cognitive capacities, and about the fact that key value-judgment about certain capacities (and not other capacities or relational features) are assumed to be the correct evaluative standard.[10]

On the one hand, philosophers talking about mental disability are often interested about particular individual traits they want to isolate in order to assess their moral significance. On the other, these specific traits correspond to a category of concrete people. The way this category has been socially defined can be the object of various criticisms and so, philosophers face a dilemma between talking about certain traits in the abstract and insist that their conclusions apply to whomever possess these traits regardless of the social category and to face the charge of doing a poor job as applied ethicists who cannot point to whom, in the real world, they are referring to, or to claim that their conclusions apply to a particular social category and face the same charges addressed to those defining such categories.

Contractual thinkers are no exception. When they reflect on the issue of justifying the inclusion of the PMD in society, they focus on the moral and political consequences of

[10] Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Indiana University Press, 2009); Eva Kittay, 'The Personal is Philosophical is Political: A Philosopher and a Mother of a Cognitively Disabled Person Send Notes from the Battlefield' (2009) 40(3-4) Metaphilosophy 606.

lacking the intellectual capacities required to be a ‘contractor’ (in the political sense of participating to some version of a social contract) or to be of ‘contractual relevance’ (as previously defined). These capacities notably include the ability to elaborate and live by a conception of the good life (which implies autonomy), a sense of justice, rationality, and a capacity to threaten or benefit others though individual and/or collective arrangements. (Which of these capacities matter depend upon the version of the contractual theory put forward.)

Inclusivist contractual thinkers cannot define the PMD as a category of people lacking enough of these capacities to be a contractor or be of contractual relevance. They must keep the notions of ‘PMD’ and ‘non-contractors’ distinct if they want to argue that the PMD have, in spite of appearances, contracting capacities and/or contractual relevance. However, instead of elaborating an empirically sophisticated definition of mental disability, they implicitly define the category of disabled people they are talking about as those who are *traditionally* seen as lacking such or such a ‘contractual’ capacity or relevance but who, once we better qualify these capacities or their conditions of exercise, possess (enough of) them.

As a result, some of their conclusions may be transposed to other people than the PMD failing to meet a threshold of contractual relevance, like the very young or the elderly. However, it remains relevant to focus on the group of the PMD in particular as their impairments of conceptual, social and practical skills of contractual relevance are not only amongst the most significant among living human beings in a conscious state (people undergoing extreme pain may be similarly impaired) but are also thought to keep them under

the threshold of contractual relevance throughout their lifetime. The group of people who best exemplifies these traits is identified as the PMD by the medical community, but this thesis only endorses the DSM's definition insofar as it refers to the capacities contractual thinkers are focusing on. It is opened to the empirical challenge that many people classified as PMD under the DSM do, in fact, have some of these contractual capacities. Indeed, it will incidentally contribute to making such a case and, in turn, prompt us to question whether the medically categorized 'PMD' are as conceptually, socially and practically impaired as the DSM suggests and to ask in future research whether and how their citizenship could be actualized.

This qualified use of the DSM definition brings up the difficult question of what is meant and implied - descriptively or normatively - by terms like 'impairments', 'disability', 'illness' or 'disorder', because the category of PMD used in this thesis has an inherent normative dimension connected to moral status, whereas the DSM's definition aims at a criticized kind of objectivity and does not venture into the territory of evaluating its moral and political consequences. Therefore, for instance, bodies like the American Psychiatric Association or the American Association on Intellectual and Developmental Disabilities may evaluate the degree of support needed by the PMD to thrive without a clear normative standard of thriving. This reflects the scientific penchant for an inductive approach and the philosophical penchant for a deductive one. For better or worse, medical researchers are more likely to make the normative meaning and consequences of their empirical findings the more flexible variable whereas philosophers are more likely to want to determine first what the proper axiological standards are and leave their empirical suppositions more liberally

opened to challenge, because the former specialists are primarily interested in achieving descriptive clarity and the latter are primarily interested in philosophical questions, to which I now turn.

1.3.2 Philosophical Implications of Belonging to the Category of PMD

What philosophical problems does the group of PMD raise, as beings possessing significantly less cognitive capacities than the species' norm, which implies having little, if any, practical rationality and self-consciousness and being unable to survive, let alone flourish, in a human community, without pervasive support?

As far as social justice is concerned, the question of whether and how far the state has to fund the support that the PMD need to attain a certain level of well-being is a major area of philosophical investigation. It belongs to the first line of inquiry stated in the opening of this chapter, concerned with finding what the PMD need and with delineating how much they are morally entitled to as robustly morally considerable beings. We will not be exploring this question. There is a more fundamental one which seeks to explain whether and why the PMD are indeed the robustly morally considerable beings entitled to equal moral consideration which the first line of inquiry takes them to be. This is the question of their moral status.

Here are the two ethical pulls that are at the heart of the challenge that cognitive disabilities present to moral philosophy:

(1) It is a very widely and commonly held strong moral intuition that the PMD have a RMS.

(2) Liberal modern philosophy has traditionally emphasized the importance of autonomy and moral agency, both requiring sophisticated cognitive capacities; it has grounded the authority of the state and the specialness of the value of our lives on such bases.

How is moral philosophy to account for the RMS of the PMD if they are characterized by being significantly deprived of such capacities?

While some philosophers see these two pulls as incompatible, at least to an extent important enough to choose a 'camp' on either side of what seems like a conceptual divide, the inclusivist contractual endeavor takes up the challenge of reconciling both by arguing either that cognitively able people contractually create a political world in which they make a special place for the PMD, even though the latter have not contributed to its creation or that the PMD are actually able to make such a contractual contribution. This thesis will test the validity of this contractual intuition (that both ethical pulls are reconcilable).

1.4 Robust Moral Status (RMS)

The notion of moral status (or moral standing) is at once very common and widely disputed, mostly because it can have entirely different axiological grounds and normative implications depending upon the theoretical frame within which it is used. For instance, moral status is sometimes considered as a scalar property, but sometimes not. In the latter case, it may be a synonymous for 'dignity'. In the former case, we need to distinguish between higher and lower statuses. Even within a scalar account, above a certain threshold of met requirements (to be recognized this status), theorists often focus on one 'special' status, which they then call, for instance, 'full' or 'strong' moral status.[11]

Although some hold that it is an essentially disputed concept, the following definition seems broad enough to encompass all of its variants: moral status is a property which confers upon the individual who possesses it a special moral considerability. The special moral considerability that is owed to beings with a full moral status is generally taken to be special kinds of attitudes or treatments, such as respect and concern, and to translate into functional privileges such as being entitled to hold certain moral rights.[12]

[11] A majority of theories, including contractual ones, simply assume that people either possess or not a moral status and the properties said to underlie it. Even when these properties obviously come by degree, theories will make use of a threshold to reach the same 'all or nothing' result: one is either below or above the threshold, one is either within the 'range' of possessing a property or not (Rawls, *A Theory of Justice* (n 1) 444-5). The *prima facie* incompatibility with the fact that RMS-granting properties come by degree and the fact that moral status is often used as an all-or-nothing notion raises the suspicion that moral reasons extraneous to the former scalar properties explain their non-scalar implications. Whether or not this way of conceptualizing moral status as correlating all-or-nothing entitlements is the best use of the notion is not a matter I will discuss here. Insofar as the social contract theory is concerned, 'a being either has or does not have the crucial property that confers rights. It is like the mark of Cain, conferring moral untouchability on whoever displays it.' Loren E. Lomasky, *Persons, Rights, and the Moral Community* (OUP 1997) 189.

[12] More generally, a moral status correlates certain characteristics of the value of an entity (for instance, non-derivativeness) as well as certain constraints on the way it may be fittingly related to (for instance, it may not be used only instrumentally).

We need to give a slightly more elaborate definition, however, as the nature and scope of the moral considerability and of its implications thus defined does not sufficiently reveal what is desirable about such a status from a contractual perspective. From a contractual point of view, I will use the term 'robust moral status' (RMS) to connote a property which confers to its possessor a moral entitlement to take part in the procedure constructing social institutions and decreeing its governing rules, and/or having one's interests equally considered during this process. These are the robust obligations owed to entities with a RMS.

Robust obligations can further be characterized by the stability of their grounds and their non-optionality. These obligations thus notably differ from those based on stipulations agreed to on the basis of mere desire or preference by able contractors (unless this desire is qualified in a way that makes it stable and/or non-optional). They need not be absolute, but they need to be based on some stable properties internal to an entity or on some stable relations this entity has with other contractors or with society (i.e. the collectivity of contractors). If the contractual obligations society or individuals have toward entities with RMS would be optional and unstable, they would not correspond to any notion of full moral status presently existing in bioethical or political literature. Perhaps the possibility of a plural, scalar, optional, unstable (and relative in other ways) strong moral status ought to be examined in spite of its (historically and politically located) implausibility, but not in this thesis. Contractual grounds for a RMS, in particular, are almost always considered as having this stability and non-optionality[13]: while parties to contractual negotiations will express their

[13] We will deal with an exception in chapter 5.

will within certain constraints, the nature of these constraints, and of themselves, qua negotiators, self-interested beings, reasonable beings and/or valuers and self-valuers (depending on the account), will limit the expression of their will in a way that makes their granting a RMS to an entity a much less optional and much more stable affair than that of choosing how they want to spend their Saturday night and how society should be organized so that, *inter alia*, they most enjoy their Saturday nights they way they prefer.

These contractual grounds for a RMS are, from the most direct to the most indirect, (1) having what it takes to be a contractor, (2) or to contribute to a contractual society, (3) or to have "contractual relevance", that is, to have other properties unrelated to participating to contractual endeavors but that would give contractors strong contract-related reasons to grant their possessors an an equally[14] important status to other contractors. By contract-related reasons, I mean reasons that are related to the moral agent's exercise of his contracting capacities or to the success of a contractual society. As I will explain in the third and fifth chapter, if these reasons are not sufficiently contract-related, their grounds and their stringency would need to be explained and justified on a non-contractual account. Also, the "contractually relevant" beings must not only have relevant properties giving contract-related reasons for granting them a RMS, but they must also be the kind of entities to whom it makes sense to confer a RMS. As we will see in the fifth chapter, theories that would justify

[14] I do not mean to be giving to equality a distinctive definitional importance here. It is simply the case that the implicit or explicit concept of 'full moral status' within contractual thought entails *one* kind of strong status. Even though nothing precludes, in theory, to consider a political theory granting a variety of scalar statuses to different beings possessing status-giving properties (such as the capacities to benefit others contractually, or to have more or less sophisticated contracting capacities) to different degrees, it is simply not an option considered in contractual thought (or that would be seriously considered in any liberal moral and political literature as far as I know). Being a member of a contractual society is assumed to be an all-or-nothing quality. C.f. n 15.

granting a RMS to entities without subjective interests or that do not partake of any goods (such as life, play and social life) like buttons seem odd or unconvincing.

A more exhaustive definition of the grounds and implications of RMS would vary depending on whether we are using a contractualist or contractarian frame. Notably, it would not be controversial to add on all contractualist accounts that RMS connotes a property which confers to its possessor a moral entitlement to a special concern and respect. Concern and respect are used here in their ordinary meanings, and they are 'special' because (1) they are ways of valuing non-derivatively certain entities and to take these entities to be their own source of value,[15] (2) they are non-optional or non-easily defeasible obligations, (3) they correspond to 'robust' duties, which are moral duties and duties of justice. It would not only be wrong, but also unfair to fail to grant equal consideration to the interests of beings with a RMS when deliberating on considerations of justice (such as the design of fair social institutions or redistribution of limited resources).[16] This more specific definition would not match some contractarian accounts however, which can associate RMS with a self-interested stance from which a moral agent will choose to respect an entity for prudential reasons rather than because she recognizes this entity's non-derivative value.

[15] Regardless of whether these two characteristics are different from one another and if it is controversial whether they are already implicit to the ordinary meaning of concern and respect.

[16] For a similar definition in the existing literature on moral status, see Agnieszka Jaworska, 'Caring and Full Moral Standing' (2007) 117(3) Ethics 460. Jaworska's definition of full moral status is similar to mine, and I would adopt an abbreviated form of it, in order to reflect a formal reservation about her associating it to the notion of personhood (which would only introduce another highly ambiguous concept or load the conceptual dice) and a more substantial reservation about her intention to define moral status non-relationally, in the sense of considering reasons given by relations and special relations as ethical pulls external to the notion.

I need not make the case that the doctrine of moral status is a good idea or of what its best account should be[17] for the purpose of this thesis. I am using it comparatively, to see whether contractual arguments justifying that non-disabled people have it also hold for the PMD, who would therefore be equally entitled to it. This comparative method (between the status of the 'central cases' of beings with full moral status within contractual thought and the status of the 'marginal cases') befits Rawls' method of incremental extension which the inclusivist branch of contractual thought explored in this thesis has made theirs. It may be that the doctrine of moral status as present in contractual thought is flawed (in terms of not being sufficiently pluralist, relational, and of not translating into all the proper moral attitudes). Indeed, my conclusion will point in this direction. However, we cannot assume it from the start, and we must ask first whether one of the available contractual accounts for the bases of RMS can convincingly apply to the PMD.

I will conclude this presentation of the concept of RMS by briefly explaining its relation to other concepts in its neighbourhood, namely dignity, personhood, equality, intrinsic value and moral rights, in order to explain why I prefer to focus on RMS.

First, it could be said that I should focus on the notions of dignity or personhood instead; this is what we ought to secure for the PMD. Although the terms "dignity" and "personhood" may have a more familiar ring than RMS, I do not think this would necessarily be a good idea. These concepts are just as ambiguous as RMS is and the way to clear their

[17] In favor of this view, see Mary A. Warren, *Moral Status: Obligations to Persons and Other Living Things* (Clarendon Press 1997). For views expressing doubts against it, see Anita Silvers, 'Moral status: what a bad idea!' (2012) 56 (11) Journal of Intellectual Disability Research 1014 and Joseph Raz, *Value, Respect, and Attachment* (CUP 2001) 128-9.

ambiguity would be to stipulate a definition similar to that of RMS that would fit the contractual theories we are exploring in this thesis. On their face, moreover, it would seem like a greater contractual highjack of the philosophical traditions behind these concepts to state that a "person" or a being endowed with "dignity" must be (direct or indirect) contractors or have "contractual relevance", and that this status (of person or of a being with dignity) would primarily imply representation within the contractual society-building process. For many influential accounts of the notion of personhood and dignity, such contract-related conditions and implications are absent or merely incidental. "Personhood" and "dignity" are kinds of RMS that are, on some accounts suffused with non-contractual elements. Of course, contractual thinkers could propose a new account of personhood and dignity, but these notions are so enmeshed with non-contractual ideas that it seems less confusing to choose a more neutral terrain of challenge. Similarly, different accounts of these notions imply very different grounds and normative consequences (e.g. Kantian and Hobbesian understandings of dignity). Though a contractualist and a contractarian understanding of RMS would be different, they would at least overlap under the definitional elements given above. Lastly, it is not certain that contractual theories need to challenge non-contractual accounts of personhood and dignity to propose contract-related grounds for RMS. (For instance, they may hold that some person are not subjects of justice.)

Second, one could think that my main focus ought to be equality *per se*, since I am concerned with showing that the PMD are *equally* entitled to RMS. Although I will deal with issues related to equality when necessary, I do not think that equality *as such* ought to be what should be primarily secured for the PMD. Apart from the familiar objections to

arguments valuing equality intrinsically, it is not what the contractual thinkers I am dealing with have in mind. For them, equality of status is incidental to the fact that the PMD have direct or indirect contractual relevance. It is also a side effect of their non-scalar view of RMS, which makes this RMS equal for all. In other words, they argue that the PMD are entitled to a special consideration as morally considerable beings and as subjects of justice because their properties demand it, and the fact that this consideration is equal reflects both their equal "contractual relevance" and the non-scalar feature of their conception of RMS rather than the intrinsic importance of equality. Besides, a primary focus on equality (by contrast to the specific rights demanded, for instance) would, if anything, undermine a contractual position, if I am correct to suspect that they require an equality of a single, non-scalar, RMS for pragmatic rather than empirical reasons, or for philosophical reasons that have little to do with contractual premisses. I will come back to this issue in the fifth chapter. Lastly, equality of *treatment* is not either what the PMD are primarily after, given the particularities of their needs. Although I am not investigating the difficult question of what it would mean, in terms of concrete distribution of resources, to give the PMD equal representation and consideration, I will explore whether and in what sense it would be unfair to *a priori* limit the support given to the PMD for considerations of equality in the fourth chapter.

There are two other notions more closely connected to the notion of RMS: intrinsic value and moral rights. Let me explain these connections in turn.

Intrinsic value is another disputed concept, and I take it to mean "final" or "non-derivative", or to be an antonym to "instrumental".[18] An entity with intrinsic value has a *telos* that goes beyond serving somebody's ends: it is more than an instrument. The valuing attitudes that are directed to it are not directed at something else beyond or through it: its value is not derivative upon the value of something else. This (plausible but not undisputed)account of intrinsic value can mean the same as RMS in some contexts, like contractualist accounts of RMS, but not others, like some contractarian accounts which only grant derivative value to other contractors (though a robust one, as it nonetheless secure as stable and comprehensive conceptual grounds for citizens' rights as this theory can offer). The greater generality of RMS plays in its favour, but as far as contractualist accounts are concerned, the two concepts (RMS and intrinsic value) can be taken to be synonyms if one assumes that both warrant the same kind of moral considerability. This assumption is problematic for contractual theory as having intrinsic value might be justified on non-contractual grounds (and if this were enough to secure a RMS, then it would provide a non-contractual account of RMS, which is not what this thesis is exploring). However, there might an account of intrinsic value which retains its contractual dimension and that would allow attributing RMS to PMD. We will explore such possibilities in the fifth chapter.

Finally, the notion of moral rights is not significantly different from the notion of RMS. A RMS will, of necessity, translate into having some moral rights. A robust moral status without moral rights associated to it would not mean much, if anything. The difference between the two concepts is that moral rights refer to a list of moral entitlements possessed

[18] Christine Korsgaard, 'Two Distinctions in Goodness" (1983) 92 Philosophical Review 169.

by an entity, whereas the moral status of this entity refers to the condition of an entity in the eyes of moral agents. Whether this condition can be reduced to a list of moral entitlements, therefore making the concept of moral status a (redundant) shorthand for that of moral rights is a question that would merit a more comprehensive review of the use of the tool of moral status by philosophers. There is no need to undertake such a review here, and I assume we can meaningfully use the notion of moral status, if only because most of the authors do. Certainly, the case can be made that, even as a mere shorthand, it would have a utility. Consider that I could describe to you someone who possesses a number of rights (e.g. to ask you some questions in some circumstances, to which you have an obligation to answer, and so on) or, instead, I could simply refer to the status of a policeman or your father, if you are a minor. Similarly, contractual authors assume that the status of a "contractor" comes with a list of rights, for instance, to have one's interests represented in a society-building process.

I should also point out that the notion of RMS is, on both its contractualist or contractarian formulations, the strongest moral and political status individuals have within a society. Its implications go beyond, therefore, notions connoting a more basic or rudimentary status (correlating fundamental rights), which would require less demanding conditions to be met and would imply only the most basic entitlements and privileges. I will explore the connections between these accounts of basic entitlements (reflected, for instance, in some human rights conventions and discourses) and contract-based RMS in the fifth chapter. My two concerns are that they may not be based on contractual premises and that even if they were, they would secure a lesser status for the PMD, translating into diminished political representation and entitlement to redistribution of social resources.

1.5 Why focusing on social contract theories as a ground for the robust moral status of the PMD?

Many theorists have tried to ground the special status of cognitively disabled people on contractual theories. Some of them, like Martha Nussbaum[19] and Eva Kittay[20], have concluded that the most promising contractual model for doing so (Rawls's) failed and that we had to look in non-contractual frameworks to explain the robust status of the PMD.

> Now of course we immediately want to say that people with impairments and related disabilities are not unproductive. They contribute to society in many ways, when society creates conditions in which they may do so. So social contract theorists are just wrong about the facts; if they correct their false factual assumptions, they can fully include people with impairments and their unusual needs, mitigating the disabilities associated with these impairments. A defense of social contract theory along these lines is, however, doomed to failure.[21]

The anti-contractual criticism is twofold. Empirically, no feat of social arrangements can turn the PMD into productive contractors. Conceptually, no matter how we broaden or modify the contractual notions of reciprocity, cooperation, society as a collective venture for mutual benefit, production or participation, used within the requirements for counting as a member of society, the PMD still cannot meet these requirements unless we also integrate many non-human beings (animals and plants) to our society. Not only would this latter solution face the

[19] Martha C. Nussbaum, *Frontiers of Justice Disability, Nationality, Species Membership* (Harvard University Press 2007).
[20] Eva F. Kittay, *Love's Labor: Essays on Women, Equality and Dependency* (Routledge 1999).
[21] Nussbaum (n 19) 105.

problem of the scarcity of resources to be distributed among such a wide ‘society’, but it would very stretch the notion of a society beyond anything recognizably contractual.

By contrast, the theorists who we will be considering in this thesis, such as Lawrence Becker and Anita Silvers, have chosen to adapt inclusivist contractarian and contractualist models so as to include the PMD within their framework and provide a contractual justification for their RMS. These thinkers have taken up Rawls’ challenge of conceptual incrementation.

An objection to this inclusivist contractual endeavor could be most strongly stated thus: why look in the social contract tradition for a justification for the RMS of PMD if the PMD (as well as children and other ‘marginal cases’ apparently not in possession of contracting capacities or strong ‘contractual relevance’) are typically taken as the social contract tradition’s Achilles' heel?

First, there is currently a divide between thinkers who try to go beyond contractual thinking to explain the duties we have toward the PMD and those who try to expand social contract theory to include them. This alone warrants my investigation, but I should answer the question: why would anyone investigate whether the PMD are owed robust moral consideration according to a social contract theory in the first place? Do other theories (e.g. need-based) not look more promising to accomplish this?

I should state that this is not, at least, a fanciful application of the social contract doctrine: its most influent contemporary representative, John Rawls, explicitly left the issue of whether the PMD could be included within the scope of justice as fairness to be dealt with later, if possible by extension.[22] The PMD may turn out to be, rather than an exception that can be brought in line, the exception that questions the rule, the 'outlier' that forces us to reexamine our outlying criteria and assumptions, but even that does not need to be deadly to contractual theory.

Second, the sheer importance of the social contract tradition makes the question of whether it applies to the PMD worthwhile. The exclusion of the PMD from the scope of contractual justice and morality is harmful for them. They may gain a RMS on a different basis, but they would still not be subjects of justice according to a contractual account. It is not clear, then, whether contractual accounts would simply recognize their limitations (something that Rawls, for one, explicitly conceded)[23] or would claim to occupy the whole terrain of available justifications for RMS. In the former case, ways to balance the claims made by beings with contractually based and non-contractually based RMS would have to be developed. In the latter case, it would serve as a refutation of contractual theory.

For that latter reason, it would be, thirdly, salutary for contractual theory itself if it could expand as to include the PMD. The exclusion of the PMD is detrimental to social contract theories, as the adequacy of theories of justice, as Lawrence Becker says, 'is now

[22] Rawls, *Political Liberalism* (n 1) 20-1.
[23] ibid.

measured partly by its success in dealing with the disabled'[24]. I believe that the contractual frame is very useful in our thinking about morality and justice, as it properly reflects liberal values like the importance of autonomy, of elaborating a conception of the good and aspire to live by it and flourish by doing so, of making plans and being held to our word, to name a few virtues of contractual philosophical frameworks. These values are so central to our human form of life that it is understandable that many scholars would be reluctant to simply put contractual theory aside when dealing with the RMS of the PMD and argue instead that the social contract tradition can successfully integrate the PMD.

My task is perhaps best termed, then, not in the endeavor to find the best philosophical frame to explain the duties we owe to the PMD, nor to challenge or comfort the social contract tradition, but in measuring the possibility of compatibility between the strong moral pull dictating that we have a robust concern toward the PMD and the social contract tradition. (Indeed, I ultimately come to the conclusion that the social contract framework is not promising to completely (or best) explain (all) the robust duties we owe to the PMD, but I also conclude that this finding suggests, not that the social contract tradition is to be jettisoned, but that we should narrow its claim to the whole of the territories of morality and justice, i.e. to defining who is a moral agent/patient and a subject of justice.)

My primary interest nonetheless lies with the PMD's moral status. I explore social contract theory because many people writing about mentally disabled individuals hope to explain in a broadly contractarian or contractualist way how to think about them. Although I

[24] Lawrence Becker, 'Reciprocity, Justice, and Disability' (2005) 116 (1) Ethics 9, 9.

shared their optimism, I am now unconvinced that this approach can provide the PMD with a suitable place in the moral world. This conclusion allows me to move my attention, naturally enough, onto other (relational) solutions. (By contrast, this conclusion could be interpreted differently, as part of a criticism of social contract theory. My focus on the PMD would be instrumental in showing that this tradition fails to provide a satisfactory explanation for deciding who should be a party to our contract-based society. This latter direction is not, however, the one I am taking in my thesis. On the contrary, my conclusion points toward an understanding of contractual relation as only one kind of normative relation among others.)

One could insist that a more natural way to start such an investigation on the status of the PMD would be by looking *first* in the places which we would immediately intuit are most likely to support the PMD's RMS, such as ethics of care, duties toward humanity or toward occurrences of vulnerability which characterizes the PMD so well. My answer is that I have started my investigation there, with axiomatic humanist arguments, care ethics' description of the value of caring relations and the anti-speciesist charges of arbitrariness. There are many ways to approach an argument, and starting by taking seriously some of the most influential, and seemingly antagonistic, positions as a preliminary step is a reasonable argumentative strategy (and the scope of such a step seems sufficient for a doctoral dissertation).

Furthermore, an advantage of asking whether the PMD have an active or passive role to play within the social contract (i.e. have contractual capacities or contractual relevance) is that it would defeat the anti-speciesist charge of arbitrariness addressed to theories which

conclude that the PMD have a special status that other species may not have in spite of possessing as much, if not more, of the capacities deemed relevant to confer RMS.

Let me point out two further virtues of seriously considering apparently unlikely but paradigmatic or mainstream solutions.

(1) Learning from the 'opposing camp' and overcoming the opposition between camps.

While we could start directly by arguing the non-arbitrariness of preferring our own species, or of intra-species relations, or of empathy, relations of care and partiality, to name but a few candidates for non-contractual grounds for the RMS of PMD, the most promising of these approaches (or the ones I find most promising) would require to question some very commonly held ethical principles, such as the centrality of impartiality. I cannot relate here the history of the use of the concept of moral status within argument regarding the exclusion of women, minorities and 'marginal cases' raised notably in discussions of abortion and euthanasia, but it is in a significant extent the history of an intellectual battlefield where too many (humanist and anti-speciesist, utilitarian and feminist, etc.) theorists end up speaking at cross-purposes. This is especially true of discussions around the RMS of PMD.

Insofar as we may have to challenge the conceptions of the person and ways of valuing taken for granted by the stories liberal politics have been telling since Hobbes, it is not superfluous to ask first whether its current-day epitome really cannot make room for our strongly held moral intuitions toward the PMD. It would not be, after all, a small statement to

make at the start of a work politicizing care ethics that the social contract tradition (and Rawls' omnipresence) in matters of justice is a dead end for the PMD or a dead end *tout court* (and it is important to emphasize that, short of finding a (pluralist) compromise, the latter may be an inevitable implication of the former). The alternative, all too familiar to ethicists dealing with applied issues like the PMD, is the one previously stated: philosophers will talk at cross purpose, from their respective theoretical frames, in a way inhibitive of moral progress. By accepting to engage with the 'dead-end' case of the PMD, I take a contractual perspective while refraining from discarding the test case of the PMD as a 'dead end' or a case better (and seemingly always) 'left for later', thus deflating the impact of one's contractual failure to have caused such a 'dead end' (by not exploring it and simply ignoring too radically different moral routes). By thoroughly exploring the case of the PMD with the twin convictions that the contractual tradition has some great wisdom to offer and that it would be unwise to neglect or treat as a psychological anomaly our strongly held intuition regarding the strong status of the PMD, we can better see whether the social contract tradition can truly not accommodate them and more importantly *why*. We can question whether the most seriously held contractual assumptions can be broadened or tinkered with, or rejected, and whether others could be added. (At any rate, forcing an apparently counter-intuitive theoretical exploration has had this epistemological virtue for my own research as I was initially contemplating either rejecting the social contract or rejecting empathetic or partialist accounts before and did not - as many authors speaking from within these two apparently conflictual traditions - consider that their respective insights could be acknowledged simultaneously under a proper pluralist frame.)

Another way to make this point is to say that starting from the approach that we suspect to be problematic can better help us to identify precisely some narrow points of disagreement that are more likely to be fixable. Delineating morally important dimensions of human relations by analyzing what social contract theories mistakenly leave out has the dual advantage of making the determination of these elements seem less arbitrary and of further justifying why we ought to modify or abandon certain contractualist or contractarian aspirations, in addition to making a later emphasis on the moral weight of non-contractual relations be the result of an elimination process in a way that would reinforce our initial intuition. Our knowledge of what moral weight contractual relations can still have, for disabled and non-disabled people can also enable us to strike a more accurate balance rather than switch for a one-sided non-contractual alternative.

(2) Choosing to deal with the most unlikely of contractors.

Apparently, the PMD are, among intellectually disabled people, the less able to act autonomously, to develop a conception of the good life, or second-order desires, or self-awareness and awareness of others, to help or threaten others, to work and participate to cooperative endeavor, including contractually-based ones, in theory and in practice. The reason why I have chosen to focus on the most unlikely of contractors, instead of on less severely cognitively challenged individuals needing less pervasive social support relies on a similar set of strategic intuitions.

I am cornering the reader's intuitions so as to block easy way-outs and force her to assess severely imaginative contractual empirical or conceptual sleighs of hands. It is too tempting, otherwise, to preserve both ethical pulls (regarding the PMD's RMS and contractual values, as presented in the section *Philosophical Implications of These Definitions*) by 'normalizing' the disabled, that is, by forcing them into a philosophical frame that almost fit them rather than face the fact that they do not fit and have to decide whether to build a theoretical home that fits them or leaving them in the cold.

I seem to have chosen an antipodean mainstream[25] philosophical kind of justification for RMS to the characteristics of the group whose RMS I wish to secure. However, I believe that by doing so, I am cutting the retreat toward normalizing loopholes (such as the potentiality doctrine for fetuses and children and claims about identity and past contribution with regard to people who were once fully competent), forcing a dominant tradition to take a good look at its deepest flaw, and competing philosophical frameworks not to adopt a complementary rather than antagonistic stance.

To choose a less disabled class of outliers would dodge the contractual bullet. To choose a more foundationally other-regarding, sentimentalist or humanistic philosophical frame would deprive the PMD from an opportunity to knock at the big door and, if necessary, blow our political home down, before settling too soon for the shed nearby. Even without presuming that the PMD have this right but assuming the value of knowledge, we

[25] What is mainstream about the contractual justification of RMS is not only the influential character of the social contract tradition and the contemporary literature it spawned, but its autonomy-related basis at the center of modern moral and political philosophy which the social contract tradition epitomizes.

can learn a lot, for the reasons I mentioned above, from engaging with vivid conceptual contrasts.

1.6 The Contractualism-Contractarianism Distinction

This thesis will explore inclusivist contractarian and contractualist strategies. Let me explain the distinction between these two general branches of contractual thought.

Contractualism and contractarianism are ethical normative theories which can be used either as moral theories to explain the grounds of moral norms or as political theories to justify the legitimacy of political power.[26] As political theories, they are known as 'social contract' theories. They all have in common - contractarian, contractualist, moral and political - the shared belief that 'agreement (either hypothetical or actual) has moral significance'[27] and that 'whether an action is right or wrong must depend on whether the act accords with or violates principles that are, or would be, the object of a suitable agreement'[28].

The use of the notion of contract or agreement between rational people is at once simple and compelling, because anyone intuitively understands how the logic of ordinary

[26] Simon Blackburn, *Oxford Dictionary of Philosophy* (2nd edn, OUP 2008) 341; Ann Cudd, 'Contractarianism', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2012) <http://plato.stanford.edu/archives/fall2012/entries/contractarianism/> accessed 26 April 2013.
[27] Christie Hartley, 'Justice for the Disabled: A Contractualist Approach' (2009) 40 (1) Journal of Social Philosophy 17.
[28] Stephen Darwall, *Contractaniarism/Contractualism* (Blackwell 2003) 1. Darwall adds 'between equals' at the end of his definition. Although it is accurate of all theories we will be concerned with, I prefer not to put it in this most basic definition, because 'equality' can be understood in very different ways and 'inequality' only affects the moral significance of an agreement when it affects the expression of uncoerced will which is what centrally matters.

contracts could apply to particular or social situations, and complex and ambiguous because a contract is not a basic notion or value, but rather refers to a bundle or intuitions, conventions and values, which must all be argued for rather than assumed. Contractual theories are not merely conventionalist. The norms at the outcome of the contractual procedures are not valid just because they have been contracted for, but because the act of contracting took place within a particular situation and allowed for the expression of particular agencial capacities - indeed, both the contractual situation and the contractors are generally idealized.[29] The normative content underlying the contractual discourse must be explained. As we start providing such an explanation, two clusters of ideas appear and, though they are both found within the conceptual history of the social contract, they center around key theoretical commitments, values and assumptions that are incompatible with one another. I follow Stephen Darwall in calling these two traditions 'contractarianism' and 'contractualism', as some philosophers have recently noted that it has become a 'common distinction'[30].

Contractualism can be said to center around the value of autonomy, that is the capacity to govern oneself. It is generally associated with Immanuel Kant, whose conception of dignity, or moral worth, was based on a person's capacity to know and endorse the moral law. The act of contracting with others to lay out principles of justice and laws is a way to become the authors of the laws, or to endorse the structure of political power enacting them.

[29] ibid 1.
[30] Hartley (n 27) 17 and Cudd (n 27). Note, however, Cynthia Stark's resistance, in her 'How to Include the Severely Disabled in a Contractarian Theory of Justice' (2007) 15 (2) The Journal of Political Philosophy 127, 128 fn 4: she prefers to keep the contractualist-contractarian distinction to distinguish moral from political theories (i.e. Scanlon from Rawls). I note that terms like 'moral theories' and 'theories of justice' may also operate this distinction.

The social contract allows people to be legislators. It expresses people's rational and autonomous nature, and ground the legitimacy of political power, and the content of legal and moral norms, upon these traits (to the exclusion, it is worth noting, of others, which are not seen as relevant to justice, and sometimes of morality).[31] The procedure of contractualist rule-making is therefore grounded on the value of a 'common perspective' that individuals engage in or partake of.[32] By engaging 'contractually' with other people, that is, by making sure that the norms we impose upon them are reasonable or justifiable *to* them, we recognize this special value that they have, its pricelessness[33] or 'inviolability'[34]. The contract is not a way around it, as it would be if this contractual agency or freedom was itself something that agents could put on the table of negotiation: it is a means to *express* this value. People's capacities to be reasonable and rational are thus honored, esteemed or respected rather than used (or rather *merely* used, as they can be respected *through* their use). The object of the contractualist conception of equality is this value and the capacities or potential for it. Though people's intellectual capacities vary and we can say that people are more or less autonomous for other reasons (one may be more submissive or less authentic for instance), they are to be treated as moral equals because it is required by their nature, their needs, and only thus can they lead a moral and, some would add, flourishing or happy, life.

Contractarianism is easier to understand because it makes a profound use of the ordinary understanding of contract. When contracting, we rarely think of what our action

[31] Immanuel Kant, *The Metaphysics of Morals* (first published in 1797, Mary Gregor (tr and ed), CUP 1996) 92; Immanuel Kant, *Groundworks of the Metaphysics of Morals* (first published in 1785, Mary Gregor tr and ed, CUP 1998) 36-43.
[32] For instance through the Rousseauian 'general will', as part of the Kantian 'kingdom of end' or behind the Rawlsian 'veil of ignorance': Darwall (n 28) 5-6 and Hartley (n 27) 17-18.
[33] Kant, *The Metaphysics of Morals* (n 31) 186 and 209.
[34] Rawls, *A Theory of Justice* (n 1) 24-25.

implies in terms of respect for ourselves and others as free agents, like contractualism asks us to do. On the contrary, contracts generally occur against a transactional background where it is permissible to care only about maximizing the satisfaction of particular desires, regardless of whether our desires are noble or moral and regardless of the impact that this has on our fellow contractors. We assume that they are, too, looking after their interests but their welfare is not occurrent to our mind: our fellow contractors, like the contract or agreement we make with them, are instrumental to the satisfaction of our tastes and preferences.

This understanding may be ordinary, but it is obviously not neutral, it relies on a conception of people as primarily guided by self-interest, and this self-interest is not constrained by moral norms, but simply by higher degrees of self-interest. Here, reason is instrumental in achieving one's ends and is not symptomatic of any special value other than power. In that, contractarianism is usually associated with Thomas Hobbes, who (prior and) antithetically to Kant, based the value or worth of people on their 'Price; that is to say, so much as would be given for the use of his Power' and defined their dignity as their 'public worth' (the former is relative to the 'buyer', the latter is set by the State). In the Hobbesian ethical frame, what is 'good' is simply what happens to be desired and power is central to this frame as it is one's 'present means to obtain some future apparent Good'[35]. Unlike contractualism which starts by prizing autonomy, contractarianism has a descriptive starting point and focuses on people's shared traits of rationality and self-interest and currencies of power. The conception of equality at work in political contractarianism is not ideal but factual: it is an equality of power. This equality is more questionable but social contract

[35] Thomas Hobbes, Leviathan (first published 1651, Richard Tuck (ed), CUP 1996) 62.

theories assume that the weak can team up against the strong and that every Goliath has his David, which makes it prudent to grant an equal political status to everybody (above a certain threshold of capacities). Contractarian theories of justice can therefore be presented as prudential rather than moral.

To contrast both traditions, a fair contractualist society is one in which principles of justice allow for mutual respect and a fair contractarian society is one in which principles of justice are mutually advantageous. The social contract allows contractualists to be moral legislators whereas it helps contractarians to get what they want. Both traditions explain RMS - in particular the status of a subject of justice - in terms of having contracting capacities. Contractualism may require, for instance, a certain level of autonomy, rationality, reasonableness, a sense of justice, moral agency and other traits that contractors should pay attention to for moral reasons. Contractarianism, on the other hand, requires power: power to help or to hurt others, making them contractors worth bargaining with, for strategic reasons.

It is generally assumed that the PMD lack both sets of capacities.

These traditions have gone under different names. For instance, Lawrence Becker contrasts theories of justice 'founded on the notions of impartiality and individual well-being' with those 'founded on the notions of self-interest and mutual advantage'[36]. Jean Hampton calls them the Hobbesian and Kantian strands. Allen Buchanan contrasts 'subject-

[36] Becker (n 24) 11-12.

centered justice' with 'justice as reciprocity'[37]. Buchanan characterizes justice as reciprocity by 'the claim that only those who do (or at least can) make a contribution to the cooperative surplus have rights to social resources' and 'subject-centered justice' by the idea that 'basic rights to resources are grounded not in the individual's strategic capacities but rather in other features of the individual herself - her needs or nonstrategic capacities.'[38]

None of these dichotomies are entirely perfect. For instance, a terminological focus on mutuality or reciprocity in the contractarian tradition alone may look over the idea that, as it is the case in the theory of Rawls, sometimes characterized as mixed, though mostly contractualist, reciprocity can be a form of respect: it depends on what is being reciprocated and what reciprocity is taken to mean. As for Jean Hampton, she uses the Kantian-Hobbesian dichotomy but presents a form of Kantian contractarianism. Similarly, Buchanan writes that 'The term 'subject-centered' seems apt since it serves to emphasize that moral status depends upon features of the individual herself other than her power to affect others for good or for ill.'[39] However, it is a key characteristic of both contractual traditions to effectuate a shift away from a natural political structure, or from an objective list of goods, to organize our political world and to recenter our metaphysical and ethical world around human beings, who are conceived as creating the political world that they inhabit. Far from being dissociated from contractarianism, such a shift is characteristic of modern philosophy in general, and Hobbes' early modern contractarian theory has a plausible claim of paternity with regard to

[37] Allen Buchanan, 'Justice as Reciprocity versus Subject-Centered Justice', (1990) 19 Philosophy and Public Affairs 227.
[38] ibid 230-1.
[39] ibid 231.

its political branch.[40] Both traditions are, in this crucial sense, 'subject-centered': they just disagree on the conception of the subject. Since Buchanan is referring to the 'contingency objection' to contractarianism (with which we will deal), perhaps terms like 'derivative' or 'contingent' might have done the trick. This would have, however, loaded the dice by focussing on an aspect of contractarianism that contractarians themselves would not find salient.

In short, while no dichotomic pair is ideal, Darwall's terms 'contractualism' and 'contractarianism', though stipulative (and perhaps partly *because* they are not self-explanatory in a way that would also cause confusion or ambiguity), are useful technical terms to adopt for the purpose of this thesis.

Finally, and most importantly, both traditions seem to exclude the PMD from the scope of justice, if not of morality altogether. It is relatively evident why. From a contractualist point of view, it seems that the PMD are not moral agents and cannot be said to belong to the moral community, if Kant was right that moral agency is indeed a *sine qua non* requirement for belonging to the moral community. The PMD cannot reciprocate our respect; the attitude of respect may not even apply to them. From a contractarian point of view, it is even more obvious why the PMD would be excluded from the political community: they do not pose a threat and cannot reciprocally 'scratch our back if we scratch theirs'. If anything, if they *can* be used in some minimal way, they may fail to be granted the full status of subject of justice and be exploited. Some within these traditions consider that the treatment

[40] Yves Charles Zarka, *La décision métaphysique de Hobbes: conditions de la politique*, (J. Vrin 1987).

of the PMD belong to another ethical sphere than that of morality of justice, such as charity or love.

In order to remember why there is no possibility to grant a 'free pass' to the PMD and not to judge the contractual tradition too quickly for this, it may be helpful think of a soccer team or a math club in a primary school. We can imagine that the sport team will not admit an obese student in their team because the child runs too slowly on the field. Though we do not find it charitable, we can see why it is rational with regard to the particular goal pursued by self-interested players. Some may even find it moral given their understanding of excellence in sport. As for the math club, let us imagine that they are enamored with sciences and are not so much after victory than after mathematical truths. Putting all of their minds together, they stand a better chance of finding the solution to the mathematical problem presented in a national contest. It is not that they are not charitable, but it would simply be absurd to grant access to the club to someone who does not know how to count. These (caricatural) illustrations aim at showing that when we size them down to particular contexts, the contractualist and the contractarian exclusionary frames seem more justified, because they fit the self-given, stipulated ambitions of the smaller groups described. The problem with contractualism and contractarianism is that when they are taken to be a theory of justice, they purport to apply to society as a whole rather than to particular communities or to a subset of social relations. This is more or less what I will conclude. However, this thesis primarily seeks to explore not whether exclusivist contractual theories could be acceptably downsized, but whether contractual theories of justice applied to society could be made inclusivist with regard to the PMD.

1.7 Structure and Summary of the Dissertation

This dissertation assesses the two kinds of integrative strategies that social contract theory can adopt to include the PMD within the scope of contractual justice (and more generally that that contractual theory can use to include the PMD within the scope of morality):

(1) Challenging the idea that the PMD do not have the contracting capacities (i) empirically (they do, contrary to what we assumed) or (ii) conceptually (they do, once we loosen our understanding of the required capacities). This would confer the status of direct contractors to the PMD.

(2) Finding or assuming that the PMD do not have the required 'direct' contracting capacities, but holding that there are other reasons justifying their representation in the contractual procedures and that these reasons are compatible with contractual assumptions inherent to these procedures. (i) The PMD may be able to take part indirectly or passively in society, as is required and/or (ii) they may have capacities or properties that make it necessary or robustly obligatory for contractors to provide the means for their social integration. We may call these two aspects (i) their 'passive' or 'indirect' contractual capacities and (ii) their 'contractual relevance'.

My dissertation is divided in six chapters.

This first chapter, the ***Introduction***, introduces the notions of the PMD, of robust moral status and explain what social contract theory and its two main branches (contractarianism and contractualism) are. It presents my hypothesis that contractual moral and political thought cannot provide a compelling justification for the robust moral status of the PMD and it justifies the choice of this hypothesis.

The first part of my thesis is on contractarianism and the second part is on contractualism, although some references are occasionally made to both traditions when similar arguments apply to, or emanate from, both branches of contractual theory. Each part is composed of two chapters.

The second chapter, ***Inclusive Contractarianism***, presents the most obvious contractarian way to bring the PMD inside of our political community by showing that it is advantageous for other members of the community to include them in their 'cooperative venture'. It can be done directly, by showing that the PMD can bring more to the table than what we usually expect, especially if we think of their input differently, or indirectly, by showing that their integration into our community indirectly benefits us even though their input seems insignificant and they are mostly passive beneficiaries. *Prima facie,* we find that the first kind of justification seems empirically dubious and the latter (rule-contractarianism) offers a problematically derivative status to the PMD. (These are the same two fundamental issues affecting inclusivist versions of contractualism as well.)

After having explored this generic Hoobesian contractarian stance, I turn to Lawrence Becker's recent contractarian argument to grant the PMD a robust political status, essentially based on a broadening of the notion of reciprocity. While he succeeds in making plausible the case that integrating the disabled could be mutually advantageous, his conclusion is still contingent upon a crowd of exclusively self-interested beings agreeing with his empirical wager which becomes less convincing when applied to the PMD.

Taking a collectivist, multi-partite stance on reciprocal relations to elaborate a kind of rule-contractarianism remains a promising avenue if the contingency objection could be met by rendering the inclusion of the PMD less of an opportunistic happenstance, and more of a necessity based on their traits and on the nature of the contribution they can provide. The next chapter explores what I find to be the most compelling contractarian argument to achieve this.

The third chapter, ***The Capacity to Trust as a Contractual Ground for RMS***, is focused on the essay *Justice through Trust,* by Leslie Francis and Anita Silvers, which I consider to be the best contractarian argument to include the PMD among the rank of contributing contractors. Silvers and Francis insist on letting go of the misleading metaphor of the social contract as a tit-for-tat kind of exchange. Even from a contractarian point if view, society is more accurately conceived as a multi-partite, complex net of transactions which fundamentally requires a climate of trust to which any being able to trust or to be trustworthy can participate. Their theory answers to the contingency objection by rendering the robustness of the PMD's status necessary in an essential way: the PMD's contribution to

fostering a climate of trust can be said to occur not in spite of their disability and its corollary vulnerability and exploitability but partly because of it.

I first present the account of justice through trust and defend it from a few potential objections. I then turn to the nature of trust and how we can understand it in a self-regarding or an other-regarding way in order to reveal a tension which I further explore in the following sections. On the one hand, trust as self-regarding seems more compatible with contractarian assumptions, but may also face the problems of being too instrumental to contractors and to ground too contingent or derivative a status for the PMD (not all of whom, in addition, have the capacity to trust). On the other, trust as other-regarding, as important as it may be to morality and justice, may not be as essentially connected to social contract theory as Silvers and Francis argue it is.

The two following chapters explore contractualist alternatives.

The fourth chapter, ***The PMD as Active Citizens***, assesses the best five strategies that contractualist thinkers have put forward to conceptualize the PMD as active participants to the social contract. They consist in (1) focusing on the PMD's talents, (2) on their capacity to have a conception of the good, (3) to 'engage' with others or play a 'part' in society (4) to have the potential to develop (further) contractual capacities and (5) to be assisted by 'collaborators' or 'cognitive prosthesis' in the nurturing and exercising of these capacities.

Instead of conceptualizing the PMD as different from the rest of us and elaborating a theory which would nonetheless justify granting them a RMS like theorists of their passive citizenship do, I explore in this chapter how we could 'normalize' the PMD, that is, conceptualize like non-disabled people as contractors (I use the terms 'contractors', 'subjects of justice', 'members of society' and 'citizens' interchangeably.)

I explain and criticize the two ways in which this could be done: by modifying the benchmark requirements for counting as a contractor or by arguing that the PMD meet these requirements, in spite of appearances to the contrary. On a contractualist account, this integrative strategy will take the form of arguing that the PMD can elaborate a conception of the good life as well as partake in society's cooperative endeavor with the proper support. I explore how prejudices contribute in concealing the socially constructed dimension of disability as well as the harm caused to the PMD by being conceptualized as burden-like passive beneficiaries instead of talented contributors in need of the proper support. However, while this approach is promising for less seriously disabled individuals, we find that social support, including notably 'mental prostheses', is not a plausible solution for many PMD, unless it is conceptualized in a way that deforms it beyond recognition or takes it beyond the autonomy-based contractualist paradigm to which it purports to be attached. I consider the other strategies mentioned above, but conclude that they cannot escape one of two pitfalls: either they modify contractualist requirements to the point of overstepping its boundaries and gesturing at alternative theories or they are not empirically warranted.

The fifth, penultimate, chapter, ***The PMD as Passive Citizens***, starts by exploring the most intuitively immediate suggestion that a contractualist would make to bring the PMD within the reach of justice. Using Rawls' famous heuristic device of the 'veil of ignorance', we consider the possibility of extending it so that the participants behind it would consider the possibility that they may be PMD themselves. We explain that this strategy rests on a misunderstanding of some fundamental Rawlsian assumptions, and turn to an alternative way of including the PMD by making them the object of a contractual agreement or by conceptualizing them as a passive subject. (For instance, their status can be parasitic on the status of full subjects of justice who have partial attachments toward them. Within a Rawlsian frame, they may be taken into account at the 'legislative stage' rather than at the earlier stage of determining the primary goods.)

I consider the notion of passive citizenship and its legitimacy, notably by untangling the status of contractor from that of beneficiary. I then examine a few problems associated with being represented, rather than taking directly part, in the contractual process. I think that some of these problems can be answered but then focus on the problem of derivativeness or contingency in greater depth. Arguments along the line of a 'rule-contractualism' could justify *indirectly* granting *direct* respect to the PMD. However, while it seems metaphysically plausible to grant intrinsic value to the PMD in this way, it is not clear how this value can translate into a robust moral status. I examine a few arguments that attempt to justify why contractors not only can, but *ought* to extend passive citizenship to the PMD in a way that would answer the derivativeness/contingency objection. Such arguments either need to more explicitly and substantially rely on non-contractual bases or ultimately beg the

question. In the following chapter, we explore whether the PMD could be considered 'contractors' themselves, which would solve the problems met by the notion of passive subjecthood.

In the conclusion, ***Beyond Contractual Relations***, I explore the implications of the failure of contractual theories to satisfactorily justify the RMS of the PMD. I gesture toward a theory where a basic moral attitude of concern could nest various moral attitudes fitting to different relations, such as respect toward a fellow contractor and caring toward a vulnerable being entrusted to our care. I suggest that the most promising way to reconcile our seemingly conflicting intuitions about the grounds for RMS may be a relational moral theory.

We should not discard social contract theories, but give them their due place and limit them to the relations/circumstances to which they apply. We can indeed integrate a lot of the PMD to these situations, but (1) not all and (2) in many cases, there are other more salient facts about the PMD that should guide us in the way we treat them (including in the way we proceed with their social integration - and our grounds for doing so).

I am not yet making the case for integrating theories of care ethics, concern, empathy, fiduciary relations in a theory of justice or in a parallel theory complementing it, but I deal with a few objections that social contract theorists may raise against such an endeavor. Notably, (1) while this theory would imply some substantial agreement about the good and human nature, so do contractual theories. (2) It does not disrespect autonomy. Sometimes dependency and vulnerability requires another moral response, sometimes, we can do both

caring and respecting, to appropriate degrees. It is in fact a common experience (child-raising). (3) The pluralism of grounds for RMS is not so problematic and the social contract tradition should not indulge in normalizing the PMD for simplicity's sake. Morality can unfortunately be messy. (4) The notion of 'concern' may help to deal with conflict occasioned by this pluralism and to balance caring and respecting. Furthermore, particular relations/roles come with their normative bundle of rules and while some relations are optional, leaving the PMD by themselves altogether is not (because of some basic relations we have with them - the nature of which I cannot characterize much in this thesis, though I can say that they cannot be properly characterized as centrally contractual.)

2 INCLUSIVE CONTRACTARIANISM :

THE PMD WITHIN A SOCIETY OF SELF-INTERESTED CONTRACTORS

2.1 Generic Inclusivist Contractarianism

Let us first consider traditional contractarian arguments to include the PMD within the social contract before considering more progressive ones. Before trying to expand our understanding of (1) contractarian goals and (2) how to best attain these goals, we will attempt to adhere as faithfully as possible to contractarian traditional commitments and approach the matter of disabilities from that standpoint. If this should fail to justify integrating the PMD, we will revisit the notions according to which contractarian theory attributes moral status. However, the more we expand or reconstruct these notions, the more likely it is that we inadvertently step out of contractarianism's boundaries altogether. We will take the same approach in the next part of the thesis on contractualism:

Within a contractarian framework assuming the self-interest of parties to social conventions, could a contractarian (Abby) not make self-interested choices to protect herself against the eventuality of becoming PMD herself? It seems that it would be rational for Abby to make provision, for instance, for periods of her life where she will be vulnerable and dependent upon others to survive, as in her old age or after an incapacitating episode.

In order to assess the plausibility of this suggestion, I must say more about (1) what I mean by 'depending on others' and (2) the standpoint from which Abby would make this self-interested choice.

2.1.1 Depending on Oneself

First, let me clarify what I mean by 'depending upon others' here. If Abby accumulated enough money to pay for a wheelchair if she looses the ability to walk, or for someone to cook her meal or feed her if she became unable to do so, she would be depending upon others, but only in a weak sense. In a stronger, more meaningful sense, she would be depending only on herself to survive for, ultimately, her survival would depend upon the balance left in her bank account.

Pushed to its limits, this dichotomy between depending on oneself or on others is reducible to the paradigms of self-regarding and other-regarding interpersonal social frames or interactions. An underlying intuition behind my criticism throughout this thesis is that social contract theory cannot do without some other-regarding concern, that is, without assuming some source of moral obligations toward others apart from oneself that precedes the contractual act of will. However, contractual thinkers are mostly willing to establish a system in which Abby does not have to fear that she will be left to die when her bank account is depleted, out of self-interest, because they are more or less like Abby inasmuch as they also face the prospect of suddenly becoming so disabled that their lives as a whole imposes more costs than benefits to the contractually collectivized pool of talents and

resources (I am assuming here that such calculations are not absurd and are morally informative).

The picture of the world (or I should say to be more precise: the conception of human nature, of justice, of the legitimacy of caring for oneself first) at work is one in which everyone is expected to carry one's own weight. Through reason and self-interest, individuals can realize that they may be more able to do so in a certain type of social structure than in another, and opt for the more profitable one. They can also realize that they may not be able to carry their own weight due to the possibility of a debilitating event making them highly dependent upon others, in a situation in which their past selves have not made sufficient provisions for their disabled self to survive too long a winter. They would therefore not only be dependent upon their past selves but on other people. These other people fearing the same possibility may agree to a kind of collective insurance scheme. Ultimately, they would therefore nonetheless be relying on their past selves who were clever enough to make arrangements for the possibility that they may not be able to provide for one's own needs in case of severe disability. Should the needs become too extraordinary or simply, without being great, being of a kind that falls out of the 'insurance scheme', people would have no recourse to others' help as a matter of justice.

This view, however, would exclude *permanently* disabled people who, at no point in their lives, have been in a position to negotiate with others, either to promise them that they are likely to contribute much to the common pool of resources, barring an unforeseen very costly or very long disability which would prevent them from doing so (even with proper

social adjustments), or to threaten them (in a Hobbes-like scenario of state of nature) to disrupt their peace should they refuse to accommodate their demands. The permanently profoundly mentally disabled are unprofitable contractors (hereinafter 'UC') on this traditional contractarian view: considering the whole of their contribution and needs, across their life span, UC are individuals whose needs exceed what they can contribute.

Importantly, there can be no veil of ignorance at work within a contractarian logic, for the veil of ignorance expresses a substantive idea about justice as it imposes impartiality (or a trustee's partiality blind to the particular identity of its represented object, which amounts to the same) to the process. Coming back to the question asked at the start of this section, our discussion suggests the answer that Abby does not have to protect herself against the eventuality of being a PMD because she does not occupy a standpoint akin to the one provided by the veil of ignorance: she already knows she is not a PMD (by which I mean a permanent state), though she may still be a UC, or may still become disabled.

2.1.2 Which (Temporal or Epistemological) Standpoint?

Let us explain the standpoint from which individuals are meant to proceed to calculate who it is in their best interest to negotiate with and what social structure would most profit them. Up to now, I have considered the most commonly intuitive (in the sense that it is closest to everyday ordinary contractual acts) case of individuals who negotiate with one another in the present time, considering their present state, which includes their accumulated power through their past selves and their likely prospect of future power. That is an 'ordinary' standpoint

from which to calculate whether someone may become gravely disabled, and perhaps disabled to the point of becoming a burden to take on board, a UC. From this standpoint, we never know whether we could become a UC or not. We assume that science can inform us with enough certainty, however, that a permanently profoundly mentally impaired individual who is a UC will remain one. This ordinary standpoint therefore allows undetected UC to get a free ride at other contractors' expense. From (a version of) a contractarian point of view, this is less than ideal.

Another standpoint expressing contractarian ideals would involve a fictional way to know the cost-benefit balance of people's lives, which has almost the reverse effect of a veil of ignorance facilitating impartiality. A 'crystal ball' would be, perhaps, a fitting metaphor for the standpoint that contractarianism would ideally need. By having access to this information, the UC could strategically opt for a social structure that enables them, as they become a particular type of UC, to maximize whatever productivity they can actually attain and/or choose to produce more in order to compensate the later inability to rely on their own capacities to cover their extraordinary needs (e.g. take two jobs instead of one, perhaps to pay for a special insurance scheme set up for classes of UC rather than spreading out the cost on others by increasing everybody's premium). Of course, for many UC, no adjustments would even be possible and they would be altogether excluded from the scope of justice. Other UC would not get others to agree to opt for a social structure that would enable them to contribute to the common good because setting up this accommodating social structure will not be overall profitable (for instance the cost of setting up accommodation may be more, in itself, than the benefits procured by the result of the accommodated disabled individuals'

work, notably if the accommodation required is too particular, varied, extensive, or if the group of disabled individuals aimed at is too small, for the adapted production structure to be made profitable or feasible).

This decisional standpoint would better fit the contractarian ideals of putting one's self first and the principle of justice 'to each his own'. However, it does not make for a very appealing structure of social justice. One may answer that this contractarian ideal is not realizable as we have no crystal ball, but that does not address the fact that it is not appealing as an ideal. Furthermore, it is far from a science-fiction scenario. On the contrary, to approach this ideal, we should invest in scientific research in order to be better able to genetically detect the odds that one's children will suffer from a variety of conditions, from myopia to Alzheimer or Down's syndrome. We could then develop health policies that benefit different 'castes' to different degrees, to the point that some castes will simply stop receiving help from the State at different degree or time of their lives. (While many such developments are matters of speculative ethics, genetic discrimination is not.) We would intuitively resist such a bleak model of justice. In order to understand the contractarian intuitive appeal of such a model, one must imagine something contrary to what the veil of ignorance suggests. Instead of thinking that one could be a UC, one must already know that one is not. One may then be inclined to think that one only ought to be subjected to imperfect obligations of charity toward the UC rather than to more robust obligations of justice. The outlier, the UC, must recognize that her misfortune, no matter how terrible, is not to be remedied as a matter of justice, but simply to be cursed or lamented and dealt with individually.

I personally do not share these intuitions. Their wrongness can best be made explicit by illustrations testing them, but which fall outside the scope of this thesis as I assume that the fact that the PMD are not accounted for in a theory of justice is a problem for such a theory. Here, not only would the PMD be excluded, but many more UC. The resulting picture idealizes a world where people each carry their weight instead of leaning on one another (in the name of other-regarding virtues or ideals implying more than charity). Many feel that these self-interested intuitions would fail to capture what is of value in human life and the non-contractual normative content of human relations. For instance, Jean Hampton rejects it as too instrumentalizing and making too little of human intrinsic worth[41] and Silvers and Francis write that it makes for a society without genuine trust within which we would not want to live.[42]

Regardless of whether these ordinary or idealized standpoints would be ethically appealing or plausible, however, they would exclude the PMD.

Let us consider other contractarian alternatives, notably based on the idea that the PMD could be profitable contractors contrarily to what has been assumed so far.

2.1.3 Must the PMD be UC?

[41] Jean Hampton, *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (Daniel Farnham (ed), CUP 2006) 11-12.

[42] Leslie Francis and Anita Silvers, 'Justice Through Trust: Disability and the 'Outlier Problem' in Social Contract Theory' (2005) 116 (1) Ethics 40. We will come back to their arguments and to the issue of whether they are truly contractarian in the next chapter.

If the basic contractarian test to determine status (and corollary entitlements) as a subject of justice is whether an individual is a profitable contractor, that is, someone with whom it is worthy to contract, because doing so will improve our common lot, must the PMD necessarily be outliers (i.e. be deprived from this status)? Can the PMD contribute, directly or indirectly, to a contractarian society in a way that would validate their claim to social membership? (I assume that such a validation warrants as robust a moral status as contractarian theory can justify.)

The standpoint from which one answers this question is not neutral, morally or otherwise. I am not referring to the temporal standpoint, like I was before, but to the social state of affairs, i.e. the institutional or structural state of affairs within which this question is asked. Indeed, whether or not we have a crystal ball (or similarly effective genetic tools) telling us whether an individual would, on the whole, be a profitable contractor to bargain with, we cannot assume that profound intellectual disability would necessarily correspond to unprofitability unless we also make empirical assumptions about this disability or social assumptions about the ways in which mutually beneficial endeavors should be set up and benefit us.

Philosophers in the social contract tradition are famous for invoking a pre-social state, a state of nature the description of which implies some substantial assumptions about human nature and things humans value, the (in)correctness of which confers (or not) normative and descriptive appeal to the contractual theory building upon it, as well as a

pragmatic prospect of durability or enforceability for the social arrangements derived from it. However, disability theorists have long problematized the claim that disabilities are natural or the claim that they are an illness to be medically cured and considered that another model, the social model of disability, could help us see that they are socially constructed. Although I personally think it should not utterly supplant other views for reasons that I cannot go into in this thesis, I can at least invoke this debate to point out one of its widely accepted results: there is at least a social dimension to the construction of disabilities. This is evidenced by the way in which many failures to meet the species-norm standards, or statistically generally achieved standards, of capacities can constitute a disabling handicap in a social context but not in another.

For instance, a distance from the species-norm standards like the fact of stuttering should not prevent one from being a lawyer or a politician, barring the prejudice by which people do not enjoy hearing a stuttering lawyer pleading. Anti-semitic people may similarly turn down a Jewish person to perform a job for which one is competent or be uncomfortable with women behind a political podium. Giving weight to these prejudices, sometimes called ‘external preferences’, may seem unwise or imprudent since these individuals are all just as able as others to do the work. The inclusivist contractarian idea would be to extend this remark to PMD who, with some accommodations, could perform some work from which they are currently excluded. Are we just making prejudiced unprofitable choices?

Sticking to this generic, not rule-based or otherwise inventive, version of contractarianism for now, let us illustrate how these ordinary intuitions hold when we try to

apply them to PMD with seemingly too little talent to be 'profitable' human beings. To speak of others as instrumental to our ends has pushed many to turn away from a Hobbesian brand of contractarianism. I believe that the case of the PMD is one of these numerous instances where the exception leads us to question the norm rather than to bring it in line with the norm (what I call the normalizing problem) though I am not arguing for it here. However, granting to our token contractarian that instrumentalizing one another is a sound way to develop a moral theory or a theory of justice, here are three ways in which the PMD can be useful to the rest of us and avoid being UC.

First, we could say that they help to create jobs. The 'caring business', though underpaid and under-developed, is an environment where project-pursuers can realize themselves, their talents, their ideal selves, in a way that makes this work meaningful to the exercise of their own conception of the good, in addition to enable them to make a social contribution and be paid for it. Second, we could say that weak and vulnerable people help us to develop caring institutions, and even more specifically cure for these disabilities in the future, or technologies to cope with them. By caring for the PMD, we are gaining scientific knowledge and developing health care institutions which will help all of us, as we all fall prey to dependency upon such institutions at some point in our lives. Third, we could say that their vulnerability teaches us about our own. It is a subtle but immensely important kind of benefit for our own personal peace of mind, as the vulnerable and dependent beings that we are, suffering from shame and anxiety, may learn to acknowledge our limitations rather than deny them. Being put in caring relations with particularly dependent and vulnerable people trains us to accept endorsing a caring role toward ourselves and others as a socially

acceptable one, and expect others to do the same, which would deflate the view of society as a large ruthless no-go area and the idea that the dominant social role of a contractor must be the only one legally and socially enforced and sanctioned.

It is not worth making a stronger case for each of these hypotheses right now. We will come back to the worthwhile aspects of each of them in the following chapters, as they are understood within more complex frames than the generic contractarianism I am now presenting. For now, I only want to point out that, apart from being problematic on their own terms, these three suggestions all beg the question.

In terms of being problematic, my key contention with them is that they only recognize a contingent and relative value to the PMD. However, one may answer that I cannot hold this against them, since this generic contractarianism does not treat any more able people with more deference. Other problems include that the caring business has historically and conceptually played no small part in the social isolation of the PMD, as we will see in the chapter exploring a position that insist that the PMD should be given an active, rather than passive, contributory role. The second and third solutions are not only instrumental in the previously stated sense applicable to all persons under a contractarian frame; they also make it explicit that the PMD are not themselves the primary beneficiaries of this policy. In other words, it is as though the PMD's identity as contractors had already been labeled as the ones whose interests will be negotiated for through some abstract non-tuistic table of negotiation. Contractarians are integrating the disabled's interests and the caring relations toward them to their agenda, like they would vote in favor of the production

of chess boards for their calming effects on society's mores (the PMD being the chess boards in this analogy). These arguments are also empirically controversial, the second one in particular.

In terms of begging the question, which is their prominent conceptual flaw, they assume, in some way or another, what needs to be proven. The first argument assumes that we ought to subsidize jobs for them rather than consider the bleak alternative of not doing so or of letting the costs of such caring be assumed by those personally attached to the PMD. It may also subtly assume that there is some value in developing a caring self that is more objective, higher, or less optional, than just any taste or preference.[43] At worst, it is treating the PMD just like any other source of work in a way that implies that the PMD could be replaced by the production of chess boards, and then their status is too contingent to count as having even a meaningful or robust kind of contingent importance (assuming there can be such a thing). The same goes for the second argument. If we found a way to develop scientific knowledge and caring institutions without UC PMD, we would not need them at all. Their inclusion relies on a (dubious) empirical gamble. At best, the view that would make them, and not the chess boards, the necessary object of the job-creating policies (or *more* necessary than chess boards anyway since we are with this argument trying to give them a status that is robust, but still conditional, by contrast with other accounts of robust status which would be conceptually incompatible with conditionality or derivativeness altogether) would rely on the idea that there is something particularly meaningful in engaging in the

[43] Consider Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (University of California Press 1984), for an exploration of the idea that care occupies a central place in human existence and moral life.

caring business and that policies supporting caring jobs reflect some particularly meaningful value (by contrast to chess board policies). This view would beg the question by assuming the existence of a moral pull prior to, or co-existent with, the self-interests of contracting parties. The same goes for the third hypothesis, which does not assume a concern for the PMD but only for our (able) selves, but the way in which it does so (by acknowledging our vulnerable and dependent nature and the importance of this fact in our happiness) seems to have implications about what should matter in a social theory of justice and in a moral theory that goes beyond the core assumptions of contractarianism. More precisely, the realization that vulnerability and dependence matters so much in our life would, because of the implications of the rich concepts of vulnerability and dependence, imply a relational stance with a likely normative content according to which the goods needed to deal with our vulnerability and dependency-related needs cannot be properly socially pursued within a contractarian frame founded upon self-interest. (We will unpack these ideas in the chapters on other-regarding concern, and in the conclusion.)

The point here is only to show that a traditional or generic form of contractarianism will need considerable conceptual tinkering before it allows the PMD to be integrated as actively or passively profitable members of society. Empirically, in some cases, they may not be profitable after all, or less so than alternative options, and normatively, contractarianism risks assimilating the PMD's status to the status of objects contracted for rather than competent contractors.

Let me address a problem that runs through the background of this current section. The argumentative celerity with which a contractarian would assume that the question of integrating the PMD is worth exploring, and the empirical optimism about its result may have the effect of importing non-contractual moral constraints within contractarianism.

2.2 Moralized Contractarianism

In the previous section, I took the examples of not hiring stutterers, women or Jewish people as example of prejudiced and unprofitable decisions. However, not only profitability and prejudice are distinct notions, but it can even be profitable to be prejudiced. Let me present two problems which affect the discretely moralized question ‘are we just making prejudiced unprofitable choices?’ that I previously asked.

First, in some cases, the PMD may really not be able to do the work. By contrast to the previous examples, at the other end of the justified-unjustified spectrum of professional exclusion (justified in terms of being able to perform the work regardless of the impact of prejudiced external preferences), we have the case of someone who is paralyzed and needs a machine or an assistant to type for her. Exclusion seems justified if the job is that of a typist. Whereas a prejudice against hiring someone who is able to type but has a bipolar personality disorder is rationally unjustified, refusing to hire someone on the ground that this person cannot carry out the job’s central activity seems justified. In between these two extremes, we have a sea of prejudices posing as natural obstacles and misfortunes to be lamented or cured instead of as the result of an opportunistic social choices.

The second problem is that on a contractarian account, unlike what I have postulated in the previous paragraph, external preferences may serve as rational justifications. Contractarianism (or a bold, traditional, version of it), as we have seen, bites the bullet of making opportunistic choices. However, it will only aim at purity from prejudices if this is the most profitable outcome, making anti-prejudiced attitudes and policies contingent upon their profitability, itself measured in terms of self-interested preferences between bargainers. For people of contractarian dispositions, what we should do about prejudices of others is always an open question. In some cases, it would be too expensive to change those preferences and so we would have to put up with them. For instance, the PMD may just be too expensive to hire because customers will not like them and will not buy products prepared or served by them. In other cases, a self-interested bargainer may admit black people in his establishment not out of respect for anyone but because she realizes that their business ultimately yields to more profit. It would be morally loading the contractarian dice to assume any other pull than such contingent benefits.

This is why inclusivist contractarian accounts seem somewhat too optimistic or naive to assume that contractarians will come to realize that they are simply missing out on a good deal. First, it is not always the case. Second, even when an inclusivist contractarian proposes a plausible picture of social arrangements that could be made for specific outliers to be integrated in a way that would yield to an overall beneficial outcome, one may ask why this contractarian is going out of her way to integrate *these* outliers instead of others. The inclusivist contractarian may say that she has considered including various species of outliers

within the political community before settling on integrating that particular class of outliers - and in the case of women and people of color, this may be a more plausible argument than with regard to people with great vulnerabilities - but generally, contractarian arguments only aim at showing that non-disabled will be better off if they integrate the PMD in society. Among the multitude of possible social arrangements which would also be beneficial, there is often a nagging arbitrariness in offering the one that happens to integrate the PMD. This is a form of contractarianism which seems constrained by some moral restrictions about the pre-qualificatory requirements for being a member of society. It seems to build on top of such an assumption a specific theory of contractarian roles which could befit the PMD, who are to play a contractarian part in this philosophical frame assuming that no other part can correlate a RMS.

This moralized contractarianism would, for instance, problematize or scrutinize stringently any 'prejudiced' starting point from which we decide to assess someone's potential input. Though a requirement of profitability would still be the decisive factor, but it would tend to be applied more liberally toward traditionally discriminated against human outliers (hence, assuming that such a discrimination is wrong) and more stringently toward policies which would further this exclusion instead of mitigating it. For instance, if one imagines something like a kind of barter economy populated with pre-industrial shopkeepers, where each individual must produce a good to be traded with others, this structural view of production as the standpoint from which we are contemplating acquiring and relinquishing some rights under a social contract, would exclude the PMD out of hand. Problematizing this starting point while still aiming at the optimal outcome would imply considering how to best

allow the PMD to actualize the talents that they do have in order to properly assess the contribution that they could potentially make and weigh it against the cost of accommodation. Some philosophers, Anita Silvers most forcefully among them, have made arguments to support the idea that such an inclusivist standpoint would lead to the inclusion of the PMD. We will explore two versions of this argument: one with PMD who can be active contributors in the chapter on active participation and one with PMD who occupy a more passive role but still participate to relations that are profitable to society in the chapter on justice as a trust-enhancing institution. I can already state my conclusion that these arguments do not succeed in supporting the integration of the most severe cases of profound mental disability, and even fail to satisfactorily explain the integration of a larger group of less severe cases. In other words, even once we have moralized the standpoint from which we are assessing the potential input of potential contractors, that is, even once we are not excluding the PMD's input because of prejudices, external preferences, or a failure to be open to imagine new forms of social production and mutually-benefitting structures, some PMD just do not cut it.

It is unsurprising, therefore, that the unsophisticated, generic brand of contractarianism we are considering here, as a way of introducing why contractarianism is *prima facie* ill-suited to justify a robust moral status for the PMD, is affected by the same conclusion, and more obviously so. This is the position that David Gauthier, a dominant contemporary representative of the contractarian school has explicitly stated: 'The primary problem is care for the handicapped. Speaking euphemistically of enabling them to live

productive lives, when the services required exceed any possible products, conceals an issue which, understandably, no one wants to face.'[44]

Eva Kittay, who has written extensively on disabilities and whose daughter is PMD, shares this contractarian pessimism.[45] Another prominent representative of the social contract theory (whose theory contains mixed contractarian and contractualist elements[46]), John Rawls, considered this serious worry as something possibly indelibly and negatively tainting his theory, and a prominent student and critique of Rawls, Martha Nussbaum, has recently used this exclusion as an argument weighing for the (at least partial) rejection of social contract theory. These renowned philosophers, though working within a contractualist framework, have not relied on anything more profound than the simple set of ordinary contractarian intuitions I have presented to reach this conclusion. This is why we will be exploring more nuanced arguments made by those who think that the PMD can (almost always) make a contribution to verify whether their verdicts hold and whether, as I suspect, the optimism or assumptions of these subversive, inclusivist, contractarian arguments conceal prior non-contractual commitments. In the next chapter on the social contract as trust-enhancing, we will challenge this summary rejection of contractarianism's capacity to

[44] David Gauthier, *Morals by Agreement* (OUP 1986) 18.
[45] Eva Feder Kittay, 'When Caring is Just and Justice is Caring: Justice and Mental Retardation' in *The Subject of Care: Feminist Perspectives on Dependency* (Eva Feder Kittay and Ellen K. Feder (eds.), Rowman and Littlefield Lanham, 2002) 257, 267.
[46] We will focus on a contractualist reading of Rawls throughout this thesis. How plausible the idea that his theory contains contractarian elements is an exegetic matter that I will not explore. I can nonetheless note that the idea that his theory is a hybrid makes sense *a priori*. Consider how an understanding of the 'earlier' Rawls emphasizing a community of people mutually respecting one another is closer to contractualism whereas there is a contractarian flavor in the later, 'political, not metaphysical' Rawls, offering a solution for relatively self-interested persons to overcome their irreducible disagreements in the most beneficial way. For an argument to the effect that Rawls' theory is a hybrid of contractualism and contractarianism because it contains both the prudential aim of mutual advantage and the Kantian ideal of mutual acceptability, see Nussbaum (n 19) 54-67.

meaningfully integrate the PMD by considering whether the PMD can be granted a robust status of contractors under a more progressive description of the capacities that enable (virtually all) PMD to be profitable contractors, namely the capacity to take part to relations of trust and therefore to participate to the formation of a climate of trust. However, in the present chapter, I want to explore another equally important essay in the field which presents the contractarian arguments I have been making in their best available form. I now turn to it to show that I have not simply been attacking a contractarian straw man, and that the fundamental criticisms I have addressed to generic contractarianism seem hard to evade without more substantial modifications or expansions of contractarians goals and strategies to attain them.

2.3 When the 'Tough Crowd' Rethinks Reciprocity

Becker focuses on the notion of reciprocity in order to show how it is generally oversimplified and how, when properly understood, it could allow impartialist and mutual advantage theories of the social contract (his category roughly corresponds to contractualism and contractarianism) to '[go] a long way toward answering the challenge that disability poses to theories of justice.'[47] While he does go a 'long way', he does not offer a way out of the contingency and derivativeness which affects the generic contractarianism presented above. However, he offers us an opportunity to distinguish two kinds of challenges that disabled people must face not to be outliers within a contractarian theory of justice: (1) not being recognized a RMS (in social contract theory, this means being robustly represented,

[47] Becker (n 24) 12.

that is, represented as equally important and entitled parties, in the contract-like procedures) and (2) being excluded from the scope of justice altogether, i.e. not being owed anything as a matter of justice.[48] Surely, Becker successfully answers to the second challenge, which is not surprising as contractarianism can plausibly do this. The status of the PMD remains too derivative however, and constitutes less than a RMS (on what a RMS would mean on a contractarian account) and I want to make this clear, even though Becker resists this conclusion.[49]

Becker focuses on 'mutual advantage theories' (which I take to be contractarian ones, in spite of the possibility of an imperfect overlap which would not be significant for the end of our analysis). His justification for integrating the disabled within our political community is essentially the one I considered in the generic contractarian account. In order to be reckoned with by the idealized self-interested rational agent hesitating between a state of unregulated exercise of power and warfare and abiding by principles of justice, one needs to either pose a threat to the contractarian agent or have something to give her that would make it rational for the agent to negotiate peacefully. According to such a view, PMD able to perform attacks or valuable reciprocal exchanges would be integrated. The rest of the PMD would not be directly integrated but would be indirectly integrated (in the sense that society would take their interests in consideration) because (1) able people could become disabled themselves and (2) caregivers and carers are strong enough to represent potential allies and

[48] There is a third kind of challenge. Contractualism and contractarianism can provide principles to structure a moral theory as well as a theory of justice. Although Becker does not deal with moral theories more generally, we will consider later a more radical challenge to the moral status of the PMD, which is not only to exclude them from the reach of justice, but of morality as well.
[49] Becker (n 24) 17, 37.

threats to others and will demand benefits for the disabled people they love.[50] We have seen that (1) does not apply in the case of the (permanently) PMD since they are not a category in which one can fall through disease or accident. However Becker shows why, on a modified conception of reciprocity, strictly self-interested agents would try to 'restore mutually advantageous reciprocal relationships between the wrongdoer and the wronged,'[51] i.e. between the burdensome disabled and the non-disabled, namely by 'rehabilitating' the disabled. He makes use of (2) - the weight that people who love and care for the PMD - to this end. It is this argument to which we turn now.

There are two theoretical strategies to satisfactorily integrate the PMD to our political community. First, we can show that it is profitable for parties to the contractarian procedures to integrate them, i.e. to give them some kind of integrated status. Second, we can argue that

[50] A variant of (2) is that able contractors 'while fortunate in their own abilities, might have long-lived but seriously disabled children, friends, and neighbors - people whom they love deeply and whose welfare is inextricably connected, psychologically, to their own.' Becker (n 24) 17. I should answer two potential questions that could be raised as I develop the argument in this chapter.

First, I will try to distinguish the 'tough crowd' from the 'caring crowd' on a different basis than Becker, namely: the caring crowd's commitment to more than strict self-interest. One could flag, like in the previous quote reproducing a Hobbesian idea, that caring for our close ones is another form of self-interest. The first answer is a disagreement on assumptions about human psychology. The second answer is that even though it would - sometimes or for certain relations - be the case, it could still be said that the caring crowd values more than strict self-interest. The third answer is that the caring crowd would not accept these political terms; they could not accept that the ethical and political weight to be given to their disabled love one would be a mere appendix to their own status, a factor for their own happiness, like a taste or a preference: Peter Byrne, *Philosophical and Ethical Problems in Mental Handicap* (Palgrave Macmillan 2000). Fourthly, the caring crowd would not, therefore, accept terms of negotiation that would *ab initio* prevent the PMD from having as robust a political status as anyone else.

Second, as we will deal with the contentious notion of a 'tough crowd' and a 'caring crowd', one may wonder if we could belong to both crowds. I do not exclude this possibility (in fact, it would reflect my position that we take part to different relations). Even if it were the case, however, we will artificially separate both for the sake of the discussion.

[51] Becker (n 24) 31.

we should conceive of what is profitable differently, in a way that allows the PMD to directly take part to this profitable endeavor.

2.3.1 Addressing the Tough Crowd First

My disagreement with Becker starts from the beginning of his essay with his idea that we cannot let go of mutual advantage theories (contractarianism) for Hobbesian-like reasons that I wish to problematize. In a nutshell, he claims that political theory cannot ignore the 'tough crowd problem' because social stability cannot be achieved otherwise, and my answer is not only that we ought to be much more reluctant to hold morality and justice hostage to the tough crowd's whims, but also that it is not so certain that the tough crowd holds the rest of society hostage to their negotiating terms.

Who is the tough crowd? Becker defines the tough crowd problem as 'the problem of persistent, life-and-death conflicts between people who are politically engaged and willing to deal with each other - rather than dight as a first resort - but who have irreconcilable views about human good and the good life.'[52] I think this definition is somewhat misleading, because it leads one to think that the tough crowd is simply 'everybody' for his description of the tough crown problem sounds very much like Rawls' description of the ineliminable reality of disagreement about comprehensive conceptions of the good life, making such a disagreement a key focus of political philosophy. This is not, however, what (as I understand

[52] Becker (n 24) 13.

his essay) he takes the tough crowd to be, and therefore, not what the tough crowd problem is.

The tough crowd are not only human beings disagreeing about conceptions of the good life. They are united in their belief that rational self-interest is the only trait that they have in common that would be susceptible to help them overcoming their disagreement in a mutually profitable way. It is this shared belief that makes them prefer the social contract over, for instance, killing everyone else, or enslaving them, which is unwise, on this account, if only because murdering people may deprive one from the benefit of their company as potential allies, co-workers or aesthetically pleasing objects, and enslaving them may cause a seditious violence to slowly seethe. They are thought to constitute a 'wide range of political actors' and they demand that 'lexical priority' be given to self-interest, or else they will challenge the established social order. They are 'those whom we regard as evil, powerful but amoral, powerful but unreasonable, or powerful but badly wrong in their conception of the good life'; Becker associates them with Thrasymachus' s' crowd, asking Socrates in Plato's *Republic* why choose justice over 'a way of life (...) based on the unfettered exercise of power,'[53] and contemporarily, with 'hard-boiled political realists, opportunistic free-riders, enthusiastic anarchists, resourceful skeptics, cultural relativists, ideologues of all stripes, members of militant religions, relentless advocates for special interests.' [54]

Perhaps individuals who believe that we ought to care for the disabled because vulnerability and dependency have an important moral dimension are part of this last group,

[53] ibid.
[54] ibid 14.

the ‘relentless advocates’. Otherwise, they are the ‘caregivers’ to which Becker later refers. I shall call them the ‘carers’, and my tendency would be to oppose the ‘tough crowd’, the one populated by ferociously selfish people with the ‘caring crowd’ to make my point. Although I am stipulating this particular semantics, I am not loading the dice (though perhaps I am showing my own allegiance and use terms that allows me to connect this particular section with broader themes in my research): I believe there is no way around this dichotomy. I am opposing a group which strictly favors self-interest to the point of giving it lexical priority over all else in society-building and constitutional arrangements, with a group who thinks that other propensities are just as fundamental to human forms of life and that social stability can be arrived at otherwise. Becker does not make this dichotomy: instead he *only* presents the tough crowd. Or I should say, he skips over the description of any crowd that does not believe in giving lexical priority to self-interest (e.g., what I have called the ‘caring crowd’). Either that or we take seriously the only opposition to the tough crowd that he does present: what we could call the ‘pliant, like-minded’ crowd. However I believe that *this* would be loading the dice by sweeping the most important alternative to the tough crowd under the carpet. This is so because no one is challenging Rawls’ finding of ineliminable disagreement of people about comprehensive conceptions of the good life in this discussion and no one doubts that ‘In pliant, like-minded company we have the luxury to consider political arrangements that are fully satisfying - even, perhaps, to pursue some form of ethical perfectionism.’[55] Everybody also agrees that, in spite of deep, enduring, disagreements, we can hope for some common ground - otherwise, we have an enduring, but also hopeless problem. What should be problematized is that the tough crowd assumes that the caring

[55] ibid 14.

crowd will agree that there is no hope for social stability outside of accepting that the only language of negotiation (within a social contract theory account of social justice) must be most fundamentally based on self-interest alone.

The tough crowd believes that nothing but an understanding of power and self-interest can lead to social stability; as they deploy their instrumental reason and become engaged into a contractual procedure, the tough crowd becomes (generic) contractarians.

The ambiguity in his essay about whether the tough crowd is characterized by (1) a shared commitment to giving a fundamental, exclusive priority to self-interest (the contractarian crowd, or the tough crowd as I defined it) or (2) by being rational people facing ineliminable disagreement about comprehensive conceptions of the good life (Rawls' *everybody* 'crowd') allows Becker to (a) say not only that political philosophy's primary problem is dealing with Rawls' ineliminable disagreement but also that its primary audience is Thrasymachus' crowd: the tough crowd or generic contractarians.[56] It also allows him to include the caring crowd in the tough crowd[57] in a way that silences the fact that the caring crowd does not agree with the Hobbesian (I will point out why after) assumptions of the tough crowd about the inevitability of 'permanent warfare' or the impossibility of a sustainable commitment to justice that would not match with, or entrench people's self-interest at the most basic social level.

[56] ibid 13.
[57] ibid 15.

So while it can be said that I am somewhat highjacking Becker's terms, I am only giving back to Rawls what belongs to Rawls by pointing out what looks like a contractarian attempt to highjack a Rawlsian-like category of rational people living under the conditions of justice. Second, I am not purposefully misinterpreting Becker's terms; I only insist that he does not disguise the tough/contractarian crowd into 'everybody' so that there is still conceptual space to challenge the contractarian generic set of assumptions about people (and what they have in common) and disagreement (and how to overcome it). Of course, he can embrace a contractarian point of view on the question - which I precisely appreciate for the opportunity it offers us to see the limits of an unapologetically contractarian attempt at including the PMD within our political community. Third, I also think that this redefinition is important because - regardless of whether Becker would concede my point - we must deal with the tough crowd's *real* problem. I leave the problem posed by Rawls' crowd (everybody, disagreeing about the good) to the chapters analyzing contractualist solutions and I now deal with the problems posed by Trasymachus' crowd (a subset of those disagreeing about the good and insisting that only a traditional contractarian solution prioritizing self-interest will lead us to social stability, and furthermore, powerful enough to hold the rest of us hostage to their view regardless of whether they are morally right). I will deal with a moralized version of putting self-interest first in a different chapter - as Becker argument does not try to moralize contractarianism but rather to present it as a self-interested story about the proper understanding of power and reciprocity susceptible to retain the tough crowd's attention.[58] Fourth, let me point to a passage where Becker seems to recognizes the conceptual distinction between the 'tough crowd', on the one hand, the 'rest' (the ones

[58] ibid 17-8.

whose negotiating terms are silenced, I have suggested), on the other, and thirdly, the 'bargaining group' which a social contract theory uses to elaborate a system of social justice:

> in any philosophically plausible mutual advantage theory, the *bargaining group* must include at least everyone that the *tough crowd* must include for strategic reasons—everyone, for example, whose exclusion from the process is likely to undermine the effectiveness or stability of the conventions, contracts, and institutions that are advantageous to the *tough crowd*.[59]

My goal is not to point out all the places in Becker's text which raise ambiguity about whether the tough crowd is 'Trasymachus' crowd' or 'Rawls' crowd' (and which lets the reader solve this ambiguity by equating both in a way that begs the question since it assumes that the contractarian starting set of assumptions holds true for all pre-contractual negotiators). I only want to point out the contractarian assumptions at work: the tough crowd is already seen as the only group from which justice should be constructed. They are bestowed a close connection to the category of the bargaining group, because of their power and recalcitrant and self-interested minds: they are already part of this bargaining group, which is completed incrementally, by adding other individuals to it, notably from the caring crowd whose exclusion could turn out to be unprofitable.

I therefore rephrase the tough crowd 'problem' as I did at the start of this section: they hold us hostage to their negotiating terms which are fundamentally grounded on self-interest, the constitutional and legal social consequences of which must reflect and maintain the priority of self-interest. They will not accept any less under penalty of threatening social stability (to a point that must be such that it becomes unprofitable to question or challenge

[59] ibid 16.

their negotiating terms, or not accept them entirely at the risk of having to deal with a certain degree of social instability - but one, I would add, incomparably lesser than a state of perpetual warfare).

Ultimately, therefore, Becker's stance has a Hobbesian flavor because of its focus on social stability. He fears that not dealing with the tough crowd (defined as the group unified by giving lexical priority to rational self-interest) will preclude social stability: if they are not satisfied, he says, they 'will repeatedly scuttle other political arrangements at the constitutional level.'[60] He also says that failing to construct commitments of justice on the basis of this rational self-interest alone, 'we have little chance, short of perpetual warfare, of protecting the disabled.'[61] This Hobbesian fear of a perpetual warfare reflects a bleak view of human nature, or at least of the tough crowd, whose 'human nature' becomes the only one political philosophy should be interested in, [62] for questionable pragmatic reasons, (questionable, if we define this group by rational self-interest alone and as being able to disrupt social stability should they be ignored, as they rationally should if that were the case).

Here are a few criticisms that can be addressed to an approach granting such an importance to the tough crowd.

[60] ibid 14.
[61] ibid.
[62] ibid 15.

(1) We probably do not want to use a starting point to a theory of justice that is overtly and unapologetically amoral if we could do otherwise[63] (2) If the tough crowd holds the rest of us hostage to abiding by its negotiating terms (which also reflect its own views about what essentially matters in human life and human interactions and not just, in spite of what its defenders claim, the negotiating terms deriving from them), it is exercising some sort of tyranny over the rest of society. A condition of liberal justice requires that no particular group be able to impose its will upon all others. If the tough crowd forces the caring crowd (or any other crowd) to adopt its primarily self-interested negotiating terms and societal structures, it is not clear whether the resulting arrangements qualify as justice. (3) It is not so sure that no other scenario of escaping perpetual warfare are factually plausible.[64] For instance, the caring crowd may consider that self-interest is important while not being the only common denominator in terms of profound and stable basis for negotiation between people with deep disagreements about the good. (4) The caring crowd could after all use the tough crowd's threat of challenging the established constitutional order if their fundamental views about what is owed to themselves and to vulnerable human beings is silenced. Are we to understand that only the tough crowd is powerful, can threaten to destabilize the social order and 'repeatedly scuttle the established constitutional order' out of love for themselves but that the caring crowd would not do the same for other motivations? (For instance, love for their disabled children or partiality toward other vulnerable and dependent groups.) We should not expect the caring crowd to be more or less 'pliant' than the tough crowd lest we confuse meekness with kindness, submissiveness with tolerance, other-regarding concern with self-effacingness, love, caring and empathy with weakness and inability to put up a

[63] ibid 17-8, 23.
[64] ibid 14.

fight.[65] Countless civil right movements, resistance movements, and groups protesting the harm unfairly suffered by their fellow human beings and close relatives in the public sphere in a way that undermines the legitimacy of acting governments, indicate that self-interest may be accompanied with other kinds of motivations (as I am considering cases where people are acting out of love or solidarity for others) not only without this leading us to a state of permanent warfare, but also in a way that may actually further stabilize the social order.[66]

2.3.2 Derivativeness of the PMD's Status Secured through their Carers

As a result of his contractarian, instrumentalizing, approach, when Becker argues that social institutions will be adapted to cater to the needs of both the disabled and their defenders

[65] This is not an admission that the tough crowd is right that the only way out of a 'unprofitable' disagreement is to focus on rational self-interest alone, but rather a claim that focussing on rational self-interest alone may not be profitable enough for the caring crowd. It does not mean either that the caring crowd is unresponsive to reason, at least no more or less than the tough crowd is: both of them value some things deeply, and both of them are rational and reasonable enough to see that they must distinguish between what they value so and the strategies (and underlying, shared, values) that make a conversation and a stable social order possible. It is not *prima facie* implausible that making some room for other-regarding concern and empathy in our description of justice cannot lead to stable social arrangements, even without moralizing too soon a theory of justice that would rather track shared traits about human beings. These shared traits could include empathy, dependence, and a tendency to cooperate and socialize, among others. Consider Michael Slote's application of his theory on caring and empathy to justice as such an argument: *The Ethics of Care and Empathy* (Routledge 2007) and *Moral Sentimentalism* (OUP 2010). We will also turn to Silvers' and Francis' theory of 'justice through trust' which tracks the natural cooperative tendencies of human beings, who work *both* solitarily and collectively.

[66] It is possible that my claim sounds naive, perhaps even more so within a thesis about theories wholly immersed in the liberal paradigm of autonomy. I cannot defend it here. However, people have historically rallied to claim the rights of others, especially vulnerable others like children and mentally disabled people. I would point out that if empathy, solidarity and other-regarding concern would *not* have countless and all-pervading social functions, within the institution of the family, through the practices of socialization, and as motivating factors to pursue meaningful projects, it is hardly a well-oiled Hobbesian punishment system - necessary though it is - that would keep society stable and peaceful. I am only bringing up these perennial issues to ward off too quick a dismissal of the idea that human beings may universally agree on more than being selfish and rational, even when it comes to seeking the terms of a society-building procedure. The claims that they are cooperative, social beings and that they are dependent upon one another may be as compelling, and their normative consequences, not so easy to dismiss. See Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Duckworth 2009).

(their carers; unless the disabled are themselves able enough to be threatening enough), it will not be for the sake of the disabled but 'for the sake of efficiency and for the sake of stability.'[67]

The PMD are not able to directly threaten social stability and as a result have no direct moral status. Granted, the people who love them or have other partial relations with them may have such solid bonds with them that this indirectness or derivativeness seems less threatening to the PMD's well-being under this contractarian view. However, I am not focussing on these derivative statuses in this thesis, though we may easily think of grounds for such statuses as a last philosophical resort should we be unable to provide the PMD with a RMS.

As for my criticism of generic contractarianism, my criticism of the particular derivativeness or contingency of the PMD's moral status on Becker's account is not a criticism of the instrumental aspect of this status as everybody is instrumentalized on a contractarian account. The instrumental status of non-disabled citizens is nonetheless the RMS provided by a traditional Hobbesian or contractarian frame even though it would not be recognized as a RMS at all within a contractualist or Kantian frame, for instance. There is still such a plausible notion as a RMS within Hobbesian contractarianism, and it is this one that Becker uses. (In fact, while using an instrumental, strategic, self-serving rationality instead of notions such as dignity, contractarian theories of the RMS of subjects of justice reach a similar end point in terms of robustness and equality of status, which shows that

[67] Becker (n 24) 17.

though the concept of what counts as a robust status may change radically from one philosophical standpoint to the other, there is a surprising intuitive sense that philosophers from different ilks are trying to capture a common notion (though by giving it very different foundations.) Becker echoes Hobbes by explaining this thus:

> the only sort of strategic situation in which every member of this crowd would make an agreement with the others is one in which no other individual can dominate anyone else or can dominate a few into forming a coalition against the rest. The result is one of the major features of the bargaining situation imagined by social contract theorists: namely, one in which all parties to the bargaining are roughly equal, free, and independent.[68]

However, the status of the PMD is not only contingent upon their being instrumental to others, but also upon being instrumental (or, rather, the object of partial preferences) to people who care for them who are themselves instrumental to others. They are, as it were, doubly derivatively valuable.

Does it matter if one is removed from a direct status once, twice or thrice, i.e. if one is instrumentalized twice rather than once if one is instrumentalized anyway? My answer is simply that if contractarian theory grounds RMS on power, there is a substantial difference between holding that someone is directly powerful and holding that someone happens to be through her contingent role within social matrices or her contingent relations with powerful agents. Since its foundations are more fragile, the moral status of the PMD cannot be said to be quite a RMS, and the fact that most of us would not trust having merely such an indirect

[68] ibid 15.

RMS within a ideal contractarian society and would much prefer being granted an ordinary RMS is an indication that the PMD's moral status a mitigated kind of RMS.

Becker would resist my characterization of the contractarian status as too derivative.[69] He, too, seeks to find grounds for a *robust* status for the PMD (or at least as robust a status as contractarians can grant). He claims that:

> the basic structure that idealized bargainers design not only will be designed from the beginning with the disabled in mind but will be designed for the disabled and for their caregivers as well as for the bargainers themselves. These considerations will not be derivative matters but central ones.[70]

The word 'matters' is ambiguous. In one sense, the interests of the disabled will be considered in the very design of social institutions; i.e. the idealized bargainers will have the disabled's needs in mind from the beginning. But the disabled's status remains derivative because of the reason the idealized bargainers have to consider them in the first place. This consideration is derivative or contingent on the consideration we have toward the agents who love and care for the PMD, and for ourselves should we need these caring institutions.[71] A possible argument is that the carers can require the tough crowd to grant a more robust (less derivative) status to their cared-for: they will accept nothing less for those they love. However, this honorific membership to our contractarian political community is still contingent upon the carer's attitudes toward the PMD and the PMD's status is still derivative upon theirs. To truly make it non-derivative, the tough crowd should accept to borrow the

[69] ibid 37, fn 30.
[70] ibid 17.
[71] ibid.

point of view of the agents caring for the disabled. However, on a contractarian view (whether the generic one or Becker's) the bond that unites the carers with the PMD is not required by justice: if justice is a matter of rationally maximizing self-interest and therefore of recognizing a robust status to people susceptible to help or hinder this end in order to contract with them because contractual rational dealings is a more mutually advantageous relation (than, say, war), the tough crowd has direct reasons to deal with the carers, but not with the PMD. The PMD only come in the picture as one of the things and tastes that able contractors want to secure for themselves. If the tough crowd *would* borrow the carer's point of view on the PMD, they would themselves become concerned for the disabled in an attitudinal way that could not be reduced to, or dependent on, the concern the tough crown has for the carers. Only then could the tough crowd be disposed to grant the PMD a non-derivative robust status, and whether this would be a matter of justice or not, it would neither be tough (in the sense of strictly self-interested) nor contractarian.

One can be uncomfortable or alarmed with the contingency affecting the status of the PMD within a contractarian frame assuming a strictly self-interested picture of people when they reflect upon what they owe to one another as a matter of justice, and perhaps also of morality. Entrusting the treatment of the PMD to the tough crowd is like putting sheep and wolves in the same pen, and crossing our fingers that the feeding system for wolves - who will not bother killing sheep if they are properly fed - works out well.

Becker argues that 'for strategic reasons alone', contractarian theories can justify a robust status for the PMD, but his best argument is not to be found in an indirect view for the

reasons mentioned above. Rather, it is in offering an understanding of the PMD as directly worthwhile fellow contractors. He does so by showing that many of them can actually reciprocate once the notion of reciprocity is understood in a richer and more complex way.

2.3.3 Rethinking Reciprocity

Becker explains that reciprocity is oversimplified in four ways: (1) it is understood to require 'direct, one-to-one exchanges', (2) and 'in-kind returns'; (3) it has to be voluntarily chosen, i.e. the subject of a voluntary transaction and (4) 'the things exchanged must be of equal value in some agent-independent sense.'[72] Becker suggests a proper account of reciprocity, which is constituted by proper accounts of 'fittingness' and 'proportionality' for the good and bad received. A 'fittingness standard' defines 'the range of things that counts as goods for the recipients, and in the case of reciprocating for bad things, the standard is to return corrective good for bad received.' Standards of proportionality state that: 'for the good we receive, we respond with an equal marginal sacrifice and for the bad, our corrective responses be directed to restoring and sustaining productive reciprocal relationships.'[73]

I have little to contribute to his view of reciprocity which I find plausible[74] and certainly helpful in understanding what constitutes proper returns in good and bad within

[72] ibid 21-3.
[73] ibid 23.
[74] Though I note that it ultimately relies on some empirical assumptions that could be challenged and are hard to prove. For this reason, I suspect that I am favorable to it because I already think that we should broaden our understanding of reciprocity, whether it serves the tough crowd's interests or not (among other things because reciprocity may serve at a later stage of our social thinking, in measuring what members should contribute to the benefit of whom, and when, and what sort of responses - accolade, higher salary, frown, jail time - are merited when they succeed or fail to do so, rather than to be an exclusive criterion for membership to society).

'transactional relations' that should be understood - for the sake of these transactions based on the well-being of the parties taking part to them - in such contractarian terms. (Though I believe that such relations are far from sufficient in, though not irrelevant to, discussions about fundamental issues of justice such as membership to the political community, RMS, or representation of interests at the early stage of society building.) My criticisms of this inclusivist strategy will rather be remarks noticing the two apparently unredeemable flaws of generic contractarianism surfacing here: the dubious empirical wager that the PMD are contingently or indirectly profitable or threatening enough to have their interests socially accounted for and the oddity of framing our obligations regarding justice and morality in terms of power when it comes to our dealing with the PMD.

On Becker's account of fittingness, the 'issues central to justice for the disabled' are framed under the rubric of 'bad received' (rather than goods received) in need of corrective steps (the fitting corrective response to maintain productive reciprocal relationships). This initial way of looking at the disabled as a burden is problematic as we will see in the chapter on active citizenship. These corrective measures aim at 'restor[ing] and sustain[ing] productive reciprocal relationships' that are 'mutually advantageous.'[75] However, one can wonder what sort of reciprocal relationship exactly could be made possible (rather than 'restored') through social accommodation. Not all PMD can become productive members of society through 'rehabilitation programs'. Not all PMD can fit a contractarian effort to normalize them - and it is far from obvious that those who partially or completely can, will offset the costs of the required accommodation as already mentioned. (As I mention in

[75] Becker (n 24) 25-6.

different places in this thesis, we cannot either generalize the status offered to a category of PMD to all PMD or to non-disabled contractees who consider the possibility that they become profoundly disabled for a period of their lives to (permanently) PMD; it would beg the question. Coherent contractarianism would require to grant a robust status only to the former.)

Becker's account of proportionality trades on the familiar idea that 'we cannot reasonably assume that the notion of [a balanced, fair and proportional transaction] involves equal, dollar-for-dollar values for the parties'. He also emphasizes that reciprocal proportionality must be understood 'into its larger context - specifically, into its role in the project of creating and sustaining mutually advantageous social relationships generally.' We will come back to both ideas which are most successfully utilized by Silvers and Francis; let me only state why they are not so successful within a more individualist (by contrast to Silvers' and Francis's) contractarian account. Of course, an advantageous exchange does not need to be dollar-for-dollar. The value can be subjective to each of the trader and one of the traders may get a less good value (even once it is adjusted to subjective valuing) but can still be a good deal if he's freely choosing it. The problem, however, is that the disabled may not be able to trade, even admitting this inequality of currency (in kind and amount). Becker's answer, similar to Silvers' and Francis's, is that the very fact of sustaining trading relations with them constitute a social advantage. This is an empirical claim which can be questioned. Becker is not referring to Francis' and Silvers' claim that relations of trust between the disabled and able people are themselves valuable. That view has issues of its own with which I will deal in the next chapter. Instead of relations of trust or any other sort of nurturing

relations, Becker is focussing on the type of relations sought by the tough crowd: 'mutually advantageous social relationships'.[76] Becker's two suggestions are that (1) we should adopt the proportionality requirement so as to not completely exclude 'the young, old, poor, powerless, unlucky, and disabled' [77] and completely extinguish the hope of a mutually advantageous project and (2) that excluding them would produce 'resentments (...) social instability and economic efficiency'.[78] However, it is unlikely that many PMD have the capacities to contribute proportionally (even on Becker's adjusted notion of proportionality) in a way that would prompt the tough crowd to bargain with them, and it is also dubious that the tough crowd would fear the PMD's resentment (supposing they are able to resent). Of course, the carers, on the other hand, are able to resent, contribute and threaten social stability, but the idea considered here is whether the PMD themselves can be seen as parties to the contract (as Silvers and Francis will suggest); if they cannot and benefit from their carers' partiality toward them or from some other social arrangements designed for able contractors, it raises the issue of derivativeness and contingency previously explored.

Becker's version of contractarianism, which is more sophisticated but which essentially retains the key damning features of generic contractarianism, cannot provide a satisfactory basis for the integration of the PMD. The key reason is that, though Becker expands our notion of reciprocity in a way that enables contractarians not to miss out on profitable deals with the PMD, it is simply too empirically dubious that the PMD constitute an untapped resource on a non-moral account of their respective power, and somewhat

[76] ibid 26.
[77] ibid.
[78] ibid 27.

outlandish as an account of justice that purports to not be amoral if we consult our ordinary intuitions about why we ought to grant them a robust status within our political community (without denying that ordinary intuitions should be our starting point, not the arrival line). We would need, if this is possible, a contractarian account which does not challenge *only* too restrictive a view of reciprocity, but also the kind(s) of profits that the PMD can procure us so that they can more plausibly and less contingently be said to have something to trade.[79]

Becker recognizes that contractarianism is stuck with a 'residue of injustice', which is:

> to impose unfair arrangements on individuals (especially the powerless) for reasons unrelated to those individuals' particular interests, needs, or claims [or capabilities]. A theory does this when it locates the crucial determinants of individual entitlements and just distributive arrangements "outside" some individuals—for example, by defining a bargaining procedure that effectively excludes some people, or an aggregation of expected consequences that discounts their interests, or a conception of excellence or flourishing that is inappropriate for them.[80]

His answer is that we cannot expect more from a contractarian theory,[81] and he is skeptical that doctrines of inherent human dignity (notably non-consequentialist right-based theories), though they would avoid the contingency objection, can successfully and defensibly 'construct interpersonal rankings of inherent individual rights that will yield a unique solution to every priority problem between the disabled and others.'[82]

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[79] Silvers and Francis offer such an account that we will explore in the next chapter. I can already state that while it is more promising, it seems to ask too much from a contractarian frame and to overstep its boundaries.
[80] Becker (n 24) 37.
[81] ibid 37.
[82] ibid 37-9.

I should emphasize that his criticism of non-consequentialist right-based theories is not a wholesale rejection of any non-contractarian (theoretical elements contributing to) theories of justice. Although it is not my goal in this thesis to develop a fully-fledge alternative, I consider promising the idea that fiduciary relations have a normative content that cannot be reduced to mutual advantage (though I would suspect it would take into account the nature of the relations at stake, as well as the circumstances and the consequences of the choices presenting themselves). I grant to Becker that dealing with conflicts between disabled and non-disabled people's claims represent more of a challenge within a theory of justice that is not unified (for instance around the goal of mutual advantage between strictly self-interested contractors) and that such an approach would admit of competing fundamental moral pulls. I can only mention J. Baird Callicott's simple but compelling answer that doing the right thing for the right reason is important, as well as Mary A. Warren's answer (to criticisms of her claim that there is a plurality of grounds for moral status) that simplicity is not the only philosophical virtue to a theory, and to highlight, like Silvers and Francis, that the harm caused to the PMD by being normalized, that is, by receiving benefits on the basis of a theoretical frame developed to cater the needs, claims, interests and capabilities of non-disabled people is far from insignificant.[83] This harm is even greater when we deal with the PMD whose needs and capacities differ even more widely from the norm than other disabled people. I agree with Becker that '[i]t is hard to see how

[83] J. Baird Callicott, Intrinsic Value in Nature: a Metaethical Analysis, (1995) 3 The Electronic Journal of Analytic Philosophy <http://ejap.louisiana.edu/EJAP/1995.spring/callicott.1995.spring.html> accessed 26 April 2013; Warren (n 17); Anita Silvers and Leslie P. Francis, 'Thinking about the good: Reconfiguring liberal metaphysics (or not) for people with cognitive disabilities' in *Cognitive Disability and Its Challenge to Moral Philosophy* (Eva F. Kittay and Licia Carlson (eds), Wiley-Blackwell 2010) (see their criticisms of Nussbaum in particular).

one could ask more of a mutual advantage theory of justice on [the issue of the disabled]'[84] but I hope, for the PMD's sake, that Becker's pessimism regarding alternative theories is unjustified, as I do not share his optimism regarding the welfare of the PMD within an idealized contractarian society.

In the next chapter, I will turn to Silvers' and Francis' theory of justice through trust, which I think is the most promising social contract account of contractarian grounds[85] for including the PMD into our political community.

Before I do so, let me conclude by emphasizing that contractarian accounts awkwardly steer a course between Charybdis and Scylla when they deliberate on the PMD's status: they either implicitly introduce a non-contractual qualificatory criterion to be granted (or specially considered for) RMS (and this criterion is incompatible with contractarian fundamental premises) or they must exclude the PMD along with other UC. I ultimately think that contractarians cannot give up on the features of contractarianism that taint it with an unsatisfactory derivativeness (without giving up on contractactarian key commitments).

2.4 Two objections: Biting the Contractarian Bullet or Admitting an Unspoken Qualificatory Criterion

[84] Becker (n 24) 37.
[85] Or social contract account with key contractarian commitments as they do not explicitly claim to adhere to contractarianism more than to contractualism.

Contractarians do not have an independent criterion for membership to the contracting community: Abby only gets to join if it is profitable to have her on board. There is no further eligibility criterion, like questions about who counts as humans or persons for instance; wolves could be in if it is profitable to bring them in.

A first contractarian position may be that there are very few 'pre-social' cases in which one can plausibly argue that the PMD can be regarded as profitable members of the emerging contracting community. In other words, the tough crowd, as we have seen, would have no interest to deal with them at all. In the 'naked' position of a pre-social order[86] where the contract is being formed, why would anybody include them? They have nothing to bargain with.[87]

[86] This first remark could be problematized. Non-disabled people could not develop their abilities either if left to themselves as newborns. The contractors in the pre-social state must have developed their contracting capacities thanks to *some* form of community support. Therefore, the state of nature scenario is not neutral in terms of the support it assumes has been dispensed: it assumes that the central case of 'negotiator' received support to develop his abilities (e.g. a capacity to communicate) but that the PMD were deprived from any needed additional support. The fact that such a 'state of nature' thought experiment would assume that only people able to achieve a high degree of autonomy should count as negotiators would not necessarily be arbitrary, insofar as only these people may become 'profitable contractors' and such a requirement is central to contractarianism. However, this view should integrate disabled people able to become profitable contractors but requiring more support than the statistical average; it would still nonetheless exclude most PMD who would remain UC in spite of any (pre-social or social) support.

[87] By contrast, but not dissimilarly, on the contractualist side, it may seem that the contract is superfluous if one thinks that there is an independent criterion that makes one eligible for being a contracting party. If we can use the independent criterion as the direct route to getting you properly treated, why bother with the contract? If, the objection goes, the contractualist identifies the PMD as 'persons' who are eligible to be in the contract for purpose of contractualism, why not just treat the fact that they are persons as decisive in itself of how they should be treated and not as condition for contract? The answer to that objection is that that there is no such independent contractualist criterion, at least explicitly acknowledged: persons are contractors, which imply possessing specific contracting capacities amounting to 'moral powers'. The moral capacities that are RMS-granting on a contractualist account are to be deployed during the *contractual* process of building social institutions and their moral salience cannot be detached from their contractual dimension. Indeed, as we will see in the chapters on contractualism, if we simply accept that PMD are worthy of a robust moral consideration without offering them adequate contractual representation, they will suffer from institutional exclusion because some of the social settings will be ill-fitted for them. The contractual process is not only about securing membership to the political community; the contract is also a modal device telling us how to treat social members and the sort of constitutional arrangements and policies they can expect.

The progressive inclusivist contractarian would answer that contractarians can be long-term planners and, even from a pre-social state perspective, they may see that the integration of disabled people through institutions allowing them to be productive would be profitable on the whole.

The objector would insist that contractarians cannot soften their premises in order to let the weaker participants have more of a role and must consider the cases where, barring an implausible optimism, a group of self-interested bargainers would think that it would have been far better if a non-contributing PMD had been excluded from the outset even though he is now regrettably 'one of us'. Now that the PMD are here, it is more difficult to remove them because of costs (such as people's negative reactions) but the question of whether it would be better if this group of people were not around is on principle opened to the contractarians (and can translate in government-sponsored and even economically sanctioned or otherwise socially encouraged eugenic policies such as the ones in place with regard to pre-natal detection of cognitive deficiencies).

The first answer that can be provided to this by an inclusivist contractarianism (or perhaps an unwittingly moralized version of it) is that even self-interested people will be more strongly averse to such solutions. They may desire, for their own sake, a social climate that is not so ruthlessly calculating, if only because it may penalize them. We will come back to such an argument in the next chapter. The second answer, however, goes back to the fact that the tough crowd may not be statically associated with a particular group of individuals. We can all suddenly be projected in the caring crowd - or likely to be so - if we have a

disabled child, no matter how socially unprofitable that child is. The contractual pre-social story is odd here, since we cannot eliminate the fact of vulnerability from the human condition. Lamenting the fact that we are now regrettably stuck with them supposes that we could have it any other way.

However, both answers seem to suppose that we are not so good at detecting the truly unprofitable, from birth to death, which is increasingly dubious, as well as social motivations which the historical (including genocidal) treatment of the mentally disabled also make questionable. In other words, contractarians must face the tough crowd. The tough crowd may indeed put a break on their purge because of the psychological cost to others, the demoralization of our productive population, the fear it brings that they or their children may be next, but since contractarianism provides an idealized account of who ought to count as a member of society, such contingent considerations would not justify granting the PMD as robust a moral status as a contractarian account can provide.[88] This is part of the nature of this idealized account.

Let me summarize the problem of introducing a non-contractarian criterion for granting RMS in the following way. Hobbesian contractarians imagine a state of nature where we are faced with the question of whether to establish a civil society, and they argue that the marginal advantage for 'us' to do so is enough so long as the problem of free-riding

[88] I put aside the idea that contractarian criteria may act as to create various sorts of moral statuses or even exclude or downgrade social members who fall beyond a certain productivity level since, although one could criticize contractarianism precisely for not closing this conceptual window and even naturally opening for it, it is not something remotely politically plausible in the current state of the liberal philosophical tradition I am dealing with.

(people who enjoy the benefit of security without contributing) is dealt with by coercion.[89] In this story, there was an amorphous 'us' and the fundamental question is: what are the pre-qualifications for being part of it? Are there such pre-qualifications (justifying granting a being a RMS before considering the usual contractarian reasons)? There are two scenarios. According to the first one, there is no pre-qualification, there is nothing that counts as being eligible in advance of the contract being made. The relevant 'us' is defined as everyone from whom the others could obtain marginal advantage. Each person is considered eligible only inasmuch as it would be advantageous for each of the others to bring that one in. If this is the case - and it is - we do have a problem in the state of nature about deciding that people are not 'us' because they do not have a marginal contribution to make. The other hypothesis is that there are pre-qualificatory requirements, which would moralize a contractarian theory. It would bring it closer to a contractualist theory by not grounding it on self-interest alone. There would be features that 'we' share that makes us eligible independently from the advantage that we would bring.

Contractarians may talk as though they believe the first theory but in practice, they may be embracing the second theory because they always model the birth of society on the hypothesis that it will include some weaker participants.[90] It is not just a society of the strongest. If they are indeed opening some breach to the contractarian commitment to

[89] Anthony de Jasay, *Social Contract, Free Ride: A Study of the Public Goods Problem* (OUP 1989).

[90] One could also note that, without further moral constraints, what would prevent contractarians from dealing with threats in a very different way than by integration? Unlike on the contractualist account of requirements that include sophisticated cognitive and moral powers, the brute powers that contractarians refer to are not closely conceptually linked to respect. The proverb advising to keep one's enemy close may not always hold, and neither may Hobbes' empirical conviction that a civil contract with groups threatening us is the best way to protect ourselves. The fact that some potential threatening individuals must be contracted with rather than disposed of does not mean that the same holds for all potentially threatening individuals: some are better left to the lions, or even thrown to them.

seeking out the most profitable deal for themselves, then what is the breadth and extent of such breach, how is it competing with their traditional contractarian commitments and how do they justify that it does not completely supersede these commitments? More importantly, what are these unspoken pre-qualificatory requirements? Why are the babies included? Only because they grow up to be warriors or merchandisers?

The contractarian ideal response is that yes, babies can eventually benefit us or be a threat to us, and therefore they are part of 'us'. But the same cannot be said, as Gauthier suggests, distinguishing the case of those who have or will contribute to the pool of common resources, from the handicapped. For the PMD - and probably this also makes us realize that, in reality, the same goes for babies and for competent adults - there must be an additional unspoken background of social bonds. We already have an under-theorized but nonetheless strong idea of what the 'us' refers to and this moral pull is at work in both contractarian and contractualist accounts even though they do not acknowledge it and instead explain social membership exclusively in contractual terms. These moral pre-qualificatory requirements are not to be integrated in contractarian accounts because they would not be coherent with them.[91]

We know that contractarians want self-interest to be the only negotiating modality in the pre-contractual negotiations, but do they want self-interest to be the only condition for entry into the negotiations? If so, it is not clear how this could be thought of as the basis for

[91] This is evident on prudential contractarian accounts, but I still have to show that it is also more likely than not the case for Silvers' and Francis' seemingly moralized contractarian account and for the contractualist accounts we will explore next.

founding a society because why would they include anyone else except the other fittest, aptest people? The weaker people pose a threat, but only if they can get together, not if we fight them one at a time. The strongest cannot prevent them from getting together and the weak would form their own social contract but, within their own social contract, the same problem would arise. Why would the middle-ranking ones include the weakest ones? Following this line of thought, we can marginalize a small group who is no threat to anyone and this group - of which the PMD would surely belong - can safely be left to die. Short of adding some moral constraints, it is hard to see how contractarianism can provide an account of liberal society as we usually envision it.

If David Gauthier and Eva Kittay are right to think that it is a kind of wistful contractarian metaphor to speak of the productivity of certain PMD (Gauthier would take this to justify the exclusion of the PMD from the scope of justice and Kittay, the rejection of contractarianism), then inclusivist contractarians like Becker are being too optimistic about the success of rehabilitation[92] and about the likelihood that the tough crowd will find it most beneficial to negotiate with the caring crowd. They also read either too much or too little in the weight of the relations that even self-interested contractors will have toward the PMD as their family members or prospective family members (as their self-interest may include, on a Hobbesian account, the interests of their close ones, whose well-being are linked to theirs). They read too much if they assume that this alone will preclude contractarians from considering whether a purge may not be, on the whole, more effective which, by definition, they are open-minded about. They read too little if they do not acknowledge and explicitly

[92] Becker (n 24) 26.

endorse what seem like their unspoken moral pre-qualifications explaining why the PMD cannot simply be left out or gradually marginalized or even eliminated in a way in which the social benefits would outweigh the psychological costs.

3 THE CAPACITY TO TRUST AS A CONTRACTUAL GROUND FOR RMS

3.1 A Trust-Based Conceptualization of the Social Contract

Anita Silvers and Leslie Francis offer a contractual account that challenges the idea that only people with roughly equal capacities can take part to the social contract (the 'homogeneity requirement'). Groups of individuals who do not possess the required degree of physical or intellectual capacities stand outside of the boundaries within which parties can contract. The interests of those outliers are bound to be neglected, or at least hostage to what participants of the social contract make of them.

Silvers and Francis explain that a group that is socially dominant will influence the determination of the properties required to take part to the bargaining process determining the rules governing social arrangements.[93] This 'requirement invites doubts about [the outliers'] legitimacy as participants, deflecting attention from their ideas and attenuating the value of reaching mutual agreement with them.'[94]

[93] Silvers and Francis, *Justice Through Trust* (n 42) 45-47.
[94] ibid 46.

Silvers and Francis essentially propose a different requirement: the capacity to trust.[95]

I note that this seems to be only a qualified challenged to the homogeneity requirement. Parties able to trust are not homogeneously endowed with the intellectual and physical capacities that will enable them to bring their equal (or significant enough for other parties to be interested to bargain with them) contribution to the joint venture, in terms of the product traditionally expected from such a cooperation: mutual enrichment and protection. However, (1) they are all endowed, albeit in various degrees, with a capacity to trust and be trusted and (2) Silvers' and Francis' argument is to the effect that they will contribute to this joint venture. However, they will do so indirectly; their capacities to directly produce riches and security are not what will explain this contribution. It is rather their lack thereof, coupled with their capacity to trust, which will indirectly benefit others, that is, benefit others by making their community more trust-facilitating. (I have yet to explain how this is the case.) It is not so much the homogeneity of relevant individual capacities *per se* that is being challenged, as the nature of these capacities (trust, by opposition to sophisticated cognitive capacities) and the idea that morally relevant capacities (the ones warranting access to the ethical community as an equal political participant) must be *directly* linked to an input, or should enable the individual to produce this input by himself, outside of a community. Silvers and Francis hence make conceptual room for another sort of input on the part of apparently extremely limited contractors.

[95] I will define (self-, and other-regarding) trust with more precision in the following section on the nature of trust (because this definition is at the heart of what I find problematic about Silver's and Francis' acount); in the meantime, the reader can assume that trust is meant in its ordinary sense.

Their illuminating essay principally questions the necessity and the historical predominance of an aspect of the contractarian tradition taken for granted. It is the idea that 'social contract theory [must be] understood as a process of bargaining for mutual advantage'.[96]

First, this bargaining paradigm does not enjoy the weight of tradition that it may appear to have.The interpretation of the social contract as a bargain, they say, '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.'[97]

> 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.[98]

Importantly, the contractual process was often conceived as a way to deal with human vulnerability and dependency[99]; the bargaining model obscures this by assuming the negotiating process takes place between roughly equal and independent parties. Indeed, from a legal point of view, the vulnerability of a party to another is a fertile ground for coercion that may vitiate a contract.

[96] Silvers and Francis, *Justice Through Trust* (n 42) 41.
[97] ibid 43.
[98] ibid 74.
[99] ibid 74.

This is not to say that other-regarding motivations and a culture of trust have always been central to the contractual tradition, which is the alternative that Silvers and Francis want to promote. Social contract theorists may not have made use of other-regarding motivations and trust to the extent that Silvers and Francis do, even if their argument was not a mere projection of dyadic bargaining and aimed instead at creating a certain political climate or culture. Hobbes' social contract, for instance, did take human vulnerability (notably, to each other) into account, but aimed at achieving a climate of peace which did not involve more than self-regarding reasoning on the part of the subjects. Silvers and Francis must therefore make the case for their 'other-regarding'[100] trust-engendering social contract.

Their strategy is to retain a contractual understanding of justice and justification for inclusion into the ethical community designing the principles of justice but to replace the understanding of the social contract as bargaining with an understanding of the social contract as a tool for building trust, both trust underlaid by other-regarding concern and trust underlaid by self-regarding concern.[101]

> 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

[100] ibid 60.

[101] This is my interpretation of Silvers and Francis, and maybe one that they would disagree with, but I think it is the best way to make sense of their argument, since they seem to evoke two different notions of trust. While they can certainly say that a culture of trust would have both, they cannot equate them - they are clearly different. Nor can they say that trust based on self-regarding elements alone does not classify as trust, which is what they seem to imply in several places, like when they refer to Francis Fukuyama's comment that people who do not trust each other can only cooperate through a costly negotiated contract (ibid 61). It is plausible that parties may enter such a contract precisely to secure trust, albeit a trust based on distrustful negotiations.

> agreed to by other-regarding agents of very different abilities, depending on one another and seeking relationships that can be sustained.[102]

They add that '[t]he 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.'[103]

They must then explain (1) why building trust and bonds would be a central goal of justice and (2) how this conceptualization of justice would justify including mentally disabled people capable of trust.

The latter element of their justification is easier to explain. Once it is established that the social contract requires a social frame responsive to people's ability or need to 'achieve successful personal trust relationships'[104] (i.e. once (1) is established), one needs only add the premiss that to include the outliers to the ethical community designing the principles of justice achieves this end to prove (2).

This second claim is not outlandish. It would raise more skepticism if Silvers and Francis were referring only to the trust taking place in a particular dyadic relationship and held that this relation had to be mutually beneficial, and meant that justice reigns when social institutions would facilitate anyone able to trust to directly benefit from particular trusting

[102] Silvers and Francis, *Justice Through Trust* (n 42) 68.
[103] ibid 74.
[104] ibid 45.

relationships. If that were the case, (2) would not follow as easily. It seems likely that PMD can take part to relations of trust, but less likely that their trustee will always directly get something out of it. One may also be willing to grant that it is plausible that A's capacity to trust would ground some duties toward A, but fail to see, barring more arguments, why these would be duties of justice.[105]

However, Silvers' and Francis' understanding of trust as a key element of justice is more collectivist; it has more to do with a climate or a culture of trust reigning in a community than with the particular individual relations of trust occurring within a community or an individual human need for trust. Not that it does not take stock of the capacity to trust. On the contrary, their contemplated just, trust-engendering social frame is precisely responsive to this fact, as well as to the 'human conditions of vulnerability and dependence.'[106] This collectivist approach is reflected in their suggestion that the entity being benefitted is the cooperative culture itself rather specific parties to an exchange:

> 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).[107]

[105] Rawls adopted such a position toward animals for instance, suggesting that their capacity for pleasure and pain would justify duties of compassion and humanity, but not duties of strict justice, Nussbaum (n 19) 331-2.
[106] Silvers and Francis, *Justice Through Trust* (n 42) 59. At least I will treat their argument as such, as I think that their text favors this interpretation, as the following quotes will show. If they meant something more individualistic, they would run into the problem mentioned in the previous paragraph and I would think it it still worth to explore this collectivist option as it is a very promising one.
[107] ibid 45. Although it may sound like it, this is different from saying that it is the community itself (as an entity having a distinct existence from its members) that is benefitted as the final recipient of justice or an intrinsically valuable end to pursue.

This conception of the social contract as primarily aimed at improving trust within a community does not disregard mutual benefits. Individual interests will be satisfied *through* this trust rather than being the primary goal of the social contract. The purpose of contracting is to '[develop] bonds of confidence'. The underlying empirical assumption is that this will better '[help] 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' than 'jockeying for position against one another' would.[108]

Inspired by Anette Baier, Silvers and Francis make a case for the importance of trust and remind us that without some degree of trust, not much could be accomplished at all. We should not therefore think that social contracts grounded on self-regarding motivations alone can do away with trust. In some basic sense, trust is a necessary condition of any human enterprise. Without some trust in the laws of physics, in the worth of my actions, in people, we would not do much. I would not start moving rocks to build a monument without some trust that the rocks will not disappear from where I left them, or will not be taken by other people, or that it is worthwhile to build this monument. Of course, this basic sense of trust as an ability to predict how certain entities will behave (a rock is likely to stay where I put it, a wild animal is likely to bite if I attack it, etc.) does not capture the more specific dimensions of trust taking place between beings able to subjectively expect, and respond to, trust. We are only dealing with trust toward other beings able to be trusted in that richer sense here, but since human activities often (if not always, at least in some basic sense) take place within a community, the far-reaching importance of this trust is not to be neglected, especially when

[108] ibid 59.

conceptualizing social arrangements. (For instance, citizens' trust is often directed at impersonal institutions.) As Niklas Luhmann notes, 'A system -economic, legal, or political- requires trust as an input condition. Without trust it cannot stimulate supportive activities in situations of uncertainty or risk.'[109]

Are these sufficient justifications for making building a climate and culture propitious to trust and bonds the central goal of justice? Is it a strong enough justification for putting trust before mutual benefit? Why not, for instance, conceive trust less centrally, as a mere means to gain personal benefits? Can trust-centered social arrangements be desirable for more knock-down reasons?

They are not, for one thing, intrinsically valuable. Such a claim would be problematic. Baier reminds us of the obvious fact that 'not all the things that thrive when there is trust between people, and which matter, are things that should be encouraged to thrive' and that '[w]e cannot simply label trustingness a virtue.'[110] In support, she evokes the case of exploitation, and the trust between criminals. Silvers and Francis are aware of this problem and do not make such a claim.[111]

Ultimately, we should not expect Silvers and Francis to provide us with a more substantial answer (by opposition to a procedural one) to the question of why trust should be a key social good to achieve. Their strategy is to retain the proceduralist justificatory

[109] Quoted in Annette C. Baier, 'Trusting People' (1992) 6 Philosophical Perspectives 137, 151.
[110] ibid 137.
[111] Silvers and Francis, *Justice Through Trust* (n 42) 64.

methodology of social contract theory instead of opting for the realization of more substantial goods or capabilities, virtues or practices (like caring). Instead, they suggest a progressive understanding of such a contractualist procedure, according to which it takes place within a culture of trust. Their suggestion that the participants to such a procedure have other-regarding motivations and a desire to cultivate a culture of trust is hardly unrealistic. On the contrary, it plausibly modifies Rawls' often criticized assumptions regarding the moderate selfishness of the participants to his proceduralist justificatory argument. They agree on this point with Nussbaum that it is not 'clear whether the rabbit of justice can really be pulled out of the hat of rational self-interest.'[112]

The result of basing justice on building trust is that anyone who has the capacity to trust can be a subject of justice, that is, they can be active parties to the sort of society-building agreement that theories of social contract contemplate. Their inability to significantly reciprocate the benefits they will receive or the lack of cognitive abilities to contract or represent themselves, as well as the difficulties arising from assigning a trustee to represent them, do not arise like under the bargaining paradigm of the social contract.

This is how, in a nutshell, Silvers and Francis argue in favor of the capacity for trust being a sufficient ground of concern for both disabled and non-disabled people.

[112] Quoted in ibid 60. Silvers and Francis refer to Martha Nussbaum, 'Beyond the Social Contract: Toward Global Justice' (The Tanner Lectures on Human Values, Canberra, 2002 and Cambridge 2003) <http://tannerlectures.utah.edu/lectures/documents/volume24/nussbaum_2003.pdf> accessed 27 April 2013. However, it appears that this quote has been edited off from the Lecture.

I am interpreting their argument as contractarian though they do not themselves draw a line between the contractualist and the contractarian branches of the social contract tradition and are making references to authors of both tradition. Perhaps a contractualist reading of their argument would be possible - notably by emphasizing that a climate of trust would facilitate a climate of mutual respect, but I choose to leave this kind of argument for later (in relation to Christie Hartley's arguments in particular) and will not interpret justice through trust in a contractualist way here. Although I could stipulate that I choose this reading in order to make the best contractarian case that I think can be made to include the PMD (and/or to reveal that contractarianism cannot escape the dilemma of excluding them or importing foundational non-contractarian premises), I also think that it is the most plausible reading of their argument. Even when they criticize most forcefully the centrality of self-regarding concern, reasons and motivations, as well as self-interest and even selfishness in the social contract tradition and appear to want to side with Nussbaum's previous quote about the difficulty of grounding justice on rational self-interest, it seems that the 'other-regarding' attitudes that they are introducing do not run as deep as a they would in a foundationally other-regarding frame that would employ them. They are indeed contrasting an influential 'adversarial' contractual relationship of strategic give-and-take with an alternative bonding contractual relationship 'promoting stable compliance with mutual expectations.' [113] However, even though other-regarding attitudes are deployed in this alternative contractual model, they ultimately serve, or are nested in, what seems like a relatively traditional contractarian self-regarding goal of 'stabilizing cooperation' in the most

[113] ibid 58-61.

'effective' way.[114] Silvers and Francis take kinds of trust (self- or other- regarding) to be crucial *instrumental* dispositions required for collaborative activity (hence the title 'Justice *through* Trust'). Practicing justice requires collaborative activity, which requires not merely agents who are trustworthy, as well as able to trust, but also cultivating a community climate of trust. Inclusiveness facilitates building a climate of trust.[115] These instrumentalizing and self-regarding features of justice through trust incite me to categorize it as a contractarian theory, though Silvers and Francis would resist my detection of this self-regarding element. (It will be part of my argument to suggest that either justice through trust embraces this self-regarding dimension and excludes the PMD or incorporate a more fully other-regarding approach and ceases to be contractual.)

In the two sections that follow I will develop a critical assessment of two problematic issues that I see with Silvers' and Francis' argument. The first (set of) problem(s) has to do with the nature of trust and the second (set of) problem(s) with whether Silvers' and Francis' understanding of trust is really as closely linked to social contract theory as they suggest (for instance, they use the notion of trust as an interpretative tool that they apply to the social contract).

My main claim relating to the nature of trust that they deploy is that it does not need to be fundamentally other-regarding if it is an instrument to attain contractarian ends. If it is self-regarding, however, it seems to exclude the PMD. However, we can still insist on integrating an other-regarding kind of trust within the social contract in an instrumental way.

[114] ibid 60.
[115] Personal communication with Anita Silvers, Winter 2012.

My main claim relating to Silvers' and Francis' proposal that this kind of other-regarding trust is crucial to the social contract is that it is only crucial if we value it for some non-contractual reasons that have been imported in their contractual framework. If these reasons have substantial normative implications, however, they do not require being framed in contractual terms and indeed, would conflict with a procedural, contractual framework endeavoring to make no such substantial assumption.

I have no problem granting them that other-regarding attitudes are key in justifying disabled people's RMS. I also agree that trust in particular is an attitude or a disposition that may partly justify granting this RMS (e.g. by being one of the affective, cognitive or conative bases for granting RMS to a being on a variety of non-contractual accounts) as well as be an important part of how moral agent should fittingly respond to the PMD's RMS (e.g. by honoring their trust if the PMD can trust).

3.2 The Nature of Trust

3.2.1 The Problem: Justice Through Trust, But Through Which Kind of Trust?

Is the version of trust that Silvers and Francis are advocating the only or most plausible candidate to complement the social contract doctrine? If other understandings of trust better fit the social contract doctrine but exclude the mentally disabled or other outliers, what would justify choosing Silvers' and Francis' understanding of trust over these alternatives? A

potential concern is that they may be tinkering with contractualism in order to reach some inclusivist results in an arbitrary way.

For instance, can we think of trust as being entirely compatible with the bargaining paradigm and with a culture promoting self-interestedness and individualism? And if so, is this interpretation of trust a more likely match to the notion of a social contract (may it be interpreted as a bargain or a cooperative scheme)? If so, are there other reasons why we should still prefer the other-regarding understanding of trust and are these reasons necessarily (or even best) expressed through contractual thought?

It seems that we can indeed conceive of trust in a self-interested, self-regarding, way that would be compatible with the bargaining model of the social contract. But before explaining why, I should make a clarification on what I mean by trust, as there are many parties to a trusting relationship and the terms 'self- and other- regarding' can be misleading since I am in fact referring to the attitudes or motivations of the trusted individual rather than to the attitudes of the trusting one.

I have delayed defining the notion of trust, in order to deal at the same time with its ambiguity and the problem it causes for Silvers' and Francis' argument. Let me do this now.

Baier defines trust as a mental phenomenon with cognitive, affective and conative aspects.[116] It is an 'accepted 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.'[117] Even though self-regarding trust and other-regarding trust may encompass different cognitive, affective and conative elements, as well as different kinds of 'confidences' or expectations and different entrusted objects, they both fall under this general definition, which we can endorse.

Whatever beliefs, feelings or intentions trust involves, they are experienced by the trusting party, not the trusted one. However, trust obviously implies a relationship between trusting and trusted parties. Understanding how trust comes to be and is maintained therefore also requires an understanding of the mental state that the trusted party has toward his trusting activities, may it be toward the individual trusting him, toward the object with which he is entrusted, toward the community or culture of trust within which this discrete trusting event takes place, or toward himself: toward his personal moral ideal as a trustworthy person or toward his reputation.

Another focus of conceptual analysis is the 'culture of trust' within which trust takes place. Silvers and Francis, for instance, seek to make the case for a trust-based understanding of contractarian justice and will be interested in such a 'climate' or 'culture' of trust as it underlies (allows for, and is allowed or facilitated by) the social contract. A culture of trust is

[116] Annette C. Baier, 'Trust' (The Tanner Lectures on Human Values, Princeton University 1991) 111, <http://tannerlectures.utah.edu/lectures/documents/baier92.pdf> accessed 27 April 2013.
[117] Baier, Trusting People (n 109) 152.

characterized by the fact that it creates favorable conditions for the dependency of trusting individuals and the reliability of trusted ones.[118]

Focussing on the mental state of the trusted party is helpful to understand what can help or hinder a culture of trust, insofar as it is telling of that party's reliability, because reliability is central to a culture of trust.

Reliability is also a key ingredient of any contractarian account of justice. It is uncontroversial that a social contract will engender some degree of reliability and predictability, and therefore of trust. The disputed points are (1) whether this trust is not only facilitated or made possible by a social contract but is also a pre-existing condition of it and (2) whether the trusted and trusting parties' attitudes are opportunistic and self-regarding or other-regarding. Whereas many traditional contractual theories of justice assume that parties to the social contract are self-interested, some progressive understandings of social contract or of justice more generally suggest that (a) social agreements to achieve justice should be seen at least partly as a strategy deployed by individuals already parties to relations of trust and trying to fortify, extend and multiply such relations and that (b) people designing principles of justice may be animated by more other-regarding motivations than mainstream social contract theory assumes.

[118] 'A culture of trust supports people's depending on each other and therefore supports individual reliability.' 'A climate of trust supports people's depending on the economic, political, or legal system and therefore contributes to social stability.' Francis and Silvers, *Justice Through Trust* (n 42) 43-4.

A key problem with Silvers' and Francis' argument is that the notion of trust can have different meanings.[119] In particular, they use it within two different contexts where trust could reasonably be expected to imply some different features: the trust that members of a society want to foster for cooperative endeavors to take place, and the trust that mentally disabled people can give or receive. It is essential for these two notions to overlap, or be connected in a causal way, if Silvers and Francis plan to argue that fostering the latter kind of trust is desirable because fostering the former kind of trust is desirable. However, this overlap is not sufficiently argued for in their article and it is not obvious that it can be assumed. For instance, if trust is taken to mean an expectation that people will behave as expected, all that could really be needed to secure stable cooperation may be inductive confidence in being able to predict someone's behavior. This would be a different understanding of trust than the one a disabled person has toward her carer that she has her

[119] I cannot deal extensively with the notion of trust, but let me make two more definitional clarifications regarding the objects that trust could have and the kind of attitude or thought that trust could be. First, one could distinguish the case of trusting that individual A will do X from the case of trusting that B (other people, entities or circumstances) will get A to do X. It is debatable whether, in the latter case, one is trusting A, B or both. It depends if one sees trust as an attitude the 'focal point' of which is the fact that X was performed by A (and is thus directed at A), the realization of X, or the ultimate or salient conditions for X to occur. These comments are related to the second distinction: trust could be a personal attitude in the sense that it would be directed at the trusted-one, or reside in impersonal thoughts of probability and predictability, or an amalgamation of both. (Imagine A saying: 'don't you trust me?' and the interlocutor answering 'of course I trust you, but I just don't think you can do X' which probably means, 'I trust your disposition and willingness to do X, but not your capacities to do X.') Some may be tempted to reduce trust to a matter of predictability, and interpret the great differences between evaluating the predictability of Amy, the police and her paying what she took before leaving the store (or the sun, astrological physics, or sunrise, or the dog, his breed's protecting instincts, or his barking) as differences in types of predictability (the fact that we focus on someone's virtue when evaluating the predictability of a person's behavior is only incidental: people are the kind of entities whose behaviors can be predicted by looking at their virtues among other things). Others may lean toward interpreting trust as a more personal attitude attachable only to beings who can meaningfully respond to trust, and to conceive predictability as a condition of its rationality. Again, some may want to insist that trust is a composite that cannot be reduced to a single attitude or object (or 'focal point' within this object) or calculation of predictability.

Silvers' and Francis' only minimally typologize the notion of trust and do not dwell on these two distinctions. The trust they are spotlighting attaches to individuals, such as bargainers and caretakers, but it can also take the form of a confidence that deals carried out within a climate of trust are likely to be realized. However, this passage from one understanding of trust to another is problematic as I argue in this section.

best interests at heart. I 'trust' that a purse of gold would be taken if left on a pavement at Charing Cross because I 'trust' in the predictability of people's untrustworthiness.[120]

The kind of trust necessary to stabilize social cooperation may have attitudinal and behavioral elements different from the one taking place in relations with PMD. Perhaps not enough attention has been paid to the particular nature of relations between able citizens and caring relations with mentally disabled individuals. Insofar as there would be, for instance, specific normative codes regulating these different relations, it is not obvious how fostering 'trust' within one sort of (for instance, personal) relation would foster 'trust' as an instrument of wide social cooperation between strangers. Perhaps, for instance, in the former case, some specific mental states are required for 'trust' to take place which are not required in the latter case. Indeed, perhaps only a consistent behavior is enough to secure 'trust' in the latter case. It is also possible that in the case of the kind of trust needed to secure a trust-fostering contractarian society, it is not necessary that the trusted parties know that they are being trusted, or at least trusted by anyone in particular, whereas in the case of a PMD trusting his carer, for instance, this trust may require the carer to be aware of it. Alternatively, perhaps trust in caring relation may be imposed upon a PMD who 'trusts' her carer because she has no other choices, but does not 'trust' her in another sense and resists the relation of trust imposed on her. In such a case, the difference between the imposed trust and the heartfelt trust may be the nature of the entrusted object. For instance, in the former case, it may be the

[120] I owe this example as well as the Humean reference of inductive confidence to Paula Bodington.

welfare of the PMD, in the latter case, it may be the PMD herself.[121] Such a personal dimension to the relation of trust may not be required by an understanding of trust as qualifying a social climate.

In sum, it is problematic to assume that fostering or hindering one kind of trust would foster or hinder another. I think that the kind of pluralist relational view of morality I present in the conclusion would help us to detect the problem, which is to assume that the notion of trust does not fundamentally change, or is not transferable, from one kind of social relation to another. This is evidently problematic if we think that some relations have different normative frames, but even without defending or endorsing such a view, it is easy to be skeptical of too quick a connection between improving trust within caring relations toward the PMD with improving trust within contractual relations between strangers. We might just as naturally expect that certain spheres of our social lives (relations within family or toward the particularly weak and vulnerable) do not raise the same sort of expectations regarding what object one can entrust to whom.

The fact that trust could be defined in terms of varying dispositions, behaviors, attitudes, motivations, affects or epistemological components points to a deep notional ambiguity. I cannot explore which account or accounts of trust we ought to adapt in different relational contexts, as it is not necessary to assess whether Silvers' and Francis' claim that a trust-based and trust-fostering contractarian theory of justice can provide a RMS for the

[121] The carer's responsive attitude to the PMD's trust would be different if it is directed at the states of affairs undergone by the PMD rather than the PMD herself. See Elizabeth Anderson, *Value in Ethics and Economics* (new edn, Harvard University Press 1995) for an elaboration of this idea.

PMD. I shall rely on Baier's broad definition as a touchstone concept, and make only one important subdivision of kinds of trust: self-regarding and other-regarding. I think this distinction best reveals what I aim at showing: justice through trust must either exclude the PMD or its claim to being a contractarian theory. Self-regarding trust is trust used instrumentally and valued derivatively to serving the interests of self-interested contractors. Other-regarding trust expresses contractors' other-regarding concern for the well-being of fellow parties to relations of trust (though what is at issue here is whether these relations of trust can correspond to contractual relations).[122]

Let us close this section clarifying the notions that pertain to the topic of trust and the reasons why the ambiguity of the notion is problematic for Silvers and Francis. We now come back to the claim that we do not need to understand trust in an other-regarding way. In the next two subsections, I will argue that on a contractarian account, self-regarding trust or instrumental other-regarding trust may be all the trust contractarians need to attain social stability and a climate favorable to cooperative endeavors. If this is the case, the PMD's RMS is grounded on quite a fragile (empirically questionable or too contingent) ground. In the following, third, section, we will turn to a sturdier, other-regarding, notion of trust which Silvers and Francis are after. This trust would provide a better basis for the PMD's RMS, however it does not seem necessarily required on a contractarian account. Even if it were, I note in the fourth section of this chapter that many PMD would still not possess the RMS-

[122] Silvers and Francis do not make this distinction themselves, and they seem to suggest that these two kinds of trust are fungible, which may be correct at the level of how both self- and other-regarding sorts of trust are reflected into similar behaviors and attitudes, but that is problematic in terms of explaining whether and how closely these sorts of trust are linked to the social contract tradition - since this is the only real point of tension that I see in their argument, I will take a stand on what exactly I take them to mean by 'trust' in the third section of this chapter.

granting capacity to trust and that it seems odd to grant a RMS to many of the PMD who would have this capacity, because such a capacity does not intuitively seem at the heart of why we ought to grant them a RMS.[123] In the fifth, last, section of this chapter, I wish to emphasize that other-regarding trust still matters, but probably because other-regarding concern matters for reasons unrelated to the contractarian master premises. Within contractarianism, at worst, trust must be simply self-regarding trust used as a tool of predictability and coercion to make sure trusted people comply with expectations, and at best, other-regarding trust may be used as a means to foster a general climate of contractual trust (i.e. trust facilitating cooperative endeavors of all kinds). Even assuming that fostering the former will improve the latter, which is far from obvious given the particularity of the relations within which they take place, it would still make other-regarding trust too derivative or contingent a basis for the PMD's RMS (unless, again, it takes the importance of other-regarding concern to justice more seriously and abandons its contractual aspirations).

3.2.2 Trust as Self-Regarding

The trusted person's motivations need not be other-regarding. It is possible to trust someone even though we know that she is purely selfish. Someone may simultaneously have the reputation of being opportunistic and selfish and of being reliable. This sort of individual may in fact be the model bargainer. To deny the name of trust to the attitude directed at her seems unwarranted and it fits the idea of 'trust as expectation' present in Silvers' and

[123] This very last argument is not meant to do more than point to an intuitively odd aspect of a trust-based contractarian account of the PMD's RMS, as I am not yet offering an alternative account the merits and 'oddity' of which could be compared with the contractarian one.

Francis' argument. If to trust is to accept[124] being placed in a situation of vulnerability vis-à-vis someone who has 'power over something one cares about, in the confidence that such power will not be used to harm what is entrusted', nothing in this definition implies that this confidence must be instilled with some sort of belief that the person with power over our well-being is caring or otherwise concerned for us. Consider that A entrusts B to do X, and B will loose a lot if he does not properly do X (he will not be paid by A, face expensive legal prosecution and so on). If the consequence of not complying with his obligations is more costly to B than to betray A's trust, is is neither naive nor foolish of A to trust B, all things being equal.

In this case, A's trust is made rational by the fact that B is self-interestedly motivated to avoid the bad consequences that would ensue from betraying A's trust. Silvers and Francis are right to point out that this requires the transaction costs associated with 'rules that must be negotiated, agreed to, and enforced'[125] but such an enforcement scheme does not mean that the typical relation of two business partners indifferent to each other's happiness (other than if this happiness serves them in turn) does not involve trust. B may also acquire the reputation of being trustworthy to facilitate future exchanges with other parties aware of his reputation of reliability in an equally self-interested way. Other parties may be aware of this and this is why A should worry if this is B's last promise and A was only counting on B's

[124] While there may be situations where trust is not 'accepted' or imposed, Silvers and Francis are not considering such options. One may think of Oliver Wendell Holmes' 'bad man' only wishing 'to avoid an encounter with the public force' rather than to behave ethically ('The Path of the Law' (1897) 10 Harvard Law Review 457) and coping with, rather than endorsing, legally entrenched trust-fostering norms as a counter-example. However, the 'bad man' has still accepted the relations of trust imposed upon him in the sense that he would not infringe them out of a fear to be caught; that much we can trust him with.

[125] Silvers and Francis, *Justice Through Trust* (n 42) 61.

self-interested motivation to maintain his reputation for future promise-based exchanges.[126] In sum, trust can be understood prudentially and instrumentally, as a means to achieve predictability.

One might argue that this trust in 'bad men' is of a significantly different nature to other sorts of trust. If the 'bad man' would not honor the trust placed in him were he not to be caught, the trust we would have toward him is very different from other varieties of trust. If one puts a tracking device and camera on one's husband, promising to beat him to a pulp if he so much as looks at another woman, one can 'trust' him not to do so, as the cost would be too great for him. 'Some trust', one may say. Perhaps only in the context of certain less personal relationships might this be called a kind of trust.[127]

I think that this objection is really that 'trust as rational expectation' does not imply that one is expecting particular other-regarding attitudes (in the example above, love or faithfulness) from someone else. In this case, the object of the expectation is a behavior: not cheating. I grant this may not be the kind of trust that the wife wants to have in her husband, but do not believe that this disqualifies the less desirable trust from being trust. Though perhaps it is such a less valuable kind of trust that even calling it trust may seem derisory to the poor wife who would have hoped to mean what faithful lovers generally mean by trust. In

[126] However, one could remark that it is commonly observable that people who get into the habit of respecting various rules out of a fear of sanction or other self-interested and amoral reasons are more likely than not to 'stay in character' even when they have a chance to 'get away with it', may it be out of habit or because they have actually developed a virtuous character through the imposition of particular behaviors, or most probably, for both reasons. I am not relying on such a possibility, as it is too approximate and uncertain, and more importantly because I am considering the fictional possibility of purely self-interested and systematically opportunistic individuals. But the participants to a real-life bargaining frame based on self-interest alone would measure what are, in practice, the odds that someone would act cooperatively - for whatever reasons.

[127] I thank Paula Bodington for this objection.

that sense, I also would not dispute the idea that it is not a trust fitting of certain personal relations, though it is still trust on our definition and, more importantly, it fits plausibly within the theoretical background privileged by contractarianism.

This objection does point to the idea, however, that the trust concerning the husband's sincerely faithful attitude is more desirable, and would generally imply that he can be trusted in terms of behaviors as well. In other words, this points to the thesis that we can use other-regarding trust instrumentally profitably as it is susceptible to do more for us than self-regarding trust. (This line of thought, though empirically challengeable, would also support the claim that to foster other-regarding trust is desirable even within a contractual framework privileging a self-interested standpoint.)

However, this would only make other-regarding trust an instrumental tool within the contractarian arsenal, and the idea that contractarians would necessarily prefer it over self-regarding trust is questionable. Let me explore why in the next section.

3.2.3 The Benefits of Self-Regarding Trust

I agree with Silvers and Francis that a community of self-interested agents seems less likely to foster trust than a community of agents concerned for each other's well-being. However, there are good grounds to question this hypothesis or at least its evidence.

My starting point is the idea that it could be beneficial to agree to play a game (i.e. to adhere by certain posited rules or to enter into a relation that constrains its participants in specific posited ways) in which we momentarily and restrictively limit our concern toward others. This starting point is probably diametrically opposed to that of Hobbesian or rational-choice contractarianism which assumes egoism or non-tuism between people who, as Susan Dimock explains, do not have 'sufficiently robust preferences for the well-being of others' to motivate them to 'act morally just because doing so realizes the good of others.'[128] In real life ordinary bargaining, we may not be asking ourselves 'is the person I am contracting with getting a good deal as well?' not because, I suggest, we are fundamentally disinterested in the fate of others and concerned only in ours, but because (or also because) we are trying to be good bargainers. In order to play the bargaining game correctly, we may have to silence to some extent some other-regarding propensities (e.g. our natural empathy).[129] My second

[128] Susan Dimock, 'Why All Feminist Should Be Contractarians' (2008) XLVII Dialogue 273, 279.

[129] This is not to say that people's natural other-regarding inclinations would suffice to insure that parties would comply with their promises; it would be naive to think so. The point I am making is rather that it is not necessarily an all the way down self-regarding strategy to suspend these other-regarding inclinations. These inclinations may just not be appropriate in some cases. The intuitions underlying my starting point can best be understood through examples. Consider the situation in which someone is resigning from his job in an opportunistic way which does not make his employer's life easy, or the case of someone who has bought some products, used and enjoyed them, and return them at the very end of the two months' period granted to return a product. Compare the scenarios in which the individual in question is resigning from, or returning the product to, a little family-owned shop with the scenarios in which the individual is dealing with a large, faceless corporation. We can easily see ourselves resigning without remorse from a ruthless law firm which would fire us without blinking an eye, and most of us would at least feel less bad to play a cheap trick on an anonymous corporation like IKEA than to the little shop around the corner. I am not saying that most people would not harm the little businesses rather than themselves, but only that there is a moral difference (if not a systematically or necessarily motivating one) between the cases described, and that this difference may be taken to illustrate that certain bargaining relations take it for granted that the parties may be self-servingly opportunistic - and that agreeing to play this 'game' does not immediately imply that one has a ruthless, selfish or inconsiderate character in general, as one is rather partaking to a game which legitimizes conceiving one's bargaining partners not as 'strangers' but as 'bargainers'. Such a construction (of the status of bargainer) does not imply a disrespect of the bargainer if she has willfully entered the bargain. I cannot further defend this view here. All that hangs on it is the claim that contractors engaging only in self-regarding trust are not necessarily exclusively interested in their own well-being. It does not matter if this claim seems dubious to the reader, as contractarianism does not need to make it. If plausible, however, it would further weaken the claim that contractors would opt for a climate of other-regarding trust: not only may self-interested agents be content with a climate of self-regarding trust (a proposition to be challenged in section 3.2.4), but even other-interested

related claim is that this may not only be advantageous to ourselves but may also further (self-regarding) trust.

Why is this game advantageous and trust-engendering? Sometimes, when A is concerned with B's well-being, A may well be engaged in a pro-social attitude, but it may not be productive or helpful. First, A's concern or empathy may misguide her even if she is well-meaning. A may sell B a bicycle helmet and insist that it is in B's interest to buy one. However, B may greatly dislike wearing a helmet. (Furthermore, let us suppose to avoid some complication that his choice is not irrational - let us suppose that plausible, but not decisive, researches have shown that is possible that wearing a helmet is not safer because it lures drivers into thinking that helmet-wearing cyclists are less vulnerable and they become less careful about them.) A may tell B that she will only sell him his bicycle (a special one that B cannot get elsewhere) along with the helmet (after B made a point to state that he disliked wearing helmets, did not own one and would not buy one). I may add to this example that A will design a way to make sure that B wears the helmet and add it as a contractual condition that must be met, and that B, because of thinking constantly about the discomfort of wearing a helmet, will pay less attention to the road and injure himself badly. But this addition is unnecessary because I am not only considering the case where concern and empathy misguide us - a case where A was objectively wrong. Although the criticism certainly applies there as well, I want to consider the more common case where it is not certain whether A or B is right, and whether it may belong to the sphere of decision-making and hierarchizing of values where each agent has some leeway to choose what is best for him

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agents may have good reasons to opt for a game of self-regarding trust for the purpose of certain relations, including contracting relations between citizens.

or her. Expressing concern in such cases may be like a parent's unrequited advice and attention to a grownup child. Simply stating that one subjectively disagrees with someone else's preferences may not only be misguided or useless, it may be disrespectful of that person's autonomy, which implies the discretionary exercise of choice within a certain sphere of choices and underlying values.

Is that not just illustrating that A has not expressed her concern properly rather than showing that A should not be concerned with B? Has A not simply failed to show a *proper* concern to B? Would the proper concern owed to B not rather imply that A respects his decision not to buy a helmet and sells only the bike to B? Indeed, this example seems to show that A has failed to recognize the nature of the relation(s) - and therefore the moral obligations attached to this relation(s) - in which she stands vis-à-vis B. For it would be appropriate of her to insist if she had been, for instance, B's mother. Therefore, if A would respect B's choice not to wear a helmet and sell him the bike alone, isn't A, after all, showing some real concern for B?

Yes, but this does not contradict my claim. For I do not deny that we have concern toward others (and concern robust enough to motivate partly or entirely many or our actions). I only say that we should sometimes suspend it if the relation calls for it. And I am not only saying that we should suspend a mother-like concern and engage into a different sort of concern, but that we should suspend our concern altogether, up to a point. It would be contradictory to say that we should suspend our other-regarding concern out of other-regarding concern. A first way out of this contradiction is the way I will suggest in the next

section, keeping with the traditional contractualist assumption that other-regarding attitudes can be grounded in self-regarding ones (these attitudes, however, do not amount to real concern, as the concern is ultimately self-regarding).

Here, I want to suggest instead that it is possible to suspend one's concern for another because the bargaining game requires it. The moral demand that bargaining makes on us itself draws its normative force from the respect we owe to ourselves and to others for having chosen to engage in it, and therefore has an other-regarding component, but it demands a suspension of this other-regarding component, which remains, as it were, latent, in the sense that we remain disposed to engage into other-regarding attitudes anew should our contracting partner falls below a certain threshold of well-being. The suspension renders this disposition inactive however. (I am not saying that I endorse this view, but it is a view that would reconcile the idea that self-regarding trust is a good thing with the idea that we are not essentially exclusively self-concerned beings. This implies that we could value self-regarding trust without endorsing a restrictive conception of contracting parties as selfish[130] and in denial of 'the human conditions of vulnerability and dependence,'[131] the flaws of which can therefore not be levied against making a contractarian central political and social use of self-regarding trust, like Silvers and Francis implicitly suggest.[132]) The envisaged position is that in ordinary bargaining situations, we ought not only to suspend excessively paternalistic concern, but to suspend other-regarding concern altogether. There is no contradiction

[130] Silvers and Francis, *Justice Through Trust* (n 42) 60.
[131] ibid 59.
[132] See, *mutatis mutandi*, Hampton (n 41) arguing that 'putting oneself first' is compatible with the recognition of the intrinsic worth of oneself and others. See also her 'The Wisdom of the Egoist: The Moral and Political Implications of Valuing the Self' (1997) 14 (1) Social Philosophy and Policy 21.

because whatever other-regarding motivation there is, it is at work at another level of the agent's consciousness. (The claim implies not only that this is a descriptively more accurate portrait of an agent's psychology in bargaining situations, but also that agents have other-regarding reasons to suspend their other-regarding concern, and said reasons derive from the nature of the bargaining relation.)

Regardless of whether this position is tenable or not (whether strictly self-regarding trust can be compatible with our other-regarding nature or is rather to be derived only from the position that we are essentially self-regarding beings), the idea is that concern is not only (1) inappropriately paternalistic at times, but (2) it is always unwelcome in contractual relations, even if it underlies a less paternalistic attitude of respect. Respectful behaviors within such relations can be secured otherwise: by a conceptual frame making use only of the contractors' self-interest.[133]

Consider how the claim that real concern is undesirable resonates with real life situations of bargaining. Often, once parties have agreed to play a bargaining game, they consider it inappropriate to show or be shown concern as suspending mutual concern - up to a point - is precisely one of the rules they have agreed to. Some business relationships require a mask of indifference to our fellow contractors' personal affairs or welfare. Consider the sayings 'it's nothing personal, it's business', 'no friends in business', etc. This is why

[133] I do not think that this would be real respect: given my attitudinal view of respect, I would identify respect by examining the attitude underlying the behavior rather than the behavior itself. Here, the attitude being ultimately motivated by self-concern rather than concern or respect toward others, it is not really respect. It is rather a prudential and self-interested sort of attitude, but the position I am presenting here in favor of self-regarding trust holds that this is all that is needed.

business partners are resentful when one of them brings his personal life up as an excuse not to perform her obligations to their full extent. People invoking personal circumstances relating to their welfare expect other-regarding concern from the other people partaking to their common venture. It is a sort of trump card, in the sense that it suspends the ordinary rules of the game, but it can be seen as an attempt to cheat if the card was not initially dealt. It is not so if the excuses fall within specific categories that the parties agreed to because then, one is invoking the normative strength of everyone's previous commitments, not of everyone's compassion. To illustrate this latter case, consider an employment contract that makes generous provisions for maternity leave. Illustrations of the former case (of requesting concern) are easy to imagine. Consider that a small company is downsizing. They must let go 20 employees out of 50, and will do so by comparing sales numbers. Employee A may invoke that she has two children to feed. This is different from the maternity leave case because no provision was previously agreed to about giving preference to people with children in case of downsizing. People may feel cheated if they judge that A is trying to circumvent or ignore the rules of the game. If that sort of trump is allowed, B and C and D may think: ‘let's talk about our own responsibilities or misery’. B is 55 year old and knows that her age will virtually make it impossible for her to find a new job in her field of work. C is young and single, but crumbling under student debts. D always wanted to raise children, but has chosen to deprive her life from that accomplishment to save money and think that it would be unfair for her not to reap some benefits from her sacrifice (assuming that A's pregnancy was planned in the face of the possibility that her job may end).

Evaluating whose claim is most worthy of concern is at least very problematic, if not impossible, and parties, even if we assume them to be of good faith and to grant to their own well-being no more importance than to that of others', that is, even if we assume that they look at the question from a detached, impartial observer's point of view, may still disagree.

Similarly, the last thing bargainers want is their fellow bargainers telling them what the goods they are trading are worth to them. It is precisely a key advantage of the traditional understanding of bargaining that it allows traders to make subjective assessments of the worth of what is being traded. Arguably, it seems to be part of the concept of bargaining that a third party, an outsider to the bargain, could not decide objectively of the most desirable outcome of the bargain for all parties involved. Bargaining thus understood has the advantage of recognizing the agents' capacity to choose for themselves (or rather the superiority of this procedural way to reach an agreement over the possibility of settling the agreement on the basis of a substantial theory of goods).

Doing away with other-regarding concern circumvents these problems, linked to the evaluation of values that seem better left to the individual's own judgment. Hence, it seems that it is sometimes best to leave evaluations based on other-regarding concern, as well as evaluations of worthiness of other-regarding concern, aside, just like it is sometimes best to leave certain moral assessments to be made by the individual for himself, the latter claim being an uncontroversial one.

The former claim is not uncontroversial, although it is a fairly appealing one. A typical objection would point to the risk of suspending one's concern or empathy for others: what about, one could say, the execution of innocent people within a social frame that has routinized a draconian suspension of concern. Granted, such a frame (which may facilitate, for instance, a genocide) is very different from a bargaining one, but even within bargaining games, suspension of concern may lead to monstrous exploitation and dehumanization. This objection misses that the position I am presenting only supports suspension of concern within certain limits. However, the criticism can be modified and point to the risk of suspending concern, even within certain limits. Encouraging agents to only adopt a concerned attitude when specific limits are reached (according to my view) or to respect these limits simply because they have been stipulated as normative without any other-regarding attitudes coming into play (according to a Hobbesian view) both imply the notion of limits that are objectively determined and below which the agent's concern or empathy are pragmatically switched off (my view) or below which the agent is entitled to consider only her own interest and give no (derivative) weight to that of others' (the Hobbesian view). The danger in blinding or hardening oneself, or making oneself indifferent to the fate of others, is that even within this space where it is supposedly safe to be ruthless and self-regarding, other people may in fact be owed our concern. There might be particular, circumstantial limits that we have failed to stipulate.

I find that this criticism is plausible, although it is not obvious that the dangers it considers outweigh the benefits provided by suspending concern.[134]

Another criticism of the position that bargaining-facilitating trust can be advantageously based on self-interest is that the preference for a bargaining model where parties wear a mask of mutual indifference in order to be more productive, efficient and even respectful, as well as avoid sterile disagreements on matters that may be neither of great importance nor easily solvable or solvable at all, reflects a desire to carry out an adversarial, war-like sort of business more than it actually achieves efficiency and respect (which are difficult to measure). This echoes the familiar feminist criticism of 'masculine' ideals. A gendered preference for this sort of bargaining is too quickly disparaging of the claim that maintaining an underlying and effective other-regarding concern while making business may be no less efficient and respectful. The movie *Potiche*, directed by François Ozon, makes such a case when it shows a housewife taking the place of her husband at the head of his company when he becomes sick. Her 'maternal' way of doing business (which does not imply a naive effusion of love-like sentiments, but only a continuous concern for her employees rather than to work with the union in an adversarial way) leads to better results for

[134] Notably because if proper constraints have been established, it seems unlikely that a lack of other-regarding concern would yield to terrible results. It is much more likely that if exploitation occurs, it would not be out of a failure to see that the bargaining frame has flaws, but out of a weakness of will to do something about it. One could answer that this weakness of will may in fact be perpetuated by a bargaining frame which may facilitate self-deception about individual or collective other-regarding duties. By contrast, if one would be concerned with the well-being of others, they would more readily become aware or the lacunae of a bargaining frame. However, it could also be said that one can find enough resources in self-interest and autonomy to correct a defective or immoral bargaining frame. Consider Iris Marion Young's 'social connection model' to explain why we have the responsibility to help people outside of our nation: she essentially maintains that exploitative structures ought to be corrected not because of an other-regarding or charitable concern for the exploited, but because of a responsibility generated by the unfairness of a self-interested bargain. 'Responsibility and global justice: a social connection model' (2006) 23 (1) Social Philosophy and Policy 102.

all the parties involved. The movie ends on the wife moving into the political world and with a promise that her maternal approach can be equally successful there. Of course, this is an artistic statement more than an argument.

The contrary position would insist that mutual concern (of the employees toward the company and the management staff, and of the bosses toward the workforce) would be a mess: inefficient at best, worsening disagreements at worst, by preventing the parties to settle on a narrower terrain of agreement constrained by clear bargaining rules. It is better for everyone at the time of the negotiation to act in an adversarial way and mind one's own welfare. However, it could also be said that indifference may, on the contrary, prevent fruitful negotiations. Putting oneself in the other's shoes in a concerned rather than purely prudential way may give negotiators insights into the other party's needs (even unexpressed ones) and allow them to propose terms that are more agreeable to all and more likely to lead to a successful agreement. Indifference can also cause considerable transaction costs, as Silvers and Francis mention. It can foster egocentric or ruthless attitudes that can slow or stiffen the negotiations and incite the parties to be suspicious and hold steadfastly to their guns.[135]

Another weighty argument against grounding bargaining on other-regarding trust or concern (apart from the intractability of certain disagreements) worth mentioning is that other-regarding attitudes can be invoked in bad faith. Whatever concern strangers have for

[135] We will come back to the potential desirability of instrumental 'other-regarding' trust in the next section. Here, I rather wish to make the case that other-regarding trust, instrumental or genuine, is not obviously better than self-regarding trust, as the next paragraph further suggests.

each other, as the Hobbesian position assumes, it is unlikely to provide motivating reasons for actions, especially when their own private interests are at stake. If A and B are truly strangers to each other in our previous examples, and unless B falls within a category of vulnerable people (like a child) to whom all members of the community owe a particular sort of concern (for instance, an obligation of caring), A's offer to sell the bike only with the helmet seems most readily explained by A's self-interested motivation to sell the helmet, and her pretense of concern is hypocritical. I will not multiply examples of strategic use of other-regarding concern in bad faith - the political and business worlds are replete with them.

In sum, the position favoring the building of trust on self-interested attitudes would rather bet on further developing a bargaining ethics, correcting and improving the limits beyond which parties should drop the mask of indifference (my account) or act prudentially in the fellow contractee's welfare because it would be in their own interest to benefit from this concern themselves (the Hobbesian or rational-choice account) and mechanisms to swiftly modify such limits and better respond to particular, especially basic and urgent, needs should they arise.

The alternative position would rather bet on developing frames to filter varieties of other-regarding concerns and channel the right one at the right time. Both positions reflect assumptions about how self-regarding or other-regarding human beings are and the sort of bargaining and social contract that would best correspond to, or correct, their nature as well as about whether autonomy or concern should be centrally valued.

The position that self-regarding trust is more beneficial than other-regarding trust and the contrary position are both reasonably plausible. My point has only been to show that one cannot so easily discard the idea that self-regarding trust and the game of mutual disinterest can be amenable to resulting in sustainable cooperation, stable compliance and a productive process, like Silvers and Francis suggest we should do. The position they are attacking is not evidently wrong. I agree with them for other reasons[136] but the reasons they invoke, in line with their aspiration to remain within the contractarian tradition, are different from mine: they say that other-regarding trust will ultimately sustain cooperation better than self-interested bargaining.

Moreover, this keeps their argument (and its moral appeal resting, it seems to me, on something more fundamental) at least partially hostage to an empirical one.

3.2.4 Trust as indirectly or derivatively other-regarding

The attitude of the trusted-one could have an indirect, other-regarding dimension that would consist in respecting the trusting party as a chooser. However, such a dimension would seem

[136] Although much of the disagreement could be solved by empirical studies (which may be impossible to carry out to any satisfactorily decisive degree), we should consider the danger of ever suspending concern or empathy, even in a constrained way. It is a fact about human beings that they are skillful at categorizing people in ways that free them from the exhausting burden that other being's needs and suffering make on them. Some strategies to deal with empathetic exhaustion and the limits of what an agent can do seem morally wiser than others. For instance, explaining to ourselves and the persons we do not help that we have limited resources, special relations and special private goals to prioritize, if our own life is to have any meaning, and be willing to recognize, if only to ourselves, when our justifications fall short of what we would personally deem moral to do, seems more moral than to easily discard an individual's needs by depriving her from her basic moral status, by categorizing her like 'vermin', or like an 'enemy'. I am not sure that such concern-lifting categories are ever desirable (even if they are much less harmful than 'vermin'), and therefore that constructing (and it seems, perpetuating) the category of the bargainer as such a category is desirable.

to be compatible with the bargaining model of contract. (Therefore, there would be no need to appeal to a trust-based model of respect to explain that kind of other-regarding concern on the contractor's part.)

Let me explain what I mean by respecting other people *qua* choosers and why this attitude would be indirectly other-regarding.

The idea is that self-interested, rational individuals can detect that other individuals are like them in many ways. In particular, they can detect that they have similar needs and worries, powers, and similar bargaining capacities. If these parties are self-interested and rational, other things being equal, it becomes possible to cooperate with them, for instance to strike a mutually beneficial deal. Presented like this, the agent who recognizes that other people are, like herself, autonomous, or choosers, valuers, or project-pursuers[137], can still, it seems, be entirely selfish and use this knowledge to pursue immoral ends such as exploitation (the mutually beneficial deal could be: if you become my slave, at least, you will not starve to death). However, the idea contemplated here is that there is more than an opportunistic recognition of other people's capacities at stake. Closely associated to the detection of these capacities would be a respect, a concern or some other-regarding attitudes toward the being possessing them. This represents a jump from a prudential reasoning instrumentalizing others to a moral attitude toward others that need to be justified.

[137] Lomasky (n 11).

For instance, one may argue that it is part and parcel, or a condition or implication, of the agent's own autonomy that he would give a particular normative weight to this same autonomy found in others. Similarly, one may think more generally that moral agents ought to be concerned with beings sharing their plight, their needs for certain goods. My point is not to go over these positions or deal with the issue that the stringency or effectiveness of such concern is problematic, but simply to point out that the attitude they aim to derive would be other-regarding.

However, I would like to point to a sort of middle ground which implies less than a fully, directly or ultimately other-regarding attitude, but which does imply an other-regarding dimension. The initial insight behind this idea is that A would be indirectly respecting B by the very fact of bargaining with B. Even if this bargaining is self-interested, and A is indifferent to B's general well-being, and even if it cannot be said that A ‘cares’ or is ‘concerned’ for B in the sense ordinarily attributed to these words, A's recognition (through the very act of bargaining) of B's status qua bargainer/chooser, implies that A has some other-regarding attitudes toward B, even though they are initially and ultimately rooted in self-interest.

For instance, an individual (or a country) A could abide by a certain agreement (or treaty) in a way that benefits (individual or country) B and thwarts its own short-term interests. At this moment in time, at least, A seems to be benefitting B in a way that is not self-serving. Although A can explain her reasons in an entirely prudential and self-interested way, there is a sense in which, at the time of fulfilling her obligations toward B, she may

engage in an other-regrading frame of mind. This frame of mind may be necessary to perform at least some obligations. If the agent has it constantly occurrent to her mind that she is not really concerned with B (but only acting in a way that best serves her concern for herself and that only accidentally coincide with actions which would normally reflect a concern for B), she may not be able to fulfill well her part of the deal. This is most obvious in the case of someone hired to perform a caring work, like a babysitter. Consider the case of a babysitter who throws herself in the street to save a child from being run over by a car risking her own life, although she would not have done it had she thought carefully this through. But she was, as it were, 'in the moment': in the performance of her contractual obligation, her own interest had somewhat receded to make room for the interest of the being she had been entrusted with. A similar example not involving a caring work would be the case of a soldier risking her life. This argument may also hold for the occupation of a role contracted for that is much less inherently related to other-regarding concern than caring for a child.

An objection to this position is that, in such cases, the agent is simply being irrational or deluded. Unless she is actually concerned for the fate of other entities (the child or the child's parents, her fellow soldiers, her country) or trying to be virtuous, the agent is just doing a poor job at acting self-interestedly, rather than a good one at acting in an other-concerned way. One may answer this objection by fleshing out the claim that the agent could not properly fulfill her part of the bargain without engaging in a less-than-strictly self-regarding state of mind. One could also point out to the fact that such temporarily - if not ultimately - other-regarding attitude is quite common to a bargaining culture, even one that

would seem to embrace agents' primarily self-regarding attitudes. Once someone has agreed to build your house, cut your hair, babysit your child, oversee a business project or a humanitarian one, there is a sense in which the good worker, the one taking her job seriously, is not merely counting the hours away and always keeping it close to her awareness that she is doing this only for money or self-interest. (Again, this may not hold true of all activities. Certainly, the more alienating the work, the more likely one may have only self-regarding thoughts, but then, alienating work may be indicative of a failure to secure a really self-interested deal and of exploitation rather than the incompatibility of bargaining and of indirectly other-regarding concern.)

Another argument to the same end is that to have concern for oneself implies having some other-regarding attitudes. Someone could be abiding by the rules of a community of choosers recognizing each other as such out of self-interest. Taking herself seriously, out of self-concern, would imply taking her community seriously, and therefore would imply some concern for the members of her community.

Lastly, a major reason for preferring to encourage a culture where mutual other-regarding concern would underlie trusting relations is that it seems beneficial for everyone. It encourages trusting other people's reliability with less insurances of their compliance, and therefore diminishes transaction costs. In addition to a quantifiable advantage, it provides an emotional benefit: to do business with opportunistic strangers, like negotiating with enemies, is more anguishing and exhausting than dealing with people who are to some extent concerned with us, and if this concern goes so far as to seek a non-exploitative agreement

(i.e. a result that is not merely strictly mutually beneficial but that also takes into account how well each party is doing and how much each is benefitting from the bargain). Francis and Silvers also underline the stability that such an other-regarding trust provides. All of these advantages make other-regarding trust instrumentally desirable.

The other-regarding component of A's attitude would not be a mere accident, inadvertence or lack of rationality. It would be an important, maybe a necessary, part of bargaining. The day-to-day basics of many jobs may require at least a partial replacement of self-interest with other-regarding interest: taking customers' or patients' needs seriously, in a way that require endorsing certain other-regarding attitudes, taking one's vocation seriously, which requires loosing sight of the benefit to be gained and relating to one's art or profession fittingly, as per the standards of that trade. This may be merely an empirical matter about the way humans endorse certain roles psychologically, but it can plausibly be thought that the operation of a contract sometimes requires such a view, or at least that fulfilling one's contract *well* does. This account would also explain why A's concern for others would be limited (to the kind of other-regarding concern required by A's role), which seems to better fit with the notion of contracting than the idea that A is more fundamentally concerned with the fate of others. A's other-regardingness would be limited to (1) the other-regardingness implied in considering the other party as a bargainer and (2) the other-regardingness specifically contracted for (the idea that, while executing his part of the deal serving B's interest, A will adopt a less-than-strictly self-regarding attitude). This leads to a picture of self-interested parties willing to adopt some limited other-regarding attitudes, ultimately grounded, nevertheless, in self-interest. Such a picture fits comfortably with the notion of

contract which requires at once a certain degree of self-interest from the parties as well as some cooperative dimensions.

So whether people trusting each other are indirectly respecting each other and paying tribute to their respective autonomy by implicitly recognizing each other's capacity to bargain or are actually endorsing other-regarding attitudes, they are not ultimately or directly concerned for others; their attitudes are ultimately self-regarding, or ultimately anchored in self-interest. This sort of other-regarding attitude is not, therefore, real concern, as it is contingent upon its serving the agent's own best interest. This indirectly other-regarding trust is compatible with the bargaining paradigm and a culture of self-interest.

What is the implication of the possibility of 'self-regarding other-regarding trust' (and its potential desirability within a contractarian frame) for Francis' and Silvers' conclusions? They try to pit contracts against trust[138] in a way that means to oppose bargain-like contract with trust-based and trust-engendering contract. However, I have been highlighting that trust does not need to be an other-regarding attitude.[139] As a result, while Silvers and Francis are right about the benefits of trust, it is not obvious why the same benefits could not be obtained from a self-regarding understanding of trust which would be compatible with the bargaining paradigm of contractualism.

It does not make it impossible for Silvers and Francis to use the weight of the benefits of trust to prefer their trust-engendering contractual theory of justice over a bargaining-like

[138] Silvers and Francis, *Justice Through Trust* (n 42) 61.
[139] ibid.

contractual theory. It is plausible that a trust-engendering social contract based on other-regarding trust would yield to some benefits that a bargain-like social contract based on self-regarding trust alone would not. Notably, the general, underlying knowledge that the members of this bargaining community do not, at the end of the day, care for each other in any way other than self-serving. This is not the sort of community that encourages social propensities and feelings bound to enrich the individual's life, like solidarity and a feeling of community as opposed to isolation from other human beings, lack of belonging and loneliness, it may even be a somewhat threatening community to be part of (it would in fact seem alien to the human form of life as we know it).

However, it does limit the claims that Silvers and Francis can make against the bargain-like model of contract since relations of trust between self-interested parties are possible, and probably more beneficial than what Silvers and Francis imply. It becomes less obvious, then, that the bargain-like model of social contract, although it may fail to provide the sort of benefits mentioned in the previous paragraph as well as the trust-based model, may not provide these benefits indirectly, as well as other benefits directly, better than the trust-based model. Notably, one may challenge Silvers' and Francis' empirical assumption about the stability and security offered by both sorts of social contract.

What I have done in this section is show that 'self-interested' or 'indirectly other-regarding' trust can already be quite beneficial to contractors and to the making of a social contract. In particular, it seems to provide the means to 'promot[e] stable compliance with

mutual expectations' and 'stabiliz[e] cooperation'[140] in a satisfactory way. It seems plausible that the inclusion of the PMD would promote trust even further but, then again, this is an empirical hypothesis and it may not prove right. (As I mentioned, e.g., one may note with relief that one's government takes care of the mentally disabled and still be a ruthless negotiator with able-minded people.) Even if it did significantly further trust between able-minded people, however, the inclusion of the PMD as parties to the social contract would come at a great cost. The fact that they stand almost exclusively at the receiving end of the mutually beneficial relation taken to be central to the idea of a fair contract would make them very costly. To call human beings 'costly' or 'expensive' may make one's teeth cringe for good reasons, but these reasons have probably nothing to do with the fact that we are missing some facts about their 'profitability' (the fact that not abusing the PMD's trust warrants a reputation or climate of constancy and trustworthiness, both at the individual and collective level.[141] In sum, this section has provided grounds to question (1) the idea that the bargaining model is not itself relying on trust (which is what Silvers and Francis imply when they pit those 'concerned to facilitate a culture of trust' against those 'seeking their mutual self-interest'[142]) although this trust is not based on other-regarding feelings and (2) the hypothesis that a trust based on other-regarding feelings will do a better job at securing agreements, comforting expectations regarding other people's behaviors[143] and facilitating the trade of one's liberties for greater social cooperation.[144]

[140] ibid 60.
[141] ibid 68.
[142] ibid 68.
[143] ibid 60.
[144] ibid 75.

That said, I do not deny that a strong case can be made in favor of other-concerned or regarding trust. It is evident that such a trust, paradigmatically exemplified by the trust that takes place between a child and a parent, has its virtues (that self-regarding trust does not seem to have). The question is rather whether these virtues are best expressed or put to use in a contractual theory. Silvers and Francis are probably right that justice is a matter of encouraging not only self-regarding, but also other-regarding trusting relations, mutual dependence and sustainable relationships.[145] But is this a contractual matter? This is the topic of the next section.

3.3 Other-Regarding Trust and the Social Contract

Is the notion of trust, and more particularly the kind of trust underlain by other-regarding concern (which Silvers and Francis want to integrate to the social contract and which would more plausibly integrate the PMD), really linked to the notion of a social contract? Or is the desirability of trust (the merits of which Silvers and Francis are supporting in their essay) better explained in other ways?

Silvers and Francis propose an understanding of social contract that takes place within a culture of trust: it is made possible by a climate of trust, which it also reinforces.[146] While I have no doubt that trust is important, I would explain this importance by reference to other traits of the human condition. Silvers and Francis do consider these facts (such as

[145] ibid 68.
[146] ibid 67. As already mentioned, Silvers and Francis take trust to be not only the result of a social contract, but also a condition for it, 'a foundational element in bargaining itself'.

vulnerability and dependency)[147] but they go further than claiming that other-regarding trust is particularly important: they interpret the social contract as being essentially trust-based and trust-engendering.

A potential criticism of their position would be that the notions of trust and contract are not conceptually linked or as closely intertwined as Francis and Silvers present them to be. That being the case, a certain kind of trust may well lead to the social inclusion of the PMD and to granting them a RMS, but not on a contractarian basis.

This criticism can be interpreted in a strong and a weak way, but before I present these two versions, to avoid confusion, let me state what I understand Silvers and Francis to be saying about (1) how trust and the social contract are connected and (2) about the nature of trust, as their understanding of trust differs from the ones I have been presenting as plausible contractarian options in the previous sections (3.2.2 to 3.2.4).

3.3.1 Preliminary Clarifications: Trust as 'other-regarding' and as 'inherent' and non merely instrumental to the Social Contract

No one questions that the social contract engenders *some* sort of trust. Silvers and Francis disagree with a specific, widespread, contractarian understanding of trust as instrumental. They do not see trust as merely one of the goals of the social contract, or as a contractual means to achieve some other goals. Instead, they see trust as inherently laced with the social

[147] ibid 59.

contract, which is conceived principally as a vector of this trust. Silvers and Francis explicitly identify the social contract itself with 'building trust' by opposition to 'bargaining'. The social contract is not an event which uses or incidentally builds, or capitalizes on trust: it consists *of* building trust.[148] The trust fostered by this social contract is also the motivating force driving social cooperation and cohesion, by contrast, say, to a sustained self-interest and a legitimate authority backed up with a potential use of force (which we could call a 'Hobbesian trust').[149] In sum, a first dimension of the kind of trust that Silvers and Francis are considering is that it is central, or inherent to, or not just instrumentally part of, the social contract.

Secondly, it seems that Silvers and Francis are referring to other-regarding trust. While it appears that they want to talk of 'trust' more generally, if they are to contrast their position with that of the 'Hobbesian trust', they must be excluding strictly self-regarding and instrumental trust.

In fact, their account echoes a virtue-based one: the climate of trust they have in mind is one where people are trustworthy, and where this 'virtue' should be fostered (hence, not just as an instrument serving individual opportunism). Their account remains contractual since this 'virtue' is only desirable because it serves social cooperation and would for that reason be desired by the parties to the social contract. I am not saying, therefore, that their

[148] ibid 74.

[149] In a way, the Hobbesian does not trust the person with whom he is dealing as much as he is relying on state authority to intervene should her fellow bargainer defect from her engagements. I write 'in a way', because it can still be said that she 'trusts' her fellow bargainer, but this trust is ultimately grounded in something 'outside' of the latter, which would not be the case, for instance, if she was relying on the bargainer's virtue.

account is a virtue-based one, since it makes the value of this virtue contingent upon contractual thinking. However, the fact that it is easily, if not best, understood by reference to a virtue (rather than to a merely opportunistically developed trait) gives us a further insight into their conception of trust and helps us to better establish whether it is self- or other-regarding. [150] The virtue of trustworthiness implies that someone will not try to opportunistically escape his obligations, for instance, by finding some sort or legal loophole, some pretext, etc., the way a systematically and strictly rational and self-interested agent would. A defender of a 'Hobbesian trust' would say that to satisfy the other party's expectation by not tricking him is also something that can be explained in egoistic terms (for instance, to establish a reputation to facilitate future deals). When we think of someone as virtuously trustworthy (i.e. when we think of trustworthiness as a virtue) however, we do not consider one's motivation to live up to the expectations placed in her to be purely self-interested, but rather to be an attempt to perform what an ideally trustworthy agent would do. Does this ideal of trustworthiness implies an other-regarding concern however? Is the virtuously trustworthy individual 'other-regardingly' trustworthy?

On a definition of trustworthiness focused on predictability or expectations, this does not seem to be the case. For instance, while one may be a 'person of her words' because it is a good ideal to achieve rather than because the Sovereign has the power to constrain her to do so, it does not seem that the trustworthy individual will not necessarily have concern or care for others. Nothing, in being a person of one's word, implies that one would feel the compulsion to give one's word in an other-concerned way. That would involve other

[150] A distinction, I repeat, that they themselves do not make.

motivations and maybe other virtues, but not that of trustworthiness. As we saw, there can be an other-regarding dimension to trust, but one could suggest that when we speak of 'other-regarding trust', we are conflating different notions which are not necessarily analytically connected. Instead, it is a shorthand for trust regarding an entrusted object which must be treated, in order for trust to be honored, in an other-regarding way, that is with an other-regarding attitude. Let me repeat Baier's definition of trust as the 'accepted 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.'[151] It so happens that certain entrusted objects (say, oneself *qua* lover) will be harmed if they are not related to in an other-regarding way. Some may insist to keep the notion of trust distinct from other-regarding concern simply because it may lead us astray by suggesting that a trustworthy individual need engage in other-regarding attitudes toward the entrusted object.

A counter-argument to this view would go as follows. When we think of a trustworthy person, we may naturally expect that this person will care for the trusting party's well-being. The one-trusted may not care for the entrusted object in an other-regarding way, but may care about the one-trusting in an other-regarding way, i.e. the one-trusted will be concerned for the one-trusting and interested in improving her well-being within the boundaries defined by the terms of their trust. We can see this understanding of trust at work when we tell a friend 'I trust you that you will repay the loan that I made you' or 'you can trust me: I will repay this loan' and distinguish it from when we say that we trust banks. This would be a richer understanding of trust, as it would incorporate some other-regarding

[151] Baier, Trusting People (n 109) 152.

elements into it analytically. It would mean that if the trusted-one does not have an other-regarding attitude underlying the discharge of her obligations as the trusted party, she will not be trustworthy and the relation to which she is a party would not really be one of trust, but rather one of sheer predictability. However, it seems to me that this is only the case within certain relations of trust: paradigmatically, the one taking place alongside or within a relation of care between a parent and a child. Elements of other-regarding concern, valuing or motivation toward the trusting party or the entrusted object (which may be the party herself, or some aspects of her life, or expectations of future actions involving her) are not necessary to all kinds of trusting relations. However, in very many relations where we are trusting someone, we will be more trusting if we are convinced that the trusted-one has our well-being at heart rather than just her own, or cares about us, or respect us in a strong other-regarding sense (for instance, a Kantian one: she believes that she ought not to treat us as a mere means).

The problem that this causes for Silvers and Francis is that, as we stated, there is a substantial bridge that needs to be built between the trust taking place with the PMD and the trust required by a social contract, otherwise fostering the former may not improve the latter. If we limited Silvers' and Francis' argument to self-regarding trust, it would not succeed at including the disabled merely because they can enter relations of trust, but only to explain why, once they are already parties to such relations, entrusted agents should live up to their expectations. Why would contractors enter in relations of trust with the PMD in the first place (or respond to the PMD's unilaterally 'imposed' trust or endorse the role of one-trusted when accidentally confronted with it)? We need to add some non-contractual ingredient to

the picture or to tell a more complex contractual story. Silvers and Francis bridge that gap by saying:

> 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?[152]

This quote shows how Silvers and Francis use trust simultaneously as a tool of predictability and as a vehicle for other-regarding attitudes. Instead of justifying that we would engage in relations of trust with the PMD on the basis of their RMS (which would then need to be justified on some other ground), the PMD are held to have an RMS because engaging in relations of trust with them - the most defenseless against a breach of trust and the easiest to exploit of all - will show how trustworthy we fundamentally are. They use trusting relations with the PMD as a way to promote certain virtues which in turn promote social cooperation. They suggest that fostering trust with the PMD will foster trust between contractors of all ilk by suggesting: 'If we are trustworthy toward the disabled whom we could easily exploit, think of how trustworthy we would be toward others, who can actually threaten us if we refuse to cooperate with them or fail to fulfill our end of the deal.' It is not clear that this has to do with trustworthiness instead of with some sort of other-regarding concern. If I say: 'I treat a vulnerable person well, doesn't that show that I would be trustworthy toward you?', I am probably referring to two different virtues, and mean 'I am good/caring/generous, etc. toward a vulnerable person, doesn't that show that I am generally virtuous, and therefore,

[152] Silvers and Francis, *Justice Through Trust* (n 42) 69.

that you may expect me to be trustworthy as well?' I could also mean that the trusting relations that I have with disabled people are infused with *other-regarding* trust, which makes me the sort of agent whose trustworthiness is special: it is underlain by an other-concerned regard from which you, potential fellow contractor, would also benefit.

An argument against such a bridge would insist on the particularity of various relations. One could answer to the question asked in the previous paragraph: 'No, it shows that you are a good carer, I still expect you to be a ruthless negotiator.' (Also demonstrating a virtuous character through one kind of relation or life activities does not necessarily correlate a globally virtuous character.) I am not concluding that Silvers and Francis are mistaken to connect one's propensity to other-regarding concern, trustworthiness, or to a composite notion of other-regarding trust toward the PMD with a propensity for exhibiting similar virtues within other relations, notably social cooperative endeavors central to the social contract tradition. I am suggesting, however, that this connection must still be argued for and I have reservations against it based on the plurality of relations (and of the attitudes, virtues or dispositions, including trustworthiness, fitting to different relations). As a result, though I agree with them that valuing other-regarding attitudes (including responses to trust) toward the PMD is essential to explaining their RMS, I find it risky to ground this RMS on the fact that the 'other-regarding trust' we would have toward them is, in turn, connected to the kind of trust that contractarians are after. (I will deal with the charge of derivativeness in the last section of this chapter.)

To sum up, the sort of trust whose compatibility with the social contract I am exploring here has two properties: it is (1) other-regarding (i.e. it is underlain by other-regarding concern) [153] and (2) seen as an inherent, rather than incidental, part of contracting[154].

3.3.2 Other-Regarding Trust is not so closely intertwined with the social contract

A weak version of this claim or criticism would be that other-regarding trust and the social contract are not conceptually necessary to one another. A stronger version of this criticism would hold that the notion of other-regarding trust and the notion of contract are incompatible. The former criticism would fragilize Silvers' and Francis' version of contractarianism as it can then be compared (and potentially unfavorably so) with the alternative bargaining model, like I did in the previous section. The latter criticism would pose a more serious obstacle to their claim that the social contract can be linked to other-regarding trust. Something fundamental about the notion of contract - whether one taking

[153] At any rate, I will take Silvers' and Francis' argument as an occasion to discuss whether the endeavor of marrying the social contract and other-regarding trust is promising. If they mean to do something else than that, I am either not sure (1) that there is not a confusion of virtues at work or (2) that they are not falling back on purely self-interested trust, which is insufficient to include the disabled, at least, as per the logic of their argument. Another reason why it is worth discussing other-regarding trust is that I believe that other-regarding attitudes are key in understanding the PMD's RMS, and I am therefore interested to make my argument progress in the direction that I find the most promising, to see what would - and what would not - be the best frame to give expression to that an other-regarding trust and the other-regarding concern underlying it. It also seems structurally sensical to go through the varieties of trust (self-regarding, derivatively and ultimately other-regarding) that can sustain the social contract and the contractual role of the PMD. In any case, I think that my attribution of views to Silvers and Francis is fair but, were I misguided, I would claim to utilize a reasonable reading of them as a heuristic adversary (at times) and ally (at others).

[154] *Id es* while the Hobbesian also thinks that the social contract aims at social cooperation, she does not not suppose that trust is necessarily the way to secure it. She sees the social contract as rational bargaining, and only contingently as trust-building.

place between self-interested parties or one taking place between other-regarding parties - would prevent it to be a manifestation of other-regarding concern or trust.

A first way to present these criticism is to ask: if the agents are already other-motivated, why would they need to make a contract? Silvers and Francis would probably answer to this objection that this question supposes a view of contract as an enforcement mechanism (which would secure trust between initially distrustful parties) rather than as 'outcomes of processes of developing trust.'[155] The problem would then be: why would these processes assume a contractual form? Or, in the stronger form of the criticism: can they assume a contractual form? Can we, in other words, meaningfully use the concept of contract to connote such processes?

I see two main reasons to formulate processes of other-regarding trust in a contract-like way, and it is not immediately clear how either makes a meaningful use of the notion of contract. By meaningful, I mean that the notion of contract must add a conceptual element to a discussion of trust that is not already implicit in trust, and that this element must plausibly be called 'contractual', which implies that a stipulative definition of 'contract' would not do, since the idea of contract within social contract theory includes specific definitional elements. Silvers and Francis may - and do - dispute these elements however. I take them to be saying that the object of a social contract will be to create institutions (or more generally, a social background) which facilitates particular instances of (self- and other-regarding) trust, constancy or 'stable compliance with mutual expectations' outside of an adversarial

[155] ibid 61.

negotiating frame between self-interested parties, as well as (to stem from and reinforce) a culture of trust including an affective dimension of bonding and other-regarding concern and a disposition to depend upon and be depended upon others.[156] Do these elements imply some expression of binding, uncoerced will, which seems to be the common denominator of any plausible definition of contract?[157]

First, let us consider the idea that an agreement or a contract would further reinforce other-regarding trust. It is evident why an enforceable contract will put self-interested parties' minds at ease and allow for (self-regarding) trust, but it is unclear how the contractual form would of itself buttress other-regarding trust. If they are merely expressions of pre-existing relations of trust, of renewed statements of these or of the parties' intentions to abide by, or preserve, or augment these other-regarding attitudes, what do (and how do) if they add nothing to these relations of trust? Alternatively, if they multiply or (re)assert them more boldly, are these assertions or statements in any way contracts?[158] The notions of assertion and of other-regarding trust, rather than that of contract, seem to explain why a 'contract' would further reinforce trust.

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[156] ibid.

[157] Sustaining social cooperation fairly may be the goal of social contract theory, as Silvers and Francis point out, but it is not necessarily the goal of all contracting - one may contract with a killer for instance. Also, I see no reason to question their comments on the history of social contract theory concluding that contract theory has long been concerned with creating a 'protective social order' since we are all vulnerable (I have explored this idea in the previous chapter, on a more traditional - rational-choice form of contractualism) rather than to be a bargain between mutually disinterested parties: Silvers and Francis, *Justice Through Trust* (n 42) 60, 74-5. However, these *goals* are not the contract itself, but its object. It is through the expression of binding, uncoerced will that they are attained.

[158] One possible answer is that they are promises, and in that sense a binding expression of will. However, this would give the social contract a unilateral feel that is not in line with the characteristics of mutuality and collectiveness that are not only attached to the tradition of social contract, but that Silvers and Francis do not wish to let go of either. In any case, this promise would be binding because of the autonomy of the party who made it. But that leaves it up to the party to promise something else than trust. If we are to base the social contract on the spontaneous promise of other-regarding trustability - we need to say a lot more about trust - and, it seems to me, why trust matters, within or outside of a contractualist frame.

The second potential justification for 'contractualizing' processes of developing other-regarding trust would be a rather practical one. Contract is a useful instrument to clarify the content of our obligations and avoid the costs resulting from confusion, redundancy of work, etc. It does seem that contracting as a form of making clear plans, channeling our efforts, and so on, is quite useful; it would be a matter of efficiency. Predictability and efficiency are certainly two virtues that the contractual expression of will provides. However, I think that this justification can be understood in two different ways, and neither one seems to ultimately require the binding expression of will.

In the first case, the contract would take place between parties who already trust each other. In this case, it would look like planning more than contracting, and the binding character of the planning is not contract-like.[159] Consider a case of planning underlaid by mutual concern, indeed love, like the plans that a brother and his sister make for the weekend, say, to go fishing. Since the interests of the parties converge - each other's happiness - there is no reason why the plans would not be flexible if that better accommodates one of them. The sister, surely, will understand that her brother has too much work, etc. This seems to do away with the binding dimension of contract, or to make it at best contingent upon serving the best interests of the parties. A contract that is not binding is not much of a contract.

[159] It can be contingent upon the fact that, as things unfolds, it still best serves the interests of all parties involved. Without enforcement, why would it be otherwise? Not because parties will naturally abide, for abiding's sake or for the sake of the other parties. Other-regarding concern toward other parties may just as well justify *not* to abide.

In the second case, the contract would take place between parties who do not trust each other, but for the well-being of someone who trusts them. For instance, a mother is contracting with a baker for the well-being of her son, who she will feed upon delivery of the bread. We should not confuse categories of people with whom we would not need such binding agreement (for the mother to feed her son for instance) with those with whom we would because their mutual devotion to each other's welfare is far from secured (the contractual relation between the baker and the mother for instance). Once we distinguish these two categories, it seems that the former does rely on other-regarding trust but does not really need the notion of contract to secure an already existing trust, and that the latter does need the notion of contract, but precisely because there is no (or not enough) trust, and could be based on self-regarding concern alone. This distinction is fairly obvious: feelings toward my children are evidently different from feelings toward the people with whom I contract for the well-being of my children. However, it is important to distinguish them because the temptation is great, if we talk of both relations in a same breath, to conclude from the fact that contractual agreements indirectly serve trusting relations that we are considering other-regarding contractual relations. One can easily understand that the former relation is other-regarding but not contractual and that the latter is contractual but not other regarding. To say that both are simultaneously essentially contractual and essentially other-regarding would require some more justification.

This discussion leads me to conclude that, while it is easily understandable to see how an enforceable contract will improve trust between mutually disinterested parties, it is not so clear how a contractual sort of agreement would of itself play an important - or even,

any - role in improving other-regarding trust. I am not claiming that it may never be the case, but only suggesting that, in many cases of pseudo-contractual processes fostering other-regarding trust, it is in fact the notions of asserting or clarifying (rather than contracting) that are fostering trust and that contracts serving trusting relationships do not necessarily take place between the parties to that relationship.

One last reason to be suspicious toward at least a far-ranging marriage of contract and the mutual concern underlying certain trusting relationships is that it could corrupt certain of these relations. The notion of contract, the binding expression of wills out of respect for the parties' autonomy, provides contracting agents with a sort of motivation that may clash with, or corrupt, rather that reinforce, the other-regarding, concerned, motivation. Consider, for instance, how awkward discussions of marriage contracts can become. It it not unimaginable that such discussions can eventually threaten the marriage. This may be, precisely, because the contractual aspect of marriage has nothing to do with the other-regarding romantic or loving relation which is another aspect of marriage. When the latter relations is brought down to very earthly financial considerations, the parties may be divided between their contractual self-interested selves and their united selves, whose welfare become fused since of the success of this common venture both their happiness depend and since, as love is often thought to imply they take the welfare of the other as seriously as - indeed, sometimes more seriously than - their own. Notice how, in this picture, the other-regarding aspect of marriage would not need a contract and how the contract, contemplating a separation, incites the parties to endorse the self-regarding stance of their future divorced self. I do not see the fact that a single event (marriage) has both other-regarding attitudinal aspects and self-interested

contractual ones as an indication that we are dealing with an other-regarding contract (no more than I conflated the relation between a mother and her son with the relation between the mother and the baker). On the contrary, there different dimensions point to almost two different, indeed potentially incompatible, relations.

Not all relations based on other-regarding trust may be thus corrupted, but certainly many would. Consider contracts between friends and family. Silvers and Francis could answer that this corruption only comes because I am assuming that the contract must ask the parties to take a self-regarding stance incompatible with their other-regarding one (as the case of two lovers engaged to each others asked to put themselves in the shoes of their future divorced selves). Of course, some other contracts, and especially, this being their main point, the social contract, can be other-regarding, can ask the parties to take an other-regarding stance.[160]

[160] Here is an illustration of the sort of response that Silvers and Francis might provide. Some, like Onora O'Neill, have criticized the intense multiplication of forms and procedures to insure that parties have consented in medical contexts: *Autonomy and Trust in Bioethics* (CUP 2002). Instead of being seen as an expression of trust, however, these numerous, formalized expressions of autonomy cultivate distrust. (If you must sign a form every time before you can do anything, it puts you in a position in which you could be blamed for trusting rather than not putting yourself in a vulnerable position.) Silvers and Francis would say that *this* sort of contract is primarily aimed at protecting the parties' 'atomistic' autonomy in a way that is already presuming that contracts do not reflect trust but rather distrust, which is what Silvers and Francis challenge. If we would think that contracts reflect trust, we would rather suggest that the contract can stipulate that the patient can trust the doctor and that the institutional frame would promote, make sure that the doctor is reliable, so that the parties can afford dependency. It would be the sort of contract encouraging dependency, vulnerability and trust.

I have been questioning how much of a 'contract', properly speaking, that assertion of trust would be. I am also suggesting that the aspects that would be binding expressions of will (i.e. contractual) may be indicative of distrust. (For instance, a patient may fear that the doctor would fail to bring up an experimental, very expensive treatment as a possibility, and a doctor may fear being sued.) Lastly, I will suggest that the fact that contracts emphasize the value of the contractors' autonomy undermines (by making incident or contingent upon it) the value of trust (and trusting relationships, or other relationships answering to people - in this case, medical patients' - needs).

Importantly, however, the idea of a contract, even one which would be aware that human beings live vulnerable lives of mutual dependence giving a great room to that fact in the decision of contractual provisions, would still require the parties to wonder what is most beneficial to their own (other-regarding) self and the terms they would like themselves and others to be bound to, as though the parties with whom they would contract would all distrust one another, in spite of everyone being aware that all of them are capable of other-regarding concern and crave other-regarding trust. Appealing to a contractual process seems an admission of distrust, perfectly compatible with the idea that we want to create, through this contract between distrustful parties, the opportunity for trusting relationships of all sorts. Again, the other-regarding aspects of the mother-son relationship are not somehow passed on to the mother-baker one because the latter serves the former.

Like I noted in the previous section, this is not to deny that the picture of contractors (and human beings more generally) as more other-regarding than the rational-choice or Hobbesian models of social contract theory would suggest is implausible. On the contrary, the way in which human beings live in relations of trust all their lives, may they be family, friends, community members, suggest that such relations are central to human life. Instead, the question is whether the social contract itself is, should or can be such a relation.

3.4 Can all the PMD take part in trusting relationships?

Silvers and Francis understand trusting and being trustworthy in a way that does not imply ‘sophisticated ratiocination’. Most vulnerable humans are able to know when it is safe to put

one's welfare in another's hands or, if they stand at the trusted end of the trusting relation, how to earn that trustworthiness. 'Small children can sense the consequences of being inconstant, unreliable, or dishonest—that is, of being untrustworthy—well enough to be deterred by them.'[161] Even animals can 'learn what behaviors they must exhibit to gain and hold the other's trust.'[162]

A problem is that this ground for being a subject of justice would exclude those unable to be actively part of a trusting relationship, even at the receiving, trusting, end. It is important to state, however, how little this portion of PMD is. This is a conceptual, rather than empirical, work, and I am not in a position to provide statistics. Such numbers would be, in any case, controversial because of how difficult it is to draw certain conclusions about the mental states underlying the behaviors of many non-verbal PMD. I rather want to make two points. First, individuals incapable to trust certainly exist. We can think of individuals who seem to have difficulty to recognize others, to make eye contact, to associate the pain they are feeling to a particular hand hurting them, or the comfort they are feeling to particular cradling arms, to the point that a relation of trust is impossible to establish. Other disabilities or mental illnesses can also leave people in a 'vegetative' state, such as advanced stages of Alzheimer. Some conditions may deprive an otherwise intelligent individual from the capacity to relate to other human beings in an other-regarding way. A sociopath, for instance, may opportunistically trust others but only in a self-regarding way (as he may be able to 'grasp' the motivations or attitudes underlying the behaviors of the person he trusts only

[161] Silvers and Francis, *Justice Through Trust* (n 42) 68-9.
[162] ibid 71.

superficially).[163] Do we want to exclude all such individuals from the ambit of justice? (If the capacity to trust would be a sufficient rather than a necessary condition, they would not necessarily be excluded, but their inclusion would depend on whether there is another plausible ground for including PMD unable to trust.)

The second point regarding the fact that Silvers' and Francis' argument may not cover all the PMD is not a criticism. On the contrary, I want to highlight how important the portion of PMD covered by this ground would be. So important, in fact, that Silvers' and Francis' contractarian approach to the issue of integrating the PMD, would already accomplish a tremendous progress and one should not neglect the pragmatic consideration that their effort to remain within a contractual justification political scheme seems less radical than alternative explanations which may have a harder time to translate into easily sellable public policies. Their view counters an important 'miscategorizing problem': most of the PMD often tend to be associated with the most severe cases of disability among them.[164] In particular, Silvers and Francis force us to realize that the sort of trust that takes place between able-minded people is not essentially different from the one taking place between beings with dramatically less capacities. This invites us to examine more closely cases where we have assumed that trust is impossible. (For instance, even in the previously mentioned case of PMD unable to distinguish individuals, we could observe that they can still be

[163] It may be said in such a case that he is still in a relationship of trust, if only at the receiving end, but one could think (1) that individuals with such capacities would be expected to reciprocate to be properly said to be parties to relations of trust (given the collective, mutual aspect of trust) or (2) that his self-interested, opportunistic understanding of the trust he is benefitting from prevents him from really being in a relation of trust - in spite of the appearance, it would be another sort of relation, say an exploitative one for instance. Perhaps this would be explained by a constant mental state of wanting to exploit the other through trust, rather than being a fair, but self-interested, bargainer in a relation of trust.
[164] Carlson (n 10).

engaged into a 'non-personalized' sort of trust: in a competently caring environment, they may grow to be receptive of care in a more trusting way than they would be if they had spent years in an abusive institution.)

In sum, the trust-based contractarian model has the advantage of yielding to a conclusion that I believe is morally correct since, although it may still be too exclusivist, it brings most PMD within the ambit of justice. However, I have questioned some of its assumptions, and I will insist that the reason it gives for inclusion is not the one that seems to most truly render our moral intuitions on why we ought to respect the PMD.

Its relative non-radicalism could still make it more attractive than alternative justifications in terms of influencing public policies. However, this approach makes the inclusion of the PMDs hostage to the fact the designers of a fair society would indeed value and prioritize securing a culture of trust and trustworthiness between members of the community.[165] It is not obvious that parties to the contract would make it such a priority to establish a trust-facilitating environment, i.e. an environment that allows for a very broad range of (mutually reinforcing) trustworthiness (where all relations of trust - either between strangers who contract together and carers and cared - for are somehow conflated). To put it otherwise, must the development of this broad-ranging virtue of trustworthiness be such a central social goal of a fair society? Since Silvers and Francis have taken the contractarian

[165] And by this 'trust' they must mean more than the trivial idea that the parties must use some sort of trust. Of course, any sort of contract would imply some sort of trust, but it could be a trust secured by authority and self-interest, as I said. They must assume that the participants to the design of the social contract will want to establish a setting propitious for trusting relations that go much beyond trust insured by authority and self-interest alone.

route which has faith in the parties' wisdom, rationality, moral insights and, they would plausibly add, other-regarding moral motivations, they can only hope that the contractual procedure yields to such a result. Is it so obvious that parties to the social contract would agree to this however? Maybe Silvers and Francis *have* gotten something right about the human condition and that this broad, polymorph trust is indeed what we individually and collectively need and if we start establishing this sort of social model, we will realize it works better for us, as a community and as individuals. But if they have gotten the moral motivations for respecting the PMD wrong, it would not yield to that result and, given Silvers' and Francis' proceduralist commitment, there would be no higher ground, no substantial goods to use as a trump against the results of the procedure, for telling the parties they have gotten it wrong and have misunderstood their best interests.

3.5 How important is trust?

The issues I am exploring in this last section relate to the importance of trust. So far, I have been criticizing the idea that the social contract was compatible with 'trust-building', or the stronger claim that its participants are best served by a 'trust-building' understanding of the social contract, and have been suggesting that such an understanding may not be the most secure (or even intuitively correct) way to include all of the PMD within our ethical community.

Trusting relations with the PMD seem intuitively highly morally important, however, and if I do not think that the importance of this trust is best understood in contractual terms, I

need to put trust in its place and at least point to the possibility of explaining it otherwise. There are two questions to explore with regard to the importance of trust: 'how important is trust?' and 'how is trust important?': (1) is trust as important or central as Silvers and Francis take it to be? and (2) on what is its importance grounded? how is it to be cashed out?

3.5.1 The problem of the derivative importance of a contractarian trust-based status

I want to point out how a non-contractarian focus on other-regarding trust would be able to avoid a problem with the contractarian account: the fact that the emphasis on the value of a trusting culture or trust-fostering political arrangement, rather than on the value that being integrated as full members of our ethical community has for the PMD, seems to make the latter value derivative of, or contingent upon, the former one.

X's capacity to trust seems like a good ground for moral obligations toward X. But does that imply that we have robust duties toward X (i.e. duties correlating a RMS), including notably duties of justice? A conception of justice based on trust is far from unimaginable, but would need to be argued. It does not seem that Silvers and Francis have provided, or tried to provide, such a conception. Indeed, it is central to their argument that they want to remain within a contractual frame that makes justice a matter of fair contracting. Contracting is not replaced by trust as a foundational justification for authority, it rather becomes closely connected to it, notably by being the goal of such contracting. They still

have the 'contractarian faith' in proceduralism to generate good outcomes, rather than in the (pre- or a- procedural identification of such substantial goods).[166]

If one argued the simpler claim that one can be a member of the ethical community working out the principles of justice if one has the capacity to trust, then the claim that the PMD able to trust are owed a RMS would be established. But it is not certain that such a claim would be successful and, at any rate, Silvers' and Francis' argument is more subtle and complex. While they do claim that there should be no outliers and that disabled individuals should be included even if they cannot reciprocate significantly in terms of their social contribution *because* this creates a climate of trust, it seems that (1) they are only 'derivative subjects'[167] of justice: their inclusion seems primarily warranted by the impact of such an inclusion, which 'enrich[es] another kind of entity, the cooperative scheme (or the social climate, the community culture, or society itself)'[168] by opposition to enriching PMD's lives directly.) (2) On that view, the capacity to trust of the PMD has, in itself, nothing to do with their inclusion, other than because including beings who trust us within our community makes for a desirable or good climate.

As we saw, Silvers' and Francis' underlying thought is that an agent who does not exploit the most exploitable being we can imagine must be a reliable one. I have challenged this idea: someone could abide by ethical principles demanding not to exploit very unfortunate people but allowing agents to be ruthless or even callous toward anyone else.

[166] Silvers and Francis, *Justice Through Trust* (n 42) 53-4.
[167] Nussbaum's terminology: (n 19) 327.
[168] Silvers and Francis, *Justice Through Trust* (n 42) 45.

One could also simply say that there is less to gain from exploiting a PMD than to exploit some more capable people, say people able to work fast in sweatshops. That said, the claim remains true when it refers to the community rather than to specific individuals. If a state makes provisions for the most easily exploitable, able contractors will know that they live in a state that pays attention to the human conditions of vulnerability and dependency, including their own. However, this consequentialist way to look at the issue does instrumentalize the PMD since the primary goal pursued is to build trust within the community, not to have concern for the PMD.

There is even some potentially denigrating undertone toward the PMD if we imply that 'if we have concern for *them*, we must be living in some bleeding heart community!' Of course, this is not the intuition that Silvers and Francis are pursuing, substantiating and formalizing. Their underlying intuition rather seems to be: 'my community recognizes and grant the proper moral weight to the human dependency and vulnerability from which I am not myself immune.' But this sort of justification either takes us toward a more self-interested version of the social contract or toward a justification based on the importance of human dependency and vulnerability, both of which can do without Francis' and Silvers' trust-based version of contractualism. It seems hard to escape instrumentalizing the PMD from within their account.

To answer the criticism that we would only be giving the PMD derivative importance if we included the PMD because they serve the cooperative social scheme, one could claim that it is part of the proper attitude of engaging in relations of trust to avoid such calculating

justification, and that we should temporarily suspend our self-interested or community-oriented 'moral focal point', which should rather be directed towards the trusting individual in a non-instrumentalizing idea. I have already mentioned such a possibility, but whether or not it is plausible, other problems remain. I will comment on two of them in the next sections.

3.5.2 Does their capacity to be part of trusting relations most centrally explain why the PMD should be subjects of justice?

Are Silvers and Francis not assuming that disabled humans are particularly important outliers? I find that their treatment of the issue of trusting animals reveals some tension in this regard.

Their response is that they are not arbitrarily focusing on the disabled exclusively: they happen to be an important group of individuals deprived from capacities traditionally taken to be necessary to participate to cooperative design of a fair society, but possessing the capacity to trust and, often, be trusted. Any outlier able to trust or be trusted should fall within the scope of justice and be equal political participants.[169] Some entities, like plants or rocks, do not have the cognitive capacities required to trust, but some animals do trust humans. They are therefore owed trustworthiness, Silvers and Francis write. It is not clear how much they bite the bullet of their premises however. They go on saying that '[c]hildren who torture animals often grow into adults who treat other people cruelly. The man who

[169] ibid 49.

whips his malnourished fallen carthorse strikes us as someone to avoid in doing business.'[170] Do they mean to curtail our duties toward beings able to trust only to the extent that it creates a trusting community of humans? The derivative aspect of the duties owed to animals - because it serves the community of people who 'really matter' - is analogous to Kant's[171] and subject to the same criticism. Surely, we want to give more than a right not to be tortured (or other derivative limited privileges) to the PMD. But if Silvers and Francis are promising full political integration to outliers, why curtail it in the case of animals?

Maybe they do not wish to do so: they say that animals could be 'active participants in shaping principles that nurture a climate of trust.'[172] However, they seem to retreat from this bold position about the status of animals when they go on asking what this status should imply, what is owed to animals capable of trust. We cannot only trust the *status quo* to inform us on this if we are to recognize to animals the power of a real input to the creation of a fair community. Surely, not many will disagree that torturing our pets is wrong, but it is rather these subordinating relations (such as domestication) that need to be questioned. (We do not want to be asking questions analogous to 'how should we morally behave toward the sort of feeble-minded, fickle, child-like being that woman is?' and rather consider the very prejudices embedded in the questions we ask and ideas like that we have bred animals for our enjoyment, used others for our unilateral benefits, hunted others for fun.) It is not evident either why only domesticated animals would be able to trust us. Dogs become 'actively' attached to people. But it doesn't seem that chickens or cows do: what implications does that

[170] ibid 72.
[171] Immanuel Kant, *Lectures on Ethics* (J. B. Schneewind (ed), Peter Heath (trans), CUP 1997) 212-3.
[172] Silvers and Francis, *Justice Through Trust* (n 42) 71-2.

have on their status? What about wild animals? They may only have intra-species relations of trust (or no propensity to trust altogether), but they are still vulnerable to human actions. However, Silvers and Francis do not reduce the notion of trust to that of vulnerability (and I think they are correct not to), but that results in their theory excluding some PMD. The more lax their requirement for trust is, however, the more, one could claim, it applies to animals. It is not unimaginable that wild animals may learn from frequent encounters with humans that they are not to be feared, for instance.

Silvers' and Francis' criterion to distinguish the morally relevant sort of trust is whether it will foster a culture of trust. They say that a man who whips his carthorse more than is strictly necessary and nourishes it just enough for it to perform its work well but not enough for it to have a pleasant horse-existence does not seem like a man we would want to make business with. Not all businessmen would agree, and if we assume that the parties to the social contract would agree, why would they not think that the men hunting wild felines or cutting trees from the natural habitat of wild monkeys are also undesirable business partners? (This latter finding would be surprising since hunting and exploiting the environment has been the traditional setting and object of contractual arrangements, including theories of the social contract.)

Would it be that the contractual parties have some prejudices and would more readily trust someone who treats certain vulnerable beings well but not others because the parties happen to already care for one group more than another? If this initial concern is warranted by some moral (non-prejudiced) reasons, it needs to be explained in reference to something

else than trust. I do think there are ways to distinguish the relations that we have toward animals and the ones we have with humans, but it may be difficult to do so by using only the notion of trust. Using the capacity to trust as the cornerstone to bring outliers in the ethical community, unless it is paired with some other (and potentially competing) moral ground, makes it hard to explain why disabled people seem to be owed something different from what is owed to animals also able to trust (if it is the case that we want to make this distinction, and I think we should, because animals and disabled humans are different sorts of beings, have different forms of life, are part of different relations with non-disabled humans, etc.) This is a particular instance of the more general problem that the specialness or particularity of the PMD's moral status is not fully explained by a reference to their impact on a trusting culture alone. The fact that Silvers' and Francis' contractual trust-based account of justice allows for assessment of inter-species contribution tends to suggest a justificatory broadness which may miss what is relevantly particular about the PMD, especially given the problematic tensions this assessment leads to.

Another problem worth mentioning about the broadness of the criterion of a unsophisticated capacity to trust is that the more basic a definition of trust we adopt, the less appealing trust is as a sufficient (and Silvers and Francis seem to say, necessary[173]) ground for being a potential participant to the social contract, a subject of justice. Reduced to some strict behavior of dependence for instance, the idea of trust would apply to a great number of beings, but it would be unclear why this sort of trust would matter so much. In fact, even a more cognitively sophisticated understanding of trust does not evidently provide us with

[173] ibid 69.

grounds to pay serious moral attention to a being, to find this being intrinsically important and eventually to divert our resources toward improving this being's welfare, should the right circumstances occur and the right relation between ourselves and this being be established. An enemy trusting me to betray my friends is a fool, and his trust does not obligate me morally. There seems to be nothing normative[174] about trust in and of itself. What makes it worse to harm my little brother who had grown to trust me rather than a child I do not know is explained by the role I have come to endorse toward my brother, the relation between him and I (say, one of care, or of brotherly love), rather than trust (although trust may well have evolved from that relation, indeed infuse it). Whether, why and how much trust would be valuable, is the topic of the next section.[175]

3.5.3 Why other-regarding trust may still matter within a non-contractual theory of justice

Why is a climate of trust - or trusting relations more generally - desirable or good? Silvers' and Francis' answer is that it best achieves the fundamental aim of social contract theory: to sustain social cooperation. And it does so, as already mentioned, by disposing participants to constancy and 'promoting stable compliance with mutual expectations,'[176] notably by

[174] This does not mean that trust is not valuable; it certainly enriches people's lives.
[175] In the case of Silvers' and Francis' argument, what makes a capacity to trust normative is the fact that it is chosen by parties to the social contract. (And these parties would choose it, they suggest, because of the positive impact that relations of trust and a culture of trust will have on society as a whole.) We would not value the mentally disabled *qua* trusters, but *qua* potential maximizers of social global happiness (assuming that to show trustworthiness toward vulnerable PMD is it is a particularly good way to develop a culture of trust). The capacity to trust thus interpreted grounds the status of subject of justice because trusting individuals allows for greater social cohesion rather then because 'trusters' are the sort of beings we should treat particularly well.
[176] Silvers and Francis, *Justice Through Trust* (n 42) 60.

establishing the trustworthiness of agents (individually or collectively) by the fact they are in other-regarding trust relations (i.e. trust underlaid by other-regarding concern). I agree that a climate of trust is desirable, but not (or not principally) because it facilitates expectations, reliability and foreseeability between contractors. My way of explaining the value of trust makes it less foundational and central a good than if one sees it as the most basic and important condition to be met through the social contract for it to be successful.

A climate of trust is indeed desirable, among other reasons, for the self-interested reasons considered in the previous chapter (on forms of contractarianism assuming self-interest and rationality). I would know, as an able or disabled citizen, that I (or my children, or my loved ones) would be taken care of, should I (or they) need it some day. This would also allow me to live a less anguished, over-cautious life in which I can take more risks to achieve happiness. It would also invite, if not obligate, me to be more reliable and disposed to help out (directly or via my government) dependent individuals, as I have recognized the importance of making provisions for human dependency and vulnerability, which can, but for luck, affect some individuals to very extensive degrees.

Contrary to Silvers' and Francis', such a justification for including the disabled would not appeal to a capacity to trust. It would rather be based on concern for one's own vulnerability (and possibly that of others). The capacity to trust would be fostered because it benefits the figure of the 'direct' contractor, the central case of a member of the ethical community on a contractarian account, the uncontested possessor of RMS on traditional

contractarian grounds (a capacity to benefit or threaten others) who decides to extend an RMS to beings on other grounds.

The difference between a direct and indirect inclusion may not seem very significant, but it is practically and conceptually relevant if one wants to use trust as a ground for RMS. Is there something about the capacity to trust that would make someone a full member of our ethical community regardless of the impact that her membership has on the community? That is, would this individual trait ground the other-regarding concern underlying the sort of non-Hobbesian contractarianism that Silvers and Francis are defending?

It seems to me that the answer is negative. However, it is not only because it serves the community that the capacity to trust is important. It serves the individual, and is therefore important because the individual is important. (This importance is not itself based on the capacity to trust, otherwise, this reasoning would be circular.) It is not the capacity to trust *per se* that matters, but the fact that a trusting relation is often a symptom of concern. The fact that X trusts me will not of itself make X important to me. It may rather be indicative that she *is* important to me, and that I am already engaged in some concerned behaviors toward X that have caused X to have certain expectations toward me. Trust may crystallize or spell these expectations out, rather than have initially created them. It is also plausible that I will have no moral concern and moral obligations for beings who (misleadingly) trust me, at least not in the name of that very trust. By the same token, it seems that I may have strong obligations toward beings who do not have trusting expectations from me. In sum, it is not evident that a capacity to trust in and of itself would grant a RMS to the PMD. It may serve

the community's culture of trust, as Silvers and Francis argue, but then, it is not clear how it would necessarily be the other-regarding sort of trust on which they capitalize.

3.6 Conclusion

One must acknowledge that Silvers' and Francis' trust-based and trust-engendering contractarian account of why the PMD should be included in our ethical community is very ingenious, considering the admissions by important thinkers of the contractual tradition that to try to include mentally disabled people on the basis of their 'contribution' was a dead letter.[177] While it seems to go a long way to justify integration, however, it has two significant weaknesses.

First, it still excludes some PMD. This in itself does not reveal a lacuna in their argument, unless I assume that no PMD should be excluded from the designing of a fair society, which would be question-begging. However, it seems that Silvers and Francis themselves would be unsatisfied with some PMD remaining outliers. Firstly, they seem to assume that their theory would encompass *all* outliers.[178] They only passingly mention that 'almost everyone' can trust and immediately after assert that 'even the most vulnerable

[177] Silvers and Francis do also modify some assumptions taken for granted by this contribution-based sort of contractarianism, but see next footnote on my reasons for keeping these issues separate.

[178] Silvers and Francis, *Justice Through Trust* (n 42) 44: 'no one should have to be an outlier'. As I previously noted, however, this statement is implicitly qualified. They must be implying *some* sort of properties qualifying a being to be an 'inlier', otherwise, stones, ferns and rabbits would be outliers. Without these properties, a being would not even be an 'outlier'; in order to stand outside of a community, one needs to be the sort of being who can *stand* in some position vis-à-vis a community as an insider or an outsider. This way of presenting the issue of exclusion or integration reveals that the ethical investigation on this matter must not focus exclusively on understanding some individual properties that matter in the absolute (i.e. in or outside of a community) but also how a community is defined in a morally relevant way.

individuals may be parties to trust.'[179] Secondly, it seems plausible that a culture of trust would better take root in a society making a special protective place even for disabled individuals deprived from the cognitive capacities that would enable them to trust, but their argument seems to lack the internal resources to make this case, as they have chosen to focus on an internally, individually possessed capacity.[180] Their argument could be taken to provide a justification for integrating the vast majority of PMD, as we need not be committed to finding a unique ground for inclusion. A different (potentially non-contractual) ground may explain why the most cognitively impaired among the PMD ought to be granted an equivalent status.[181]

However, their justifications for including the PMD would still face a second problem, as they do not seem to entirely capture important reasons why the PMD would matter in a way that would require their inclusion into our ethical community. One could say that their argument already provides sufficient reasons for considering the PMD as parties to the social contract and that it does not necessarily have to aim at being a full account of what is owed to the PMD. However, these reasons might not always be sufficient, and might include incorrect or questionable assumptions or claims. Notably, as I have suggested, this

[179] ibid 69.

[180] If the criterion for being integrated to the social contract would just be that this inclusion would foster the climate of trust, one could argue that X could be included even if X cannot take part to relations of trust themselves. However, the problem of the lack of correlation between the relation contractors would have with X and the climate of trust would be even more pronounced, and so would the derivativeness of X's 'RMS', supposing it can be a RMS. Also, what would this inclusion mean if it cannot be understood in terms of taking part to a social matrix of trusting relations? How would it benefit X itself? Such an inclusion would likely ultimately be justified by a preference or beliefs shared by community members rather than because X is a contractor like them. (Consider, e.g., integrating ancient sculpted rocks considered as benevolent spirits as members of the social contract.)

[181] I.e. have their interests considered by the designers of a fair society to be as important and worthy of consideration as the interests of the other 'moral legislators', leaving aside for now the complex issue of whether they themselves, like Silvers suggest here and elsewhere, should be considered as active legislators/ participants.

contractarian argument instrumentalizes the PMD: we would care for them and recognize their role as members of society because it would encourage a culture of trust where non-mutually beneficial relations could take place and be fostered.[182] Since the way in which the PMD benefit or threaten us is very indirect (by fostering or hindering a collectively beneficial culture of trust, or trust-facilitating and engendering institutions) it leaves it opened for someone to claim that we do not need to include the PMD at an early stage of the social contract. This argument does not seem to necessarily require that we give them an initially important moral status. As I have suggested, they may come in later, when social architects think it beneficial to the community (of whom they are not yet seen a part of) to bring them in, along with bridges, public libraries and laws protecting old trees. From a contractual point of view, it seems that it is where they most plausibly fit. (This may seem wrong because we intuit other reasons for them to be given a more important status than bridges. But these reasons may find a better expression elsewhere than in contractual thinking.)

[182] As we have seen in the previous chapter, this criticism is not addressed to Silvers' and Francis' argument specifically but to a broad variety of contractarianism that assumes that parties to the social contract must be able to contribute to this collective endeavor or to threaten the social order should they be left outside of it. Silvers' and Francis' argument has the advantage that it could be used to make the case that we should include the PMD without modifying these contractarian assumptions. Such is not their intention however. They challenge these assumptions by noting that parties can also have other-regarding, not only prudential and self-interested, motivations. Although I interpreted their argument as a trust-based contractarianism, their argument draws from different varieties of social contract theories, which we could associate to both contractarianism and contractualism. Sometimes, Silvers and Francis appeal to the logic of the former tradition, by considering how disabled people could contribute to social cooperation (if they were involved in the adoption of its terms and could therefore request a structure that would allow them to be 'productive': see e.g. Silvers and Francis (n 42) 49 and 69). At other times, they appeal to the Kantian idea that is '[c]entral to the point of contracting is that each party is respected as in some broad sense being a chooser' (Silvers and Francis (n 42) 44). There is no (at least not immediately evident) contradiction is working on these two fronts, but the thrust of their argument being on trust and the benefits of a culture of trust, I take them to be centrally dealing with the idea that including the disabled benefits us all, in a sense that fits better within the first, rather than the second, variety of social contract theory. They have more to say about the status of the disabled *qua* active choosers, but that is a topic that I will deal with later in order not to confuse the arguments favoring the inclusion of the PMD and better analyze their respective merits.

Even if Silvers' and Francis' key insight is formulated in a way that emphasizes other-regarding trust rather that self-interest (by turning away from a bargaining paradigm to a trust-generating based one), the criticism of instrumentalization is hard to avoid. Caring about very weak beings may foster trust, reliability, a feeling of community, of being oneself the potential recipient of care and help and real concern (rather than some apparently other-regarding attitudes ultimately based in self-interest), etc., but would only be valuable if it effectively promotes those ends desired by contractors (and if there are no other better ways of promoting them).

Silvers and Francis have nonetheless provided what I take to be the best case made up to now to conceptualize the notion of 'mutual advantage' at the heart of the social contract in a way that allows to put this sort of benefit in the contractual balance. They have provided a very compelling way of harnessing, within a contractual theory, the 'multifaceted and diffuse benefit to society of interacting with [the mentally impaired] and supporting them,'[183] as Nussbaum puts it. Many philosophers agree on this 'diffuse benefit'; the hard disagreement is whether it can be placed within a contractual theory in order to justify granting a RMS to the PMD.

Ultimately, I do not think that the social contract is the best conceptual frame to compellingly and entirely express the importance of such a special benefit. More particularly, to respond to Silvers and Francis, I am not convinced that relations of trust with the PMD could constitute such a benefit. On the contrary, it is more intuitively plausible to me that to

[183] Nussbaum (n 19) 105.

ground the PMD's RMS on their capacity to trust puts the cart before the horse. In other words, It is because the PMD already have a RMS (grounded on a different basis in need to be articulated) that we ought to engage in trusting relations with them (if and when this is required by their RMS) rather than because they have a capacity to trust (and therefore to indirectly and questionably contribute to a trust-based and trust-engendering social contract).

If we assume, as I do in this thesis, that the PMD have a RMS and should be owed stringent duties of justice, it is far from obvious that the capacity to trust is the most salient aspect of their RMS. The value of a climate of (other-regarding) trust, although it plausibly fits their version of the social contract, does not seem to best fit our ordinary intuitions about why we owe it to the PMD to honor their trust and to incite them to trust us in the first place. The real reasons behind this would probably explain why we still owe them a very important concern (and probably one warranting integration to our ethical community) even when they cannot trust.

For instance, even though Lennie trusts George, in the novel *Of Mice and Men* quoted as an epigraph, the value and normativity of this trust cannot be grounded on the hypothesis that it fosters a social climate of trust. Lennie's existence helps in nothing, indeed hinders the climate of trust reigning in the community. (As we know from the story, Lennie is mentally disabled and George cares after him. He kills a woman without criminal intentions and is chased to be lynched. George ultimately his friend Lennie who is hunted to spare him a harsher death.) George has no doubt about the stringency of his duties toward Lennie. There is a sense in which George would not have it any other way and in which Lennie is not a

burden: he just happens to be there, like George himself. And to think of Lennie as a burden is to think of human beings as unburdened from one another or to think that this is a proper moral aspiration to have.

This is precisely what, for better or worse, contractarianism generally assumes. Silvers and Francis challenge this assumption while paradoxically defending the questionable hypothesis that Lennie's capacity to engage in relations of trust entitle him to a RMS. In this novel, however, trust-fostering contractarians are the angry mob chasing him with rifles.[184]

[184] One may note that Lennie has betrayed the community's trust and the social climate of trust needs to be reestablished through his punishment, but my point is that Lennie has no separate claim to a right to life if it turns out that his capacity to properly respond to trust is defective due to his mental limitations. This story, *mutatis mutandi*, illustrates how one is entitled to a RMS on a trust-based contractarian account. It is not about Lennie being a subject of justice who must be duly punished. On the contrary, he has no special moral status left, he is chased to be summarily killed like an animal who disturbs the community's tranquility.

4 THE PMD AS ACTIVE CITIZENS

In the last decade, the two philosophers Anita Silvers and Leslie P. Francis have been developing elements of a theory of justice which would both retain the social contract frame (mostly in its form rendered mainstream by Rawls) and fully integrate outliers (those marginalized people whose RMS is inexistent or standing on insecure grounds), in particular the disabled. Most of the writings I will be focusing on has a more specific focus on the cognitively disabled, and also purports to apply to almost all PMD.

Working separately and together, they are probably the best representatives of the view that the PMD have the necessary capacities to be conceptualized as active participants within a liberal theory of justice and more particularly within a social contract theory. Their view is characterized by an effort to maintain the paradigmatic features of liberal social contract theories, such as the requirement of autonomy, the capacity to have a conception of the good, and the possessions of talents which can contribute to the common social pool. Contrarily to the theorists of passive citizenship whom we have explored, they go further in redefining or broadening these notions. However, contrarily to other theorists of active citizenship whom we will explore[185] (as well as other theorists conferring a RMS to the PMD on the other bases than capacities specifically pertinent within a social contract argument

[185] Such as Christie Hartley (n 27), who conceptualizes the notion of mutuality and reciprocity as demanding only a sort of 'engagement'.

whom we will not explore[186]) they do not make these notions less demanding by lowering the threshold of requirements to be granted a RMS or be considered a full subject of justice. Instead, they 'elevate' the PMD to more traditional standards for status or subjecthood.[187] They do reconceptualize these standards - all of the three groups I am contrasting do, but whereas the 'passive citizenship' theorists reconceptualize them in order to make the indirect integration of the PMD innocuous or compatible (if not strongly, urgently or compellingly justified) with a social contract taking place between capable, active citizens, and whereas the 'active citizenship' theorists who 'lower' the standards reconceptualize them in order to capture a greater number of less capacitated beings, Silvers and Francis reconceptualize these standards in a less radical way, by anchoring them in the liberal tradition, of which they offer plausible readings. This is notable in the way in which they anchor their theory of 'justice through trust' and their views of conceptions of the good (as socially rather than strictly independently scripted) within established liberal traditions. Certainly, this approach counts in their favor, at least pragmatically, in so far as incremental changes better answer to a valued tradition deeply embedded into our liberal political culture (and revived by Rawls) which they suggest to better understand rather than to overthrow. At the same time as they reconceptualize in a relatively traditional way key liberal notions of the social contract, they

[186] 'Among the more inclusive criteria proposed are the capacity to communicate, or for minimal communication with other humans; to value or care; to give and receive love; and to engage in relationships characterized by reciprocity of care.' (citations omitted) David Wasserman and others, 'Cognitive Disability and Moral Status', *The Stanford Encyclopedia of Philosophy* (Summer 2013 edn), forthcoming URL: <http://plato.stanford.edu/archives/sum2013/entries/cognitive-disability/>.

[187] Surely, the theorists who 'lower' or 'lessen' the threshold for RMS, contractual or not, would not consider that their reconceptualization implies any pejorative 'lessening': they are simply getting to the truth of what should suffice to establish moral status or subjecthood within a theory of justice. Yet, it is part of Silvers' and Francis' conceptual frame to be aware of the social and historical context within which disabled people have been conceptualized as objects of obligations (instead of subjects) and to suggest that pejorative tags (of being a non-contributing beneficiary and a 'burden') may insidiously accompany such less demanding benchmarks, as we will see.

also do something that neither of the two other groups mentioned above do (at least nowhere near as forcefully): they reconceptualize the PMD themselves, or rather they spend a considerate amount of their argumentative focus on how the disabled can individually be enabled to meet a (liberal) threshold (by contrast with only or mostly focusing on rethinking this threshold).

Through the seven essays that we will consider in this chapter, Silvers and Francis develop a rather complex conceptual apparatus to make the case for the integration of the PMD mentioned above. Their arguments involve the sketching of a theory of justice (justice through trust) and an under-developed suggestion of another theory of justice (justice for talents) as well as metaphysical, ethical and sociological arguments dealing notably with autonomy, conceptions of the good, 'cognitive prosthesis' and prejudices toward the disabled when we see them primarily as objects of redistribution instead of participants to be integrated. To their merits, these elements fall together coherently like pieces of a puzzle the key components of which I am summing up in the five following premises or claims. While I think there is much to be said in their favor, they do not fully capture the reasons why we care for the mentally disabled. I must conclude that even a social contract theory extended with the conceptual apparatus provided by Silvers and Francis would not be sufficient to satisfactorily and fully explain why we owe the sort of duties we owe to the mentally disabled, severely or not, although it certainly goes an important way in explaining a lot of them.

(1) The PMD should be socially integrated rather than being the beneficiaries of compensatory distribution.

(2) The justifications for this integration are their talents and capacities to cooperate,

(3) as well as the fact that their integration to the social structure will enhance social trust

(4) and their capacity for formulating a conception of the good

(5) thanks to the help of the proper support, a support that must not become a kind of compensatory distribution (or else, it would contradict premise # 1) but rather enhance individual capacities in a way that enable social contribution and integration.

Not all of their essays are focused exclusively on the cognitively disabled, but I will myself take this focus and interpret some of Silvers' arguments as applying to the PMD when I believe she would herself agree to it and that her argument allows for it. I have already assessed the merits of (3), their theory of justice as trust, which was complex and promising enough to deserve a separate chapter (also, it would not very well fit in a chapter on contractualist theories of active citizenship).[188]

Before I start exploring and problematizing Silvers' and Francis' arguments, I should make its connection with social contract theory explicit. Their arguments are to the effect that the PMD effectively possess capacities pertinent to taking part to a collective endeavor regulated by a social contract. Namely, their talents and their capacities to cooperate and to

[188] The PMD's capacity to trust or foster trust is more convincingly read as a kind of passive participation, though it could also be understood as a non-traditional active kind. It is also most simply and boldly stated as a contractarian integrationist argument instead of a contractualist one. This is why I used it as the best contractarian case for (active or passive) citizenship available. It may be associated with contractualism instead, though I suspect that taking the capacity to 'trust' too seriously may imply not taking other psychological capacities central to contractualist doctrines seriously enough.

elaborate a conception of the good with the proper support are 'contractually' useful. Silvers' focus on their social as well as their philosophical image (i.e. their social role as well as their roles within justice theories) and how both reinforce a common harmful stereotype is also relevant to at least a variety of social contract theories which would have trouble successfully justifying the integration of the PMD if they were only seen as objects of compensatory redistribution, as 'burdens' rather than as valuable participants to contract-like moral, political and social arrangements. In her words, '[d]istributive schemes that cast people with disabilities as supported by others rather than as supporting others thereby diminish their opportunities by denying them the identities they need to initiate mutual or reciprocal relationships,'[189] that is, the kind of relationships which constitute the sort of social cooperation that reasonable subjects of justice would endeavor to pursue fairly.[190]

4.1 Justice For Talents

4.1.1 The Distributive Discourse of Compensation *Versus* the Rewarding Discourse of Talents

Anita Silvers starts with a dichotomy between the PMD as vulnerable, dependent, burdens, and the PMD as potential social participants. The operational goals of justice associated with the former conception are distribution, separation, special treatments and accommodations

[189] Anita Silvers, 'Formal Justice' in *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy (Anita Silvers, David Wasserman,* Mary B. Mahowald (eds), Rowman & Littlefield 1998) 13, 142.
[190] Rawls, *Political Liberalism* (n 1) 16, 20, 50.

whereas the operational goals associated with the latter conception of the PMD are integration, similar treatment and neutrality.[191]

Silvers' dichotomy between integration and compensation is similar to Martha Minow's dichotomy between denying and recognizing difference and Ronald Dworkin's dichotomy between the right to an equal treatment and the right to be treated as an equal.[192] Martha Minow called it the dilemma of difference: 'when does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?'[193]

Silvers clearly takes a side in this dichotomy. She is opposed to the idea that the 'problem' of disability is one of (re)distribution, which involves seeing the disabled as burdensome, deficient and needy. The justificatory focus is put on their 'special needs' requiring 'extraordinary allocations of resources', and this philosophical frame is influenced by, and exacerbates, a pejorative or prejudiced way of thinking about the disabled. The resulting just practices required by such a view also has the harmful effect of furthering the social isolation of the disabled. This isolation, or rather insulation, of the disabled both within concrete social institutions and structures and within philosophy is the key problem that Silvers is fighting against. Her proposal is to shift the focus of considerations of justice

[191] Martha L. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1991) 20-21; Anita Silvers, 'No talent? Beyond the worst off!: A diverse theory of justice for disability' in *Disability and Disadvantage* (Kimberley Brownlee, Adam Cureton (eds) OUP 2011) 163, 167-9.
[192] Silvers, *No Talents?* (n 191) 167-9; Silvers, *Formal Justice* (n 189) 126; Ronald Dworkin, *Taking Right Seriously* (Harvard Univeristy Press 1978) 227.
[193] Minow (n 191) 20.

from distribution to integration.[194] In other words, the metric of justice should be social access, integration, opportunity to cooperate or participate to society and express one's talents, instead of focusing on enabling the PMD to partake of the basic goods or capabilities that non-disabled people enjoy. Of course, such a good could be social integration, but Silvers' point is to contrast a focus on social integration with a focus on compensation for their misfortune. The models she is criticizing would too quickly abandon the possibility of integrating the PMD and redistribute resources for the PMD by creating special - often protective and apparently well-meant - regimes for the PMD. Such insular regimes correlating, I believe, an insular kind of moral status, isolate the PMD, alienate them from society, hinder their self-accomplishment and, once put under such expansive tutelage, 'cast them as exceptionally needy and thereby in deficit compared with other people.'[195]

It is in this sense that Silvers is contrasting distribution and integration. However, I note that we could, like David Wasserman, insist that a 'just social response to disabilities must encompass distributive concerns' [196] and that the good(s) of integration, social participation and contribution are simply goods to be *distributed* among others. Instead of proposing a shift from distribution to integration, Silvers might have proposed a shift from distribution of resources and compensation for a lack of (normal) abilities to distribution of the conditions for being socially integrated. After all, it is not distribution *per se* that she is against, but distribution of the wrong kind of resource or good to people in dire need of being socially included and recognized as active citizens and talented contributors, rather than

[194] Silvers, *Formal Justice* (n 189) 4-5.
[195] ibid 34.
[196] Anita Silvers, David Wasserman, Mary B. Mahowald, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy (*Rowman & Littlefield 1998) 6.

being further marginalized and tagged as burdensome and needy unfortunate beings to be brought to an average or minimal level of well-being by some standard of normalcy through measures that isolate them.

This conceptual shift is part of her contractualist integrationist strategy of conceptualizing the disabled as active contractors and citizens instead of passive beneficiaries. On her account, focusing on redistribution at a later stage of the social contract procedures (as well as on redistribution at a later stage of social cooperation and production) has inherently exclusivist consequences. By emphasizing social integration instead of accommodation or compensation, she characterizes the disabled as active participants or contributors instead of passive beneficiaries, which brings them closer to the figure of active contractors that the current chapter is considering.

4.1.2 Social and Philosophical Prejudices Isolating the PMD from Active Participation

While Silvers does not deny that the PMD can and should sometimes be the object of care and recognizes that justice can also be a matter of compensation, she seems to (potentially paradoxically) hold that it is a mistake to emphasize compensatory concerns in a theory of justice dealing with the disabled. Indeed, she militates against it:

> There is all the difference in the world between conceiving of people with disabilities as equal and thereby as deserving only such differentiated treatment as is needed to reform social practice that excludes them and thinking of them as deficient and thereby as deserving of special benefits, entitlements, and

> exemptions to sustain them in their exclusion from the mainstream of commercial and civic life.[197]

Silvers suggests that people conceived as supported, protected or cared for are not 'social persons in a full and meaningful sense'.[198] Her description of their state of vulnerability and dependence has a certain hyperbolic or pejorative ring (the PMD's 'extraordinary needs', 'spectacular neediness' triggering a 'visceral protective [psychological] response') that makes her claim easier to accept. It is still a claim that theorists more comfortable with grounding the duties of justice toward the PMD on their vulnerability and dependence would be uncomfortable with. Silvers' argument thus seems to limit the possibility of being a subject of justice or a 'social person in a full and meaningful sense' to the capacity of being integrated. Her requirement that the PMD be able to 'initiate mutual or reciprocal relationships' and support others is alarming considering the limitations of some PMD.

My worry is that, no matter how progressive, helpful and inclusivist her proposal is, her attempt to make the PMD fit in a mainstream model of the person and of robust political entitlements may be yet another sort of normalizing strategy which Silvers herself criticizes. (By 'normalizing', I mean here to conceptualize the PMD, the standards of capacities they ought to possess to be entitled to a RMS, and the benefits they are owed, in function of a central case of person.) Silvers criticizes cases of wrongful normalizing - such as capping the PMD's social support to the realization of 'average talents' or even a lower threshold of a basic minimum. However, her own characterization of the PMD as individuals to be integrated rather than compensated seems like a kind of normalization. By forcing the PMD

[197] Silvers, *Formal Justice* (n 189) 138.
[198] ibid 141.

into the traditional liberal model of person or the contractualist model of a social member, she risks denying that central aspects of the PMD's lives and of the relations we have with them have more to do with caring for dependent people than with enabling their active participation and expression of talents to contribute to the common good, and that these aspects can be regulated by principles of justice. I firmly believe that her proposal is sound: our philosophical and political focus on compensation is often prejudiced and may lead to wrongfully leave the PMD with an insular (and generally lesser) moral status. It is nonetheless unjustifiably reductionist. Even if the PMD did have the contracting capacities and talents that she assumes they would have, given the proper social support, their RMS would still (at least, also) be grounded on other aspects of their identity and relations. I find that this conclusion is all the more salutary for the PMD that we may find that they do not have the kinds of contracting capacities and talents that a contractualist frame would require them to have in order to grant them a RMS, which is the conclusion that I reach in the penultimate section of this chapter on cognitive prostheses.

4.1.3 Justice for Talents: What Good and For Whose Benefit?

Surely, it sounds like a promising idea to take the notion of talents seriously and more specifically, to take the category of 'talented PMD' seriously. By contrast, we generally speak of the PMD's 'talents' in a compassionate and metaphorical way, as though they could not really belong to the category of 'talented', and even less 'exceptionally talented', people. That we take the notion of talents seriously in the sense that we recognize the value that the cultivation and expression of talents have for individuals, and as a matter of respect for the

individual, as well as of increasing the pool of common resources or value is not very controversial. To say that the *PMD* should be conceptualized as talented individuals instead of talentless unfortunate individuals burdening the rest of us or as being entitled to have their talents supported beyond the realization of 'average talents' is a more novel and controversial claim, and one worth defending.

Let me start by pointing out a problem affecting her general argument: the conflation of different (dis)advantages for the disabled. She is pulling many conceptual strands into a single bundle of justice-related ideas, models and strategies that she favors (the 'integration' bundle), and equally many strands into the bundle that she criticizes (the 'distribution' bundle). It may be problematic if we realize that these different strands do not have to be pulled together. Here are a few strands worth unweaving for me to state my agreements and disagreements.

She associates the notion of distribution with a characterization of the PMD as 'worst off' but this association seems quite contingent, in spite of the argument she makes for it. I suggested that the operational goal of justice could be distribution in either case, but distribution of different goods, to different people, for different reasons. This brings us to the nature of the goods that could be distributed as per Silvers' arguments:

(1) conditions to realize one's talents (subjective standard)
(2) conditions to realize average or minimum talents (social 'normal' standard or objective basic threshold required for human flourishing)

(3) conditions to realize one's exceptional talents

(4) conditions to be socially integrated.

One must also come clear about who is to be benefitted: society or the individual or, if both, whether one has priority over the other. Lastly, talents can be used as properties which justify granting a robust status to a being or can be a notion guiding redistribution to beings whose status is already secured (Silvers mostly deals with the latter as she, by and large, assumes in her writing on 'justice as talents' that the disabled are already members of society, but portions of her argument can be read as stating that being talented is a RMS-granting capacity insofar as the truly talentless fall outside of the scope of 'justice for talents'.)

All of these notions are distinct and should not be assumed to always fall within the same bag, though they may, and perhaps Silvers' claim is that they do, although I suspect she is only interested to highlight that in numerous cases these notions are related in the following way: it is both good for the individual and for society to promote talents and exceptional talents, and social integration allows for the realization of these talents for the individual's and society's sake. These notions may surely coincide but sometimes they will not and this becomes a problem when we must choose how to distribute limited resources and prioritize the realization of certain goods or needs over others.

For instance, certain ordinary talents may coincide with social integration while others may be exercised solitarily. The good of social integration and of talents are therefore

not to be analytically connected as necessary for one another (except if we take 'social integration' to mean simply to have benefitted from an upbringing and from social resources allowing one to possess the capacities that he is exercising, even as a hermit). This may be even truer of extraordinary talents, if the saying 'geniuses are misunderstood' holds any truth. While the realization of one's ordinary and extraordinary talents will further one's well-being or flourishing, they will not always serve society, for instance, by increasing the common pool of resources. (We may define 'serving the social good' loosely, but there is a limit. Perhaps an iconoclastic poet will turn out to enrich humanity's heritage for generations to come. Even so, however, the exercise of certain talents will still not enrich society but be for the individual's benefit alone. For instance, a talent for meditating.) Also, it is not clear whether a society has such a stringent duty to help one develop one's exceptional talents out of consideration for that person if other people haven't had the chance to develop even their ordinary talents (even more so, to add another variable, if the latter talents serve society but not the former).

Silvers does not conclude by jettisoning the compensatory distributive discourse altogether, but only to argue that the disabled should be granted the conditions for their social integration and the realization of their talents on a different basis. My answer is that once the distinctions above are made, such a conclusion is not so obvious and therefore that a contractual account may not suffice to explain the PMD's entitlement to have a robust claim to have their needs supported.

For instance, we could cap the social support of the realization of people's 'ordinary talents' to 60% (of realization of these talents, evaluated subjectively), given our limited resources, but cap the social support for the realization of people's exceptional talents to 10%.[199] If we decided to give more than the allotted 60% or 10% to disabled people, it would more likely be a form of compensation for the losses that they incur in many areas of their lives rather than just the result of an assessment of the value of their talents. More generally, though I believe that justice for the PMD can be framed as 'justice for talents' in many cases, I would insist to keep distributive compensatory concerns within a theory of 'justice for talents' applying to them, as respect for their talents may often or best be understood as a way to care for them.

Silvers, on the other hand, grounds her theory of 'justice for talents' on two pillars different from caring, and even more from compensation and charity. First, focusing on realizing people's talents is a way that 'enabl[es] cooperative interaction among them', lets them participate to 'productive cooperation' and does not exclude them from 'collaborative human activities' where these strengths and talents can be put to use.[200] However, this conception of talents limits the kind of talents that would be supported to those that are in demand, from a social point of view. There is a good side to this: it is framing the PMD 'like the rest of us': we are all 'selling' our talents intersubjectively, and it is part of Silvers' underlying belief that we should not think of the PMD as having anything less to 'sell'. It is

[199] At times, Silvers seem to conflate both kinds of talents (which are, after all, all parts of someone's talents) but our intuitions differ when someone can reach (supposing for this argument's sake that such a scale is a proper way to talk about talents) a score of 100 of 'talents' and someone else only has the potential to score a 50 on the talent scale. To help both at 60% of their respective potentials seems unfair, past a certain threshold which already respect people's basic needs to realize themselves through talents and beyond which their additional 'fortune' seems more of a luxury than the realization of other aspects of people's welfare.
[200] E.g. Silvers, *No Talents?* (n 191) 192, 196-8.

not obvious, however, that all PMD indeed have talents to 'sell' if that is the line of argument taken. The first pillar of Silvers' 'justice for talents' connects social integration and talents in a way that does not seem necessary and limits the notion of 'talents' or the available justifications for supporting them.

The second pillar is oriented toward individuals rather the common good: promoting someone's talents respects people's autonomy and improves their self-esteem.[201] While the importance of people's autonomy and development of personal projects and talents is very much prized not only in the social contract tradition, but in modern moral and political philosophy at large, it is not clear that supporting the talents of some disabled people as a matter of remediation should not come before supporting their talents as a kind of reward for the exercise of these talents. (Otherwise, I will suggest, capping their talents in more restrictive ways would not seem so unfair.)

Some may think of a third pillar: that the development of talents, including exceptional talents, is the relevant social aim in itself, but I think about Silvers' position in the more conventional framework of setting social priorities by thinking about people's well-being.

4.1.4 Remediating Distributive Scheme *Or* Integrative Pro-Talents Scheme

[201] Silvers, *No Talents?* (n 191) 192.

This section criticizes the tendency to opt for a unique scheme or a unique justification to deal with the PMD, as well as the tendency to generalize conclusions that apply to some cognitively disabled people to all of them. These 'monistic' or generalizing tendencies, though easily correctable, affect a considerable amount of literature on disability and justice. I do not reject Silvers' position but I suggest that its reach needs to be curtailed.

I agree with Silvers that integrative schemes are important to respect and show concern for the PMD and I also agree that conceptualizing the PMD as utterly non-reciprocating recipients of care is likely to feed (and feed on) prejudices about disabled people (as 'talentless' 'burdens') and that in many cases this would constitute a loss for society and a mistake about the value of their input and of the relations we have with them. I do not agree, however, that a frame focussing on compensation or remediation for the worst off is conceptually bound to cause such an impact. Silvers' claim that it 'inescapably'[202] cause such an impact does not seem justified. This compensatory frame could be preserved and its harmful social reception mitigated in practical ways that would not imply a wholesale rejection of it.

Are there other reasons for focusing on disabled individuals *qua* primarily autonomous beings to whom we owe integration (and the support to achieve that end) as a matter of justice rather than to opt for a model of the disabled as primarily vulnerable and dependent and to whom justice requires us to give compensation, remediation and care? In addition to the reason just mentioned, Silvers (and on this account, Francis as well) can also

[202] Silvers, *Formal Justice* (n 189) 34.

invoke the advantages of remaining within our mainstream political tradition and liberal commitments. This reason justifies promoting a conceptualization of the PMD as social participants, but I do not find that it would compellingly justify *not* conceptualizing them as 'worst off' or 'cared-for' deserving support and protection as a matter of justice as well. This one-sided way of characterizing the PMD is also to be criticized in alternative theories which consider the PMD primarily as dependents and only consider that they ought to be integrated or encouraged to develop their talents as a means of properly caring for them. These are two paradigms, encompassing a conception of the PMD, of the basis for their subjecthood, and of the duties of justice owed to them. The former nest obligations of care or protection within a more fundamental obligation to respect their autonomy whereas the latter nest the obligation to respect their autonomy in a more fundamental duty to care for them. A third way would be to accept a paradigm conciliating both dimensions of the PMD by recognizing that the PMD, like any other human beings, are at once autonomous and dependent, that these two traits are ineliminable parts of what humans beings are, and that both morality and justice should take this into account without trying to subsume one dimension in the other. I will come back to such a pluralist model in the conclusion.

It may be useful to contrast Anita Silvers' and Eva Kittay's personal experiences to make sense of their respective (I am suggesting, over-)generalization.[203] They use the category of 'disabled' in a way that requires more specificity. Professor Silvers is a wheelchair user, and like wheelchair users, she has had to cope with various exclusions and

[203] Silvers camps herself on the integration/autonomy side: Silvers, *Formal Justice* (n 189) 38-9, 144.

humiliations[204] which, in spite of being prejudiced and unfounded, often cost wheelchair users the opportunity to exercise their entitlements and express their talents. It is obviously understandable why exceptionally gifted people like her could not care less about being granted charity but rather demand to be treated with decency and justice and be given the same opportunity as anyone to realize their conception of the good and satisfy their tastes. It is indeed profoundly insulting for someone capable to help herself, let alone hundreds around her, to be socially pictured as some sort of 'burden', an image sadly reinforced by policies and theories emphasizing disabled people's needs over their talents, and distinguishing their needs as somehow essentially different from the needs of other folks. On the other hand, Professor Kittay's daughter, Sesha is a grown woman with congenital cerebral palsy and severe mental disability. She was expressive, pleasant and welcoming when I met her, but she was unable to talk, and it is unclear to me whether she would have recognized me if I had come to pay her a visit on the following day. Eva, her mother, has acted as a carer for Sesha for her whole life and, like most parents of cognitively impaired people, made sure that her daughter would be properly cared for when her parents could no longer carry out this work. It is unsurprising that much of her work has focused on the fair distribution of caring.

I believe that such personal experiences can enrich one's philosophical arguments, because it enriches the life of the philosopher and her moral insight. I think that both philosophers address valid problems and should simply be careful not to over-generalize. There is a danger that a philosopher wanting to make a forceful point about the category of

[204] Consider Silvers, *Formal Justice* (n 189) 1 and 114-5.

the disabled as a whole forgets that an alternative view may also hold in other cases, or in the same cases concurrently, but to different degree.

As obvious as this point sounds, Silvers and Kittay, among other authors, sometimes ignore it. The category of the disabled cannot be equated with the category of the PMD. There are important moral differences between physical and mental disabilities, as well as between light and severe cognitive impairments. In the four essays by Silvers (one being co-written with Francis), only one is about disability in general. The numerous examples used in that particular essay[205] illustrate cases in which conceptualizations of disabled individuals as objects or protection and care rather than as social participants have not been beneficial for all parties involved. (I would still hold that, even in such cases, remediating frames should not be abandoned altogether although I wholly agree that they should recede when they become incompatible with more appropriate integrative frames.) Silvers seamlessly transpose many of her arguments and her core way of thinking into her three other essays focused on mental disability. However, this transposition becomes problematic when it means to be applied to the PMD as well (as it does) and when it underestimates the number of PMD that their integrative theory and its liberal conceptual apparatus, no matter how much broader they made it, fails to (plausibly) capture, or fails to properly express our intuitions on the central reasons for being morally obligated to them.

The solution is simple: we have to make clear that the PMD constitute a particular case. This assertion should not alarm theorists inclined to detect theoretical moves that have

[205] Silvers, *Formal Justice* (n 189).

socially outlying effects. I am not saying that the PMD fall under a different status altogether: I believe that both paradigms of autonomy and dependence apply to all human beings and that both frames apply alternately, to different extents, at different times of our lives, and in different relations. Only narrow (and somewhat outlandish though common) understandings of autonomy, care and dependency allow us to categorize people as *either* autonomous *or* dependent. Philosophical, political and legal myths idealizing such fictive categories may do more harm than good. The fact that one individual would happen to be extremely dependent and have an almost inexistent (or no) autonomy would not fundamentally affect his moral and political status, though the autonomy-based frames would apply little, or, in some rare cases, not at all. We are both dependent and autonomous to different degrees, and the level of autonomy does not necessarily correlate the level of dependence in an inversely proportional way (independence and autonomy are not simply antonyms), except when they apply to a same role, relation or event and their simultaneous increase would be contradictory. To illustrate, one can be highly autonomous and yet highly depend upon others, as is the case of people leading complex collective endeavors toward success. One's lack of autonomy in a particular respect, like feeding oneself, may however more or less directly correlate an augmented dependence (on being fed) in that specific regard.

This 'conciliatory' model would not reject the pertinence of social contract theory for describing moral obligations and duties of justice, but it would curtail it to certain relational aspects of the PMD's lives (and I add, though it is beyond the scope of this thesis, of the lives of non-disabled people as well). By contrast, the exclusively contractual model would

insist that justice is fundamentally a matter of dealings with subjects who are autonomous and independent and, while their other traits (like vulnerability and dependence) are ineliminable, they indirectly become considerations of justice if and only if their welfare is rationally brought up by contractors, conceived in a variety of ways, but still excluding the PMD.

Such a model, if successful, would at least curtail contractualism's ambition to provide the grounds for RMS. I will start sketching it in the next, concluding chapter. The second portion of this chapter is dedicated to contractualist views that would rather insist that the PMD have what it takes to be contractors.

4.2 The PMD's Capacity for Formulating and Realizing a Conception of the Good

An important constructivist feature present in social contract theory is the idea that a substantial notion of what the 'good' (to be pursued individually and collectively) is should not precede the contractual procedure, but partly (1) be its outcome or be inherent to the developed contractual procedure and (2) be left for individuals to determine for themselves within certain (contractually determined) constraints.

It is therefore important for Silvers and Francis to show that the PMD can effectively have and express such a 'will', i.e. that they can effectively author or originate a conception of the good (and therefore are amongst the actors in need of a contractual scenario to avoid

conflict and maximize the possibility of realizing their own conception of the goods and satisfy their tastes deriving from it). Their aim is to show that the PMD possess the powers or capacities that are necessary to be 'full-fledged cooperators' within the social contract tradition.

They argue that the PMD possess the three powers traditionally characterizing the connections between a moral agent and a conception of the good within contractualist thought, and in particular the Rawlsian branch: reciprocity, responsibility and self-origination.

The power to *reciprocate* is the capacity to '[govern] one's self to benefit others in return for being benefited oneself.'[206] Contrary to Rawls and Nussbaum who claim that reciprocity 'is fundamental to traditional social contract theory', and similarly to Christie Hartley, who suggests a different understanding of reciprocity to make social contract theory inclusive of the PMD[207], Francis and Silvers consider that the capacity to reciprocate is not required to obtain the 'status of full participant in social cooperation'. In other words, they reject the requirement of reciprocity as meaning 'abilities to strategize or to be of use to others,'[208] but would not reject it if it were reduced to meaning mutually beneficial capacity to engage with one another.

[206] Silvers and Francis, *Thinking about the good* (n 83) 249.
[207] See section 4.2.2 *The Capacity to Engage*.
[208] Silvers and Francis, *Thinking about the good* (n 83) 250.

Silvers' and Francis' notion of *responsibility* correlates the capacities to control one's thoughts about a conception of the good and understand this conception and its feasibility. These capacities enable an agent to be in control of a conception of the good rather than have this conception controlling her and be responsible 'for pursuing and realizing that good'. The PMD may not be able to thus review the feasibility and propriety of their conception of the good, but may be assisted in doing so (as well as in elaborating the conception itself, which is the third power).

The last moral power is the most fundamental one: it is the capacity to be the author of a conception of the good, that is, to be a valuer, to subjectively value one's self and one's goals rather than to endorse society's valuing. As we saw in our analysis of Korsgaard, this is the Kantian idea that the ultimate, non-derivative, source of value is to be found in a legislating act of the individual will. Value is not to be found in the world independently from the exercise of a capacity to 'take [oneself] and [one's] personally embraced ideas of the good [...] as the source of their duties and obligations'. These powers of 'self-origination' and 'self-authentication' are endorsed by Rawls[209], as well as by Silvers and Francis as the fundamental requirements to be a full social participant.

4.2.1 Beyond the Independence Assumption

[209] Silvers and Francis, *Thinking about the good* (n 83) 237, 253; John Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 (9) Journal of Philosophy 515, 546.

Silvers and Francis re-interpret the contractualist Rawlsian requirements that subjects of justice should possess these moral powers rather than discard it or diminish its centrality to a theory of justice. Importantly, they do not transform or lower this requirement either: they claim to explain it as it most plausibly is. They deployed the same strategy in their *Justice Through Trust*: in all of their considered essays, they are not departing from traditional liberal concepts, but they are rather claiming that these concepts have been misunderstood. A proper understanding of them, purged from myths and prejudices, would actually allow for the integration of the PMD.

Part of their strategy is to question the 'independence assumption' and the normative conception of the subject on which it rests.

The 'independence assumption', at work in liberal theories including Rawls', postulates that people build their conception of the good 'in abstraction from interaction with others. Ontologically, everyone is an island with respect to constructing conceptions of the good.' This assumption relies on a 'deeply normative (...) idealization of agency as insularly independent'.[210]

Silvers and Francis distinguish between two aspects of constructing a theory of the good. The first one is the idea that we have described as being central to the social contract theory and its metaphysical and political recentralization around the subject as the original source of value (*qua* valuer): the conception must be elaborated individually, personally or

[210] Silvers and Francis, *Thinking about the good* (n 83) 242.

subjectively, so as to be the subject's own in a morally relevant way. The second one is that this elaboration must take place in abstraction of social relations, 'independently or everyone else'. Silvers and Francis wish to preserve the first requirement and jettison the second.[211] This is in line with their focus on preserving the authorship of a conception of the good, autonomy, self-origination of value, etc., while accepting that support, dependence, social help and social scripts are used in the process.

Their justification is that the independence assumption is mistaken. Drawing notably from feminist literature[212] and Anthony Appiah's concept of social scripts, they argue that the exercise of autonomy must be understood, ethically, as taking place within a matrix of relationships and that conceptions of the good, even though '[they] must be tailored [to reflect] the individual's subjective experiences and personal characteristics' (the 'individual' aspect), must also take into account social contexts, scripts and roles.[213] Appiah conceives of individuality as a social rather than pre-social notion: even though it is the product of a subjective creation, it must respond to our environment. This is a compelling view: the subjective input consists in the individual constructing her identity by responding to, endorsing, picking, valuing elements of social scripts or narratives provided by collective identities. The individual cannot elaborate her conception of the good *independently* from these cultural standards, though she can *autonomously* do so, which implies that she can reject these narratives instead of using them in 'shaping [her] pursuits and telling [her] life

[211] ibid 242, 249, 238-9; Anita Silvers and Leslie P. Francis, 'Liberalism and individually scripted ideas of the good: Meeting the challenge of dependent agency' (2007) 33 (2) Social Theory and Practice 311, 322, 332.
[212] E.g. Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self: Feminist Essays on Autonomy, Agency and Social Self* (OUP 2000).
[213] Silvers and Francis, *Liberalism and individually scripted ideas of the good* (n 211) 322.

stories'. Appiah, Silvers and Francis therefore subscribe to the communitarian acknowledgment of the necessity to start from collective 'scripts' when constructing one's personal identity and, more specifically to social contract theory, when elaborating a conception of the good.[214]

Going one step further, they introduce the idea of individuals receiving support in elaborating a conception of the good. Rejecting the 'independence assumption' allows them not only to correct the mistaken belief that agents construct their conception of the good in abstraction of social scripts by exercising their autonomy in a non-relational way, but also allows them to claim that agents come to their personalized conceptions of their good aided by others. Through parents teaching us many social narratives available to us, colleagues inspiring us to adopt a narrative rather than another, friends helping us to order our own narrative, calling our bluff or criticizing our quixotism, etc., we constantly receive external input in building our conceptions of the good. Similarly to Southwood's acknowledgement of the important role that 'advisors' play in our lives[215], they note: 'We commonly advise or urge or even intervene to induce unmindful or feckless individuals to shift plans or adopt different projects. Most of us do not build responsible aspirations independent of our responses to other people, nor are we expected to do so.'[216]

[214] See Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press 2007) 22, 108; Silvers, *Formal Justice* (n 189) 102; Silvers and Francis, *Thinking about the good* (n 83) 254; Silvers and Francis, *Liberalism and individually scripted ideas of the good* (n 211) 322, 331-2. For an account of human nature complementing Appiah's view of individuality, see Christian Smith, *Moral Believing Animals: Human Personhood and Culture* (OUP 2003).
[215] Nicholas Southwood, Contractualism and the Foundations of Morality (OUP 2010) 111 and ff.
[216] Silvers and Francis, *Thinking about the good* (n 83) 251; see also Silvers and Francis, *Liberalism and individually scripted ideas of the good* (n 211) 325, 332-3.

Since we are all dependent upon some kind of advisorship to various degrees, there is no need for a novel frame to deal with the case of the PMD, whose trustees or collaborators should provide a mode of support tailored to their needs to construct and realize subjective conceptions of the good.

Two pieces of their arguments, in particular, cement this claim. First, they protect themselves from the criticism that their view implies a controversial substantial conception of the person by denying that theorists who claim to provide a political but not metaphysical account (like Rawls and Nussbaum) do not really succeed to do so. The independence assumption is precisely the sort of metaphysical commitment that Rawls claims to be avoiding: it relies on the ontological picture of people as independent self-validators bound and informed by reasonableness alone, and excludes the idea that 'conceptions of the good are interactive and intersubjective products'.[217] Second, they reject the idea that autonomy must be a non-scalar notion to play its role within social contract theory. Francis explains that autonomy is a bundle of various attributes, including the capacity to value and the powers of responsibility and self-origination as described above, as well as the capacities to act under categorical imperatives (by opposition to desires), not to be subject to coercion and to participate to the construction of justice.[218] Her point is to show that the PMD possess enough of these attributes to be meaningfully said to be autonomous.

[217] Silvers and Francis, *Thinking about the good* (n 83) 242.
[218] Leslie P. Francis, 'Understanding Autonomy in Light of Intellectual Disability' in *Disability and Disadvantage* (Kimberley Brownlee, Adam Cureton (eds), OUP 2011) 200, 201-2.

The different arguments presented by Silvers and Francis in the essays here explored fit coherently together and amount to a compelling vindication of a dependent contractual agency. I find this view hard to resist. I agree that our contractual agency is much more dependent and socially scripted than what the 'independence assumption' suggests.

I note, however, that their characterization of the 'independence assumption' is perhaps too bold or unfair to Rawls. Charles Taylor's similar criticism of the 'atomism' characterizing notably social contract theories, for instance, does not imply that conceptions of the good, must be arrived at not only individually but also in isolation of everyone else.[219] (If anything, the fact that they may not be as distant as they think from Rawls and other liberals supports rather than undermine the argument that people can rely on others to elaborate their conception of the good.)

Unlike them, however, I do not think that it applies to all PMD. For some, a 'proxy' does not seem to successfully express the PMD's powers of responsibility and self-origination, at least not to an extent relevant for social contract theory. Also, for some PMD, and perhaps all PMD and even non-disabled people, their autonomy (or their cognitively assisted autonomy) does not seem to completely explain why we are obligated to others, including as a matter of justice, in many circumstances.

While I would expect theorists like Silvers and Francis to insist upon a more optimistic empirical assessment and perhaps not to share my intuition that the contractualist

[219] Charles Taylor, *Philosophical Papers* (vol 2, CUP 1985) ch 7.

frame fails to completely or best capture what we owe to the PMD, I believe that the way to successfully escape the criticisms of their account of a proxy that I will present is to reduce their notion of 'collaborators' to the notion of trustees speaking in the PMD's interest, whether or not it translates the PMD's actual will, desire, autonomy or conception of the good. This, however, would be a retreat to the theory of passive citizenship previously criticized for its inability to provide a *contractual* ground for granting such a fictional representation to beings who would not otherwise be incorporated into a contract-based society.

Before criticizing their account of cognitive prosthesis, I wish to consider an alternative view to their (still relatively demanding) contractual requirements for rather sophisticated powers of autonomy, responsibility and self-origination. Christie Hartley has suggested lowering or broadening more radically the cognitive requirements set by a social contract theory to grant an individual RMS: instead of capacities to autonomously elaborate a conception of the good as well a second-order idea about its feasibility and desirability, Hartley suggests that all that is required in a capacity to engage.

4.2.2 The Capacity to Engage

Hartley argues that all that contractualism requires for someone to be granted full membership to society as subjects of justice is the capacity to 'make a *cooperative*

contribution to a society based on mutual respect'.[220] From there, she can deny the Rawlsian requirement that subjects of justice ought to possess the two powers of moral personally[221] to partake to the kind of social cooperation at the heart of contractualism. Finally, she argues that almost all PMD fulfill this requirement.

Let me flesh out her key points and explain why I believe that they either beg the question or rely on non-contractualist intuitions. That said, even though I do not think that her key points entirely succeed to integrate the PMD as they purport to do, her argument has the key merit of decisively bringing out the Kantian thread weaved into the contractualist tapestry to the forefront. Not all subjects of justice are (Rawlsian) philosophers, in spite of what the sophisticated requirements of social contract theory seem to imply. Theorists like Francis, who highlights that autonomy is multifaceted and that being a subject of contractualist justice does not require all of these facets, or like Hartley, who says the same of social cooperation, are much needed to make sense of the fact that subjects of justice are not equally cooperating: many of them receive more than they give or the other way around. Like Korsgaard, Nussbaum and Hartley point out, 'Contractualists need not claim those to whom the principles of justice apply are the same as those who design the principles'[222]; not everyone needs to be a social designer of fair institutions. One could answer that these statements confuse the ideal representation of subjects of justice and designers of social institutions with actual citizens like you and I, but my point is rather that this former ideal is

[220] Hartley (n 27) 28.
[221] Rawls, *Political Liberalism* (n 1) 302: 'the capacity for a sense of right and justice (the capacity to honor fair terms of cooperation and thus be reasonable), and the capacity for a conception of the good (and thus to be rational)'.
[222] Hartley (n 27) 28.

not the right ideal. A contract-based society should not be idealized as an expansion of a one-to-one, tit-for-tat contract, but as a matrix of relations which enable 'contractual relations'[223] to take place (As we saw, this idea has most forcefully been expressed by Silvers and Francis.) My criticism toward Hartley is that, while she rightly extends the range of relations that we would intuitively think count to make one a full subject of justice, it is hard to see how these relations still qualify as contractual, even on her broad contractualist account.

Hartley uses contractualism's deep ideas or commitments to reinterpret certain of its notions that could otherwise exclude most of the PMD. Notably, she understands the notion of social cooperation as (contractualist) reciprocity rather than as the notion of mutual advantage.[224] By that, she means that cooperators' contributions do not have to be 'a net gain for society', and refers to Rawls to show that a Rawlsian understanding of reciprocity as mutuality may plausibly depart from a more contractarian understanding. Rawls explains reciprocity thus: 'all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard'[225] and defines it as: 'a relation between citizens expressed by principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world'.[226]

[223] Not in the ordinary sense of contract of course, but in the sense of mutually benefitting and binding expressions of one's autonomous will.
[224] Hartley (n 27) 18-9.
[225] Rawls, *Justice as Fairness* (n 1) 6.
[226] Rawls, *Political Liberalism* (n 1) 17.

This understanding of reciprocity opens the door to a sort of 'rule-contractualism', in the sense that the focus is not on whether the particular individual can partake to all social institutions as the 'fullest possible' idealized participant of the social contract could, but whether he can participate to a contractualist society. Rule-contractualism displaces the question rather than answers it: what are the rules according to which individuals can act to be social cooperators? On contractualist accounts of the passive citizenship of the PMD or on contractarian accounts of their RMS, this rule-contractualism may require only that their inclusion improves the conditions that make a contractual society go well, even though they are only passive subjects or objects. By contrast, Hartley answers that individuals are to be considered full subjects of justice if they take an active participatory role. They must have the capacity to 'make a *cooperative* contribution to a society based on mutual respect'[227], which brings the notion of a relation of mutual respect to the forefront of what contractualism centrally values and promotes.[228] (As we will see however, this could also be taken to mean that the PMD are not active participants to the social contract, but only active participants to certain relations which are necessary for a contractualist society to go well. They would then not really be 'active contractual subjects' but rather passive citizens or objects, which would hinder the quality of their status, as we saw in the chapter on contractarianism and on passive citizenship.)

Her next move is to distinguish herself from Cyntha Stark or Rawls who, while they make room for a spectrum within which 'how much individuals contribute is not important',

[227] Hartley (n 27) 28.
[228] ibid 29: 'Contractualism concerns the establishment of mutual respect among members of society; this essentially has to do with individuals relating to each other in a certain kind of way.'

mind that certain individuals are not able to contribute to 'all spheres of social life: the political realm, the family, civil society, and the economy'.[229] Hartley suggests that the deepest commitment of contractualism (to reciprocity as social cooperation within a society promoting mutual respect) does not 'compare or evaluate the different contributions of members' and whether they are 'able to contribute to each of the main institutions.'[230]

This is how Hartley gets to her desired conclusion that contractualism really only requires a capacity to contribute cooperatively to *some* of the social institutions in a way that allows relations of mutual respect to take place.

She says that such relations include, for instance, relationships of care to which, indeed, almost all PMD can meaningfully participate (at least at the receiving end). All they require, on her account, is a capacity to engage, defined as

> the capacity to see another as a responsive, animate being and to recognize the ability of the other to be responsive to something she interprets as a communication to herself. It is the ability to recognize others in a certain kind of way and to attribute to them a certain kind of standing (the standing of a being with whom communication is possible), but it also involves the ability to make some kind of communication to another.[231]

It is at this point that her argument becomes problematic. First, because it seems to make the value of the relations with the PMD contingent upon the fact that they factually improve the quality or number of mutually respectful relations. On this reading of her argument, I take

[229] Stark (n 30) 24.
[230] Hartley (n 27) 27.
[231] ibid 28.

her to say that many relations to which the PMD participate are only derivatively valuable, as she says: 'Certain kinds of relationships among members of society such as mutually supportive companionate relationships and relationships based on mutual trust help make relationships based on respect possible.'[232]

However, other passages raise a textual ambiguity and she could mean - instead, or also - that these relations are themselves an instance of mutually respectful relations, which would bring (a) the empirical question of whether the PMD can indeed take part to relations of respect in the contractualist Kantian sense she has been evoking or, alternatively, (b) if we defined respect more broadly or along a spectrum that would apply in the case of the PMD, it would beg the question: what would be the basis for such respect?

Hartley writes that: 'the capacity for engagement makes possible certain sorts of cooperative relationships that fundamentally concern individuals relating to each other in a certain kind of way and are themselves important to contractualist society.'[233]

I am not sure in what 'kind of way' exactly these (say, passive, caring) relations would 'themselves' be important to a *contractualist* society (though I have no doubt that they matter to society and ground duties of justice on non-contractual grounds). If she means nothing different than the argument offered by Silvers and Francis in their *Justice Through Trust* (that is, that such relations, by their very existence, create a beneficial climate of trust), we have examined the problems with this argument earlier. If she means to give a

[232] ibid 29.
[233] ibid.

meaningful role to the PMD not as moral legislators, but within a community of moral legislators, and a role that goes beyond passive citizenship, it is unclear how the value of the relations requiring a capacity to engage can be explained (at all, or at least, in the most compelling way) in such contractualist terms. Hartley refers to authors arguing outside the boundaries of Kantian contractualism, like Eva Kitta, who grounds duties to care on care ethics and Anita Silvers, who grounds them on trust and some contractarian assessment of the desirability of such trust. Now, it could be said that trust and caring are just two of the relations that are 'crucial to establishing a society based on mutual respect through their capacity for engagement', that is a contractualist society, but then, Hartley would have to explain who is owed mutual respect and why, as she is not saying that trust or caring matter in themselves, but rather because they contribute to a contractualist society based on mutual respect. Probably the membership to such a society is based on some notion of special worth inhering in individuals, but the source of such a worth must be explained.

Such explanations should not be found in the PMD's usefulness for society in a sense that is too reminiscent of the contractarian instrumentalizing and self-interested tendencies that she is rejecting.[234] Hartley sets out to argue that the relations in which the PMD are able to engage meaningfully are important to a contractualist theory of justice, and important in a way that warrants granting the PMD full subjecthood. I find that the value of the relations in which many PMD do engage is not to be explained in contractual terms; at best she makes a case that they are derivatively valuable in the sense that they facilitate and promote the sort of mutually respectful relations that do matter. In that sense, her reading of Rawls evokes

[234] ibid 18.

what Kant says about our indirect duties toward animals.[235] Although she tries to say more than that treating the PMD well will improve our way of treating subjects of justice, I do not see how her additional arguments are contractualist, Kantian or Rawlsian.

Hartley is right to focus on Rawls' view of justice as 'cooperation on a basis of mutual respect' requiring citizens to 'recognize the independent validity of the claims of others' instead of essentially as a (contractarian) 'cooperative venture for mutual advantage'. But whereas Rawls bases the validity of his claim on individual moral powers, like Kant grounds intrinsic moral consideration on moral agency, Hartley is stuck between a rock and a hard place: either she grants derivative value to the PMD on the basis that they can partake to relations which, in turn, serve relations that are truly valuable on a contractualist account, or she develops an account of the value of the relations in which the PMD actually engage themselves that can hardly be contractualist.

It is a paradox or a tension in her argument. The contractualist seeks reasons for attributing full moral consideration that are not self-regarding: they are characteristics that call for respect in the person (a person's 'dignity'), whereas the contractarian looks for a self-serving benefit stemming from interacting with another person. Hartley explicitly endorses the contractualist view and rejects the contractarian one. However, after presenting the former view and a Kantian reading of Rawls focusing on mutually respectful (rather than beneficial) relations, she suddenly turns to what seems to be a more instrumentalizing sort of

[235] ibid 28: for instance, when she says: 'through relationships with others, individuals who lack the two moral powers can contribute to the family and civil society more generally by helping others develop values that are important for fair cooperation.' For Kant's view on our obligations toward animals, see Kant, *Lectures on Ethics* (n 171) 212.

argument, as she says that the PMD can engage in relations that ultimately serve society (if not, at least directly, its economic side). In order to stay within the more other-regarding tradition and argument she had been making, it seems that she had to explain why we value the PMD for themselves, not because of their contribution. However, she may lack a theory for doing so. She tries to use the Kantian or Ralwsian justifications, but they do not fit the PMD and, I have said, it is not satisfactory to suggest (even if it were accurate) that these relations can help other, intrinsically valuable, relations to take place and flourish, for it introduces the aforementioned paradox, or tension in her argument. What theory can we supplement her with, then, that would better fit the PMD's actual capacities ?

4.2.3 Playing one's part

I believe that the notion of 'part' is a good place to start. Rawls means it mostly as 'contribution', but 'part' can also mean a 'role', as in a theater part. In Rawls' case, the pertinent 'role' is that of contributor, so both meanings are conflated, but Rawls is aware that humans can play many parts and that notions of personhood or human nature could be associated with the notions of 'homo oeconomicus', 'homo faber', or 'homo politicus'. He writes: 'Beginning with the ancient world, the concept of the person has been understood, in both philosophy and law, as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect his various rights and duties'.[236]

[236] Rawls, *Political Liberalism* (n 1) 18. On the notion of 'person' and its latin origin *persona* meaning 'mask, character, person in a play; one who plays or performs a part; a character, relation or capacity in which one acts', see Jenny Teichman, 'The Definition of Person' (1985) 60 (232) Philosophy 175, 177 and Peter Singer, *Practical Ethics* (2nd edn, CUP 1999) 87. Although I have put the notion of 'person' aside for the purpose of

His commitment to conceiving justice as a fair system of cooperation made him focus on a particular part: that of a contributor (i.e. he defines 'person' as a 'normal and fully cooperating member over a complete life'), and only those who benefit others thus can receive social benefits themselves: 'all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard'.[237]

Like Hartley, I believe that this does not limit the notions of 'part' and 'doing one's part' to paying back in a 'tit-for-tat' contractarian way. However, unlike Hartley, I am not bound by the deep Kantian commitment of Rawlsian contractualism which founds people's 'inviolability' on a conception of person as rational beings able to assess justifications.[238] This allows me to consider, notably, whether one could play a 'part' in a way that would not involve cooperation or contribution (and would sound like less of a stretch when we reflect upon the 'part' that the PMD play in our society). Starting by asking which "role", contractual or not, the PMD play in our society and what are the nature and potential value of the relations though which the PMD can effectively engage with others does not assume from the get-go what a Rawlsian inclusivist contractualist needs to be concluding: that these relations are cooperative and reciprocal (in a contractualist sense of cooperation and reciprocity). Let us take a closer look at the type of caring relations that so qualify, according to Hartley.

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this thesis, it is relevant to not the connection between the notion of 'person' and 'part' here as 'person' is often taken to mean a being with full RMS.

[237] Rawls, *Justice as Fairness* (n 1) 6.

[238] Hartley (n 27) 18; Rawls, *A Theory of Justice* (n 1) 24-5, Kant, *Groundworks* (n 31) 433 and 439.

They are 'mutually supportive relationships with family, friends, and caregivers':

> Often we think of how those with severe mental disabilities are supported by and provided with companionship from others. We do not consider how those with mental disabilities also provide support to others. However, the capacity for engagement makes communication possible; and through communication, which need not be verbal, individuals with severe mental disabilities provide support and companionship [and love] to others.[239]

Looking for more ways in which the PMD are not just passive recipients in such relations but also *cooperators* in a *contractualist* sense, she adds:

> Some individuals with mental disabilities are humble or kind in such a way that interaction with these individuals can help others better understand what is important in life and even their own humanity, its limitations, and its fragility. The humility of some, best appreciated through relationships with them, can humble the rest of us by countering arrogance, which threatens a society based on mutual respect.[240]

I could not agree more with this statement, based on my own experience of growing up and living with a brother with mental disorders. I have already said why, however, I fail to see its contractual dimension.[241] The idea that the PMD pay us in comfort and love and self-realization, is mistaken for many reasons: (1) the theoretical effort of looking for ways in which they could pay us back employs the contractarian logic of looking for a self-

[239] Hartley (n 27) 29.
[240] ibid.
[241] It is odd to suggest that we give the PMD a robust moral status because they teach us about ourselves (e.g. about our vulnerability and the value of caring). We would not even let them sit at the negotiation table if that were the case. Because what they teach us is partly how other-regarding we are and that we have pre-contractual duties toward them. To frame this as another kind of self-knowledge that can fit a contractual frame is incoherent. Perhaps it would make it clearer to distinguish between an 'effective' and 'ineffective' piece of knowledge in the specific sense that it affects the knower's motivations. The contractarian frame assumes that the desire of what is traded by the party acquiring it and the self-regarding attitudes of that barganing party will not be transfigured by this acquisition. My claim is, however, that this sort of 'effective good' (self-knowledge) cannot be traded like food and money and cannot be made into an 'ineffective' good.

interestedly, mutually beneficial relation that Hartley (rightfully, I believe, as I have explained in the chapter on trust) sets aside to deal with the PMD. (2) When we focus on features of the relation itself - in this case a relation of care - we do not quite see how the Kantian frame focused on moral agency or its most stretched out version of simple 'cooperative engagement' would apply to it, short of also applying to the vegetal and animal kingdoms (and if we extended it to apply to animals and plants, we would fail to account for the particularity of relations with autonomous people as well as of relations with the PMD). (3) If, to avoid this conundrum, we valued the features of the non-contractual relations we have with the PMD simply because they contingently serve relations which *are* clearly valuable on a contractualist account, it would render the value of these non-contractual (probably caring) relations and the status of the PMD derivative, which would be unsatisfying according to my own, and Hartley's stated, goals but also because it would fail to capture the nature of the greater value that these non-contractual relations possess.

One does not have to look far for an alternative account: it jumps to the eyes once one does not insist in framing it in a contractualist way. For instance, we no longer see love as a 'benefit' of any kind, but as the pre-condition and the motivation for us to care for a PMD. Their support, friendship, companionship and love are not benefits that people seek contractually. The thought is *prima facie* absurd: do we pay or contract for love? Can we, even, as a conceptual matter, pay for such thing? Do we not, in fact, only corrupt this very object by submitting it to a contractual logic, or otherwise debase it, or degrade it to a form in which it is parodied? (One may think that prostitution can serve as an illustration.)

There is obviously background solidarity at work here which needs to be explored and theorized and which does not find its best expression in contractarian or contractualist accounts. Whatever ethical bond precisely is at work, it would justify the belief that we all play parts and that it is fair that we should do what our parts, our roles, our relations, require of us, fair that we should be blamed if we fail to do so, and fair that we should not be considered as less of a member of society because we cannot play a part that most people are expected to play, i.e. because we cannot engage in contractarian or contractualist cooperative roles. These intuitions are very familiar to us, in a society filled with vulnerable and dependent people, sometimes temporarily, sometimes permanently. Some people's part may be to try to be helped gracefully when they have to. Some people's part are passive, it is to be helped, and perhaps to show gratitude in some context, love in others, patience in yet others (for instance, when they have trouble accepting support having been highly autonomous their whole lives). Imagine a sinking ship. The role of the captain is to coordinate others, perhaps at the cost of self-sacrifice; stronger people must help lowering the rowboats, others must care after their children, children must obey their parents and respond to care in a way befitting their relation. Beings that are not able of self-aware responses, like babies and the PMD may not help in any way and yet must be helped. To flee the ship and leave them behind would seem particularly monstrous probably, although I am not arguing it here, because of the relation of dependence they have toward us.

It is hard to see, on the contractualist accounts explored up to now, how we can flesh out these familiar intuitions without appealing to more than the recognition of one's legislating will as a trait conferring a RMS. I conclude that many PMD cannot occupy RMS-

granting contractualist roles, no more than they could be fully cooperating members in a contractarian sense. They seem to play other social parts, but contractualism has trouble explaining the performance and normative consequences of these parts. It does not mean that Hartley's requirement of a capacity to engage could not lie at the basis of a non-contractual theory of justice. Similarly, Silvers has been developing for years, along with Leslie Francis and Michael Stein, a theory of inclusivist justice that does not focus so much on requirements or criteria to be granted subjecthood or moral status. This theory, yet to be fully articulated, is focused, instead, on 'collaborative engagement' (though one may think that it willy-nilly reintroduces the notion of a requirement: that of being able to take part to a collaborative engagement) and comes with appealing advantages and problems of its own, but not strictly speaking contractual ones, unless we reinterpret the social contract tradition in way so radical that it would abandon its central commitments to key cognitive capacities with which I take issue. Like Hartley's arguments, Silver's anti-exclusivist conception of justice seems to rely on some sort of normative background solidarity (or another ethical concept like openness or Iris Murdoch's 'loving gaze'[242]) that go beyond contractualist requirements.

4.2.4 Cognitive Surrogacy[243]

[242] Iris Murdoch, *The Sovereignty of Good* (Routledge & Kegan Paul, 1970); Nancy E. Snow, 'Iris Murdoch's Notion of a Loving Gaze', (2005) 39 The Journal of Value Inquiry 487.

[243] The words 'trustees', 'surrogates', 'collaborators' and 'proxy' are used more or less interchangeably in Silvers' and Francis' discussions. Apart from the basic distinction I will make (n 291) between helping someone to speak and speaking in someone's interest (the key difference between the kind of trusteeship that is needed for active and passive citizenship, respectively), it is not necessary to elaborate a more sophisticated typology for the purpose of this thesis and I will also use these terms interchangeably.

Silvers and Francis claim that the PMD can meaningfully carry out the role of social cooperators as understood in a contractualist account with a proper external support amplifying, rather than supplanting, their autonomy and conceptions of the good. They suggest that trustees should provide the PMD with 'prosthetic cognitive probing through a process of assistive thinking'.[244]

The key problem with their ingenious device is that such a cognitive prosthesis does not work in the most severe cases of mental disability. Jeff McMahan and David Wasserman conclude their assessment of the notion by stating that, in some cases, the presumption that human beings 'have the potential to participate in human forms of life' is groundless. Some PMD can simply not 'take part in human social life through the assistance of others human beings'.[245]

Silvers and Francis do not claim, however, that the tool of mental prosthesis would work with the most severe cases of cognitive impairments. They recognize the distinction between 'a prosthetic process that remains a simulation of a particular human capacity that the subject lacks and a prosthetic process that compensates with a different capacity.'[246]

For some PMD, there is simply nothing, or close to nothing to enhance, prosthesize or amplify. For others, there is so little to build or extrapolate from that one wonders how

[244] Silvers and Francis, *Thinking about the good* (n 83) 251.
[245] David Wasserman and Jeff McMahan, 'Cognitive Surrogacy, Assisted Participation, and Moral Status' in *Medicine and Social Justice: Essays on the Distribution of Health Care* (Rosamond Rhodes, Margaret P. Battin, Anita Silvers (eds), 2nd ed, OUP 2012) 325, 332.
[246] Silvers and Francis, *Thinking about the good* (n 83) 248.

plausible the claim that the PMD's authorship can be preserved is, and why it would justify undertaking a prosthetic endeavor in the first place if granting the RMS is conditional on its success.

In some cases, the personality, character or social identity of a cognitively deficient individual is a purely social construction. Though such fictional social identities can arguably be morally meaningful within some social contexts,[247] they have an essentially relational basis and do not rely on the value of some internal capacities.[248] Even though their moral status would require that we fully integrate a PMD to our political community (for instance, in order to have other people of our community respect them even though they are not related to them through partial bonds), the basis for such an integration would not be found in the respect owed to their primitive conception of the good existing *in potentia*, waiting to be fully prosthesized, or in the respect of whatever kernel of autonomy a being able to engage with others and react has on a broad account of autonomy.[249] The reason for integrating them would lie elsewhere altogether, and would not be the sort of contractual reason that Silvers and Francis are considering here.

The simple fact that collaborators are exclusively 'inspired' by the PMD[250] in question becomes suspicious: the notion of being 'inspired' by the PMD is clearly one step

[247] For instance, Kittay refers to anencephalic children (Eva F. Kittay, 'At the Margins of Moral Personhood' (2005) 115 Ethics 100, 110) and Francis (n 326) refers to Pedro Almodovar's movie *Hable con ella*, presenting a nurse falling in love with a woman in a coma.
[248] Although these disabled individuals' moral status could be based, however, on internal (e.g. genetic) attributes which take a moral signification relationally, like their humanity or the fact that they are of human born, or the special connection with their mother.
[249] See Hartley's notion of engagement, previously defined (n 27), and Francis' scalar, complex notion of autonomy (n 218).
[250] Silvers and Francis, *Thinking about the good* (n 83) 251 and 253.

toward acts of creation or imagination and one step away from deferential reconstruction based on attentive empirical observations. I believe these notions are best thought as coming along a spectrum, with the individual expressing her own autonomy (relatively) independently at one end and with trustees speaking entirely for her at the other. I also believe that a notion of co-authorship (of conceptions of the good and of contracting performances) should be envisaged, but the normative impact of such a co-authorship is not so relevant here. I rather want to emphasize that as we move from the autonomy end to the paternalistic end (for lack of less controversial terms) of the spectrum, the contractualist justification for trustees to intervene (in a collaborative way, to provide a cognitive prosthesis) gradually dims, just as other justifications (that we cannot analyze in this dissertation, but to which I believe theorists of justice and morality should turn when dealing with the PMD) start to have an increasing weight on justifying and delineating the role of trustees.

Comes a point where the contractualist justification, while still relevant, becomes either only incidentally relevant, or perhaps even is nested in another kind of justification that takes priority over it or and absorbs it (like, conversely, a contractualist or another autonomy-focused theory can nest the caring or dependency concerns when we get close to the other end of the spectrum). Exactly how both kinds of justifications dim out or fade into, or are made secondary to, one another goes beyond this current work, which only claims that this spectrum is a more plausible way to look at what constitutes proper trusteeship, to allow a certain pluralism better reflecting human needs and aspirations, and most importantly deny

that only the contractualist end of the spectrum can inform a theory of justice, or even morality in general.

Though it is true that in some cases the contractualist paradigm simply no longer plausibly applies, it is also true that in many cases along the previously suggested spectrum, it still applies but is, at the very least, no longer the only or central justification for granting the PMD a RMS. Comes a point along this spectrum where the internal capacities of the PMD do not justify, in and of themselves, that we would prosthesize them. When there is so little autonomy to prosthesize, so little value to realize in this regard, it is more likely that we are valuing something else altogether and that it is on the basis of that other moral consideration that we seek to offer a prosthesis to the PMD's autonomy, no matter how modest.

4.2.4.1 Distinguishing the Capacity to Originate a Conception of the Good from the Capacity to Express this Conception

I conclude that cognitive prostheses are not justified on a contractualist basis in some cases, though they may still be helpful and morally warranted in these cases on non-contractual grounds. I therefore wish to curtail my criticism.

I believe that Francis and Silvers, like Wasserman and McMahan, should not lump the capacity required to 'produc[e] a conception of the good that has a normative weight within a contractualist account' and the capacity to perform certain activities deploying this

individual conception of the good during the contractual process. They lump both into a single activity (which they respectively think can, and cannot, be accomplished through an external support while preserving authorship). I think it would be more accurate to evaluate separately the authentic performance of the activity of originating a conception of the good from the performance of deploying, endorsing or defending this conception within a contractualist account.

Even if the PMD have enough capacities to be said to be the authentic authors or agents of this conception of the good, short of having any 'contracting capacities' to be amplified, they can hardly be said to be the agent taking *contractual* steps to actualize this conception of the good and realize their tastes. David Wasserman and Jeff McMahan put it compellingly: 'Moving someone's arm in a manner that she enjoys is not helping her to move the arm unless she contributes to, directs, or authorizes the movement.'[251] In the context of evaluating the authorship of the (idealized) contractual actions, the skills relevant to the 'contracting act' (which includes a bundle of actions) go beyond only the skill of authoring a conception of the good. Otherwise, how could Silvers and Francis say that collaborators do not *represent* the PMD but rather 'enable their subjects to configure ideas so as to represent themselves while the [contractual] process unfolds through their use, via prosthetic functioning, of the trustees' cognitive and linguistic skills?'[252] These 'contracting' cognitive and linguistic skills are central to the authorship of the 'contracting' actions and cannot be supplemented without jeopardizing it.

[251] Wasserman and McMahan (n 247) 331.
[252] Silvers and Francis, *Thinking about the good* (n 83) 255.

My criticism of the tool of a cognitive prosthesis thus differs from that of Wasserman and McMahan in so far as they do not even seem to grant that it can allow to attribute the authorship of a conception of the good to PMD.[253] I believe on the contrary that we can plausibly attribute a conception of the good to at least those PMD who sufficiently express their preferences for their collaborators to read interests and a conception of the good in them without (the collaborators) becoming co- or sole author of these conceptions. The PMD's relative passivity only becomes a threat to their authorship when this conception of the good is taken to mean more than a conception of the good *simpliciter*, but rather a conception of the good that justifies granting them a full moral status under a contractualist frame, that is, when we seek to not only attribute them a conception of the good, but the rational, deliberative, reasonable and other agential capacities required to facilitate or make possible the realization of this conception of the good through a political structure secured through a contractualist society-building process.[254]

4.3 Conclusion

[253] Wasserman and McMahan (n 247) 331: 'the subject could hardly be said to employ her trustee as a prosthesis unless she played a more active role than that of inspiring or informing the conceptualization of the good. A suit, however closely-fitted, is made by the tailor, not the wearer. Even if the wearer indicates where the fit is too tight or loose, her role is far too passive to make her a co-creator.'

[254] I note that such an approach would actually, as Silvers and Francis are willing to concede (notably to McMahan) certainly include higher primates as well into an equal realm of justice. I concede that certain higher primates can play the contractual game if the threshold of required capacities to be a player is lowered. The problem is rather that the contractual game is insufficient to account for all our considerations of justice. Therefore, when 'speciesist' philosophers propose to lower the threshold of 'contracting capacities' to include more humans, they are heading in the wrong direction because (1) the lowered threshold can hardly be said to be contractualist in any meaningful sense and (2) because there are other, co-existing status-conferring properties which should justify the integration of the PMD. (Other philosophers also find that the fact that pigs and babies or plants and comatose people, are being given an equal footing in our political community is in itself an indication that something went wrong. See Kittay, *At the Margins of Moral Personhood* (n 247).

It appears that there is an unspoken moral background to theories explored in this chapter as well. For instance, why insist to prosthesize the capacities of a being who has so little to prosthesize? Why support the talent of a being who has so little talent? These strategies seem to assume that these beings are already members of society even though they all use the PMD's supported capacities as the requirements for membership, for being a contractor or an active citizen. Accommodating or supportive social measures seem warranted on the basis that the PMD *already* belong to our society and are entitled to equal consideration. The ground of this membership seems to be a prior sort of concern which cannot be explained on contractual terms. If we analyze contractualist and contractarian strategies without a iota of this concern, they start looking like conceptual stretches, dubious empirical wagers and question-begging assumptions. No matter how disabled a person is, these authors seem to assume, we must give her some concern as a person, that is, a member of our society to whom robust duties are owed. Contractualist and contractarian thinkers may then find it natural to frame the PMD not only as persons, but as contractors as well, since otherwise, they would have to concede that the normative concept of person is not exhausted by that of a contractor. This, I will now suggest in my concluding chapter, may not be so damaging to contractual theories.

5 THE PMD AS PASSIVE CITIZENS

5.1 The PMD Behind the Veil of Ignorance

One of the most famous conceptual tools from John Rawls' theory of 'justice as fairness' is the 'original position' (OP), a thought experiment through which readers are asked to adopt a moral point of view characterized by impartiality-inducing features. One such feature is the 'veil of ignorance' behind which every individual is made ignorant of

> his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. [Rawls] shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.[255]

The parties to the social contract in Rawls' theory of justice are imagined to stand in this original position when they choose the principles of justice, that is, 'the principles that rational and free persons concerned to further their own interests would accept' as equals in such a position.[256]

[255] Rawls, *A Theory of Justice* (n 1) 11, 118-23.
[256] ibid 10; *Justice as Fairness* (n 1) 15 and ff.

Can we put the PMD behind the veil of ignorance? This is the inclusivist suggestion that will most naturally come to a contractualist mind and I therefore open the chapter on passive citizenship with it.

This inclusion would mean that parties behind the veil of ignorance must consider the possibility that they may be PMD, just like they may be black or poor. The idea is that the condition of being disabled is morally arbitrary and it is therefore one of the features that should be removed from people before they are dropped in the OP, just like their excellent sporting skills.

The problem with this suggestion is that it supposes that the cognitive capacities that constitute the two Rawlsian 'moral powers' (a capacity for a sense of justice and a capacity to elaborate a conception of the good) can be stripped away from the parties in the OP without affecting some fundamental premises of the Rawlsian theory.

Why would the parties in the OP be prevented from imagining that they may be deprived from the cognitive capacities necessary to exercise the two moral powers? After all, this does not mean that the central importance of these powers is denied. The parties in the OP still possess them and, though they will not exercise their capacity to elaborate a conception of the good life to dictate the content of the justice, they will consider the fact that they have such a conception of the good life, that all citizens do, and that these conceptions cannot be reconciled. Their moral powers will therefore have a direct impact on the nature of the principles of justice. The fact that the citizens that they are representing do not possess

these cognitive traits (even those traits allowing them to elaborate a conception of the good life) should not, in itself, matter, since these citizens also have many traits (such as being poor or being women) that the parties themselves do not have.

The problem, instead, is that if we believe that justice can only take place between people armed with these two powers, why should the parties in the OP imagine the principles regulating the relations between subjects of justice as also regulating relations with non-subjects?

These are two ways to imagine the PMD in the OP: with their disabilities or without; Michael Sandel would say, 'encumbered' or 'unencumbered'. Sandel's objection to Rawls is that he strips everybody of their identity and leaves them with none of the distinctive features that make them interesting negotiators in the OP. The parties do not come with their identities, including their disabled identities. As a result, we only know that they might turn out mentally disabled, though none of them are. Such a view is assuming that their rationality can be detached from their identities. For Sandel, it is a damaging objection to Rawls' whole contractualist effort that the participants in the OP are unencumbered and the case of the severely disabled can serve as the case for that objection. If we send the PMD in without their mental disability, we may think that we have missed the importance of their disabilities or arbitrarily promoted them to the status of rational beings where they cannot be. As we saw in the previous chapter, there are good reasons for disabled people to be represented by disabled people in the OP (notably, it may otherwise lead to the construction of social institutions which are not satisfactorily responsive to the PMD's peculiar needs and

existence). In Sandelian terms, it would be the only way to make the full range of people represented; removing all these encumbrances remove all traces of distinctiveness that give the participants in the OP something to talk about.[257] However, if, on the other hand, we send them complete with their disabilities, then we may think that they cannot negotiate properly. Both of these options seem like unappetizing conclusions.

We have explored the alternative of making the PMD direct negotiators in the previous chapter on active citizenship. At first sight, it seems simpler to find an alternative to expecting the PMD from being direct competent contractors which they are apparently not, though this more indirect way to integrate them comes with an important problem of its own: will such 'indirect' arguments provide too contingent or fragile a status for the PMD?

I have briefly said why I do not think that the parties in the OP can be unencumbered from their severe mental disability or, to put it otherwise, can represent PMD. The reason is that the contractual procedure in the OP is a thought experiment that individuals possessing rationality and a sense of justice would find sensible to undergo in order to reach an agreement on the principles that should regulate their basic social institutions. They are dealing with other individuals as themselves, who can also be responsive to the comparative appeal of this procedural solution to the problem of substantial disagreements about the good. This supposes that the individuals designing the parties behind the veil of ignorance form a community of rational people responsive to this solution. Why would we counterfactually presume that the PMD are included among these beings?

[257] Michael J. Sandel, 'The Procedural Republic and the Unencumbered Self' (1984) 12 (1) Political Theory, 81; *Liberalism and the Limits of Justice* (CUP 1982) 25-8, 122-32.

Perhaps this starts from the wrong end of the question. It starts with individuals trying to overcome disagreement in a fair, rational way. Why could we not start by the ideal instead that these individuals are trying to use as a way out of their disagreement? And if this ideal is one of fictive beings stripped of their social particulars, natural talents and other morally irrelevant traits, why not consider that severe mental disability is one of these misfortunes, like poverty, or characteristics, like skin colour, which the person represented by the party behind the veil of ignorance may or may not discover that she has once the veil is lifted?[258]

Let us call this possibility the 'broadly inclusivist' one for the time being.[259] Let me explain why taking this inclusivist stance is also problematic as an ideal (and not only because it challenges the idea that justice takes place between people able to develop a sense of justice). The possibility contemplated is that everybody gets to be represented in the OP with no irrelevant properties, and to consider that disability is one such irrelevant property (which is something that Rawls says of characteristics like being black or being a woman). 'We' go into the OP without our disability and disability is only mentioned in the OP as a

[258] I speak here of an 'idealized' approach by opposition to an approach which starts with a characteristic of the circumstances of justice (pre-social individuals possessing rationality, reasonableness and a capacity to elaborate a conception of the good) but perhaps my distinction between an ideal and a 'concrete' approach is confusing, insofar as both reflect Rawlsian ideals, so let me clarify that both ways of approaching the issue of integrating the PMD reflect (a possible tension between) two elements of Rawls' doctrine. One of them is that justice takes place between people possessing moral capacities falling within a certain range of capacities. On this account, it *is* relevant whether beings have the (potential for) moral powers (within a certain range) or not. Rawls' other doctrine is that we step into the original position unaware of the facts that will advantage or disadvantage us in that society. This latter competing principle could be taken from Rawls' hands and expressed in a non-contractual way as the conclusions that an impartial observer would have after looking at a 'group' of people. Whether in its contractual or this non-contractual form, however, as I am now explaining, it is problematic that we take this group to include the PMD.

[259] We will see variations of it in this chapter and the next, and the challenge that these variations will face is to surmount the problem that I will present now.

possible future risk susceptible to affect anyone as the veil of ignorance is lifted and we find ourselves in the real world.

The challenge to this position has been most forcefully expressed by the anti-speciesist philosophical movement which has denounced the apparent arbitrariness of the frontiers of the 'we' or the 'everybody' mentioned above.[260] If 'everybody' gets represented, why deprive rocks, flowers, insects and other non-human animals from representation?

One may first answer that this criticism would not affect a Rawlsian position as Rawls may answer that the key question is to establish which distinctions are morally relevant or not and would probably say that the distinction between having or not having a disability is morally irrelevant. Nobody deserves their disability or is morally the worse for their disability. He would also probably hold that the distinction between humanity and the rest of the world is morally relevant and exclude the animal kingdom, but not the PMD, on the basis of a kind of humanism. Race, gender and disability discrimination is bad but species discrimination is acceptable.

This (speculative Rawlsian) reaction begs the question if it limits itself to being a speciesist assumption. To some extent, if we accept this answer, and confer a RMS to the PMD on the basis of their humanity alone, the exclusion of the PMD from contractual relations - including contractual roles through which society is built and to which robust

[260] Finnis and Regan have also made this challenge. John Finnis, 'Discourse, Truth and Friendship' in *Reason in Action* (John Finnis (ed), OUP 2011) 41 and Tom Regan, *The Case for Animal Rights* (University of California Press 1983).

moral status is conferred - poses much less of a problem. It is only a problem for contractual thought, as I stated in the introduction, if we assume that the PMD have or ought to possess this robust status and want to test whether the social contract tradition can provide them with it (and if not, whether this puts the contractual tradition in trouble). We are not addressing the more fundamental challenge coming from certain anti-speciesists and utilitarians claiming that the PMD do not have or should not be granted a RMS in this thesis. However, insofar as a contractualist or contractarian thinker would ultimately use a species-based argument to justify the frontiers of the group to be thought of as contractors rather than to rely on contracting capacities (varying depending on their contractual account), the issue must be flagged. Contractarian and contractualist thinkers cannot merely use the device of the social contract as a modal tool to find how to best show equal consideration, concern or respect to the PMD once it has already been assumed that the PMD have a RMS regardless of their potential, prosthesized or indirect contracting capacities. Such an assumption would effectively concede that the social contract tradition cannot provide a foundational account of why we are strongly obligated to the PMD as a matter of morality and justice.[261] If Rawlsians and other social contract thinkers wish to use such a pre-qualification for deserving a RMS, they must provide an answer to the anti-speciesist charge.

Whether such a non-contractual qualification for RMS (and to be fictively placed behind the veil of ignorance) would work falls outside of the scope of my dissertation where I explore whether social contract theorists can successfully explain whether the PMD are to

[261] This is, incidentally, the conclusion to which I arrive and I think that once we have recognized this, we can both expect social contract theorists to use contractual thought as the modal tool mentioned above when they can, and to recognize the situations where such a model is wrongheaded or incomplete, even when used only as a modal tool.

be represented behind the veil of ignorance on contractual grounds.[262] If these contractual grounds succeed, as I pointed out in the introduction, they would defeat the anti-speciesist charge of prejudice toward our own species, as they rely on specific (contracting and contract-related) properties which can potentially be found in non-human beings and which some human beings can potentially lack.[263] If a non-contractual metaphysics of the person is taken out of the contractualist drawer, however, it must face the anti-speciesist charge anew and provide an answer to it, for it is not an uncontroversial assumption.

That the PMD should (assuming they can), on the ground of their non-contractually based RMS, be (somehow) integrated in the contractual process in a way that would imply that they also have a robust status within a contractual account would be, moreover, a contingent move, unless one explains why it would be necessary that a non-contractually based RMS translate into a contractual one. One such explanation could be, for instance, a species-based argument for status, according to which the PMD are contractors or are to be given the status of contractors because they belong to the *genus* who generally develop into contractors; the PMD just happen to be 'defective' exemplar of the category of human beings. On such accounts, a contractually based RMS would not be given to particular individuals on a case-by-case basis but to a *genus* as a whole. I have already noted that this is not *per se* a contractual argument. It is a separate 'nature of the kind' argument about the way in which status should be attributed to beings separate from the argument explaining

[262] By contrast, one could assess the merits of human exceptionalism and evaluate whether and how it could be squared with contractualism.
[263] If that turns out to be the case, either contractual theorists must make concessions and include some animals (like Silvers) or attempt to further refute the anti-speciesist charge - for instance, by vindicating some sort of human exceptionalism (like Kittay).

what a particular contractual status would imply. A status of contractor may be required by the PMD's non-contractually based RMS, for instance, because it is the best way to promote the PMD's welfare as this RMS, let us assume, requires. However, this would not ground their RMS on a contractual basis, it would just explain why they would be integrated in different ways to contractual relations (such as being placed behind the veil of ignorance).

In sum, contractualism cannot arbitrarily include the PMD themselves behind the veil of ignorance while leaving giraffes and plants out. It needs to provide non-contractual reasons for the special worth of disabled humans for broadening their 'inclusivism' to include humans who do not have the potential to develop contracting capacities *and* to provide justifications (if they are not implicit to this account) for not applying these reasons to all or most non-human beings (or be ready to come up with further justifications to prioritize the needs of certain beings over others if their account end up including too many beings for the little resources that are available). Such justifications are not essentially contractual and fall outside the scope of this thesis focusing on a tradition which has, as I said, an answer to provide to the anti-speciesist charge of arbitrarily preferring the members of one's own species. Instead, the social contract tradition holds that it is the capacities for contracting that confer a RMS to a being, human or not. The previous chapter concluded that we can hardly characterize - or most plausibly characterize - the PMD as active participants to the social contract. This chapter explores whether there are contractual grounds for granting them a RMS nonetheless. This RMS could correlate a robust kind of (passive) membership to the moral community; it would justify that their interests be given a robust consideration in the contractual society-building process.

5.2 The PMD as Passive Citizens or Indirect Participants

Let us define the notion of passive citizenship as (1) not correlating the capacities of a direct contractor (a 'fully cooperating party') but nonetheless (2) implying a RMS. Presumably, passive citizens possess other features than direct contracting capacities or belong to relations with contractors other than contractual ones, either of which justify granting them a RMS.

The advantage of securing this status through passive citizenship is to circumvent a major problem. The problem of constructing the PMD as contractors by reconceptualizing what it takes to cooperate or participate to a contract (we did not count the right thing), and/or by looking at the PMD's 'contribution' under an empirical (we did not count properly) or conceptual (something was wrong with the very way in which we counted) new light. Nussbaum and others are skeptical about such endeavors. Trying to prove that the PMD are, after all, bringing something to the table is not, they say, the way to think about the duties we owe to the PMD. However, some passive citizenship theorists, they are not giving up on the social contract tradition. This is because they believe there is a way to make room for grounds for strong duties even toward the non-cooperating within social contract theory.

While it circumvents the issue of the *prima facie* implausibility of the claim that they can be reciprocal contributors, arguments about the PMD's passive citizenship face a potentially insurmountable problem. Granting a strong status to non-contractors on

contractualist ground would seem *prima facie* nonsensical. The challenge is to find arguments explaining why those who *are* contractors would construct/grant a robust status for/to the PMD. The immediate obstacle that arises is that one can suspect that whatever ground is suggested, it will either produce too contingent a moral status (e.g. by making it the mere product of contractors' desires) or will fail to root it in a contractual basis (by rooting its necessity or robustness in a non-contractual constraint).

At any rate, passive citizenship, whether contract-based or not, enjoys another apparent advantage. Carving a RMS (including a set of robust rights) for the PMD by representing their interests rather than by imagining how they could represent themselves or select delegates may better reflect people's usual, unquestioned assumptions about what we owe to the PMD. They are commonly seen as unable to fend for themselves in a harsh, brutish, primitive world, or stand discursively for themselves (e.g. by negotiating, arguing, lobbying or voting) or care for themselves in a more civilized or democratic world. It seems that giving them a delegate to speak for themselves, among other proposals compatible with the architectonic idea of having their interests robustly represented in public reasoning, is the only way to go if we want to promote their welfare using the political instruments and structures at our disposal. Therefore, by definition, all the ideas being explored in this chapter take as a starting point the (controversial) fact that the PMD cannot represent themselves, and try to construct a way to provide them with indirect representation.

5.3 Unlacing the Concepts of Moral Legislators and Members of the Moral Community

In order to theorize a status of passive citizen within a contractual theory, the first step is to detach two ideas that are generally conflated: that of being a contract-maker and that of having a strong status under this contract, or between those who can provide benefits and those who can receive them.[264]

This is a (contractualist/contractarian) subset of a more general conflation between beings able to confer value upon entities, and entities with intrinsic or non-derivative value; or between moral agents and beings with a full moral status or who are self-authenticating source of moral and political claims, who cannot be instrumentalized or who must be treated as ends rather than only as means. (There are many ways to formulate this dichotomy because it has been made within various theoretical frames. A political focus warranted by the political aspect of social contract theory would make us privilege the Kantian term of 'passive citizen' related to the political notion of citizenship. By contrast, a broader ethical focus would make us adopt the term 'moral patient', notably used by Tom Regan to describe

[264] Though this chapter, and my thesis generally, make use of notions widely used in law (such as contract, trust or subjecthood), I wish to use these notions without implying the baggage that voluminous caselaw and legal doctrines have attached to them. However, a jurist's reaction to the statement that being a party to a contract can be separated from being a beneficiary of it might be that this is more than a contingent conflation but rather a classic feature of contract: that having a right under it is the same as being a party to it. A lawyer's first intuition might therefore be that it is a non-contractual idea that we could extend the robust moral benefits of a contract to those who are not parties to it. However, this legal assumption is not justified analytically by the notion of contract. The legal doctrine of privity of contract, which would support that it is, can be criticized on that account: even if there may be virtues to keeping the contract between the parties, there are also virtues in preserving the parties' freedom and autonomy to contract in a way that benefit a third party. For one thing, not all legal systems have strict rules of privity. For another, one of the methods that Anglo-American law has used to get around the privity doctrine is the legal category of a trust, in order to make a third party to a contract benefit of something like a right. When the parties make a contract for the benefit of a third party, they create an express trust of the benefit of the contract for that party, who then has a proprietary interest in the chosen action represented by the benefit of the contract. See, e.g. Re Schebsman [1994] Ch. 83 (C.A.), Johns –Mansville Canada Inc. et al. v. John Carlo Ltd. et al., (1980) (Ont. H.C.).

certain animals.[265] It does not matter much which term is preferred as long as it is clear that I associate it with the possession of a RMS. This is not necessarily the case when people refer to a variety of non-rational and non-human moral patients while holding that they have different moral statuses calling for different degrees of moral consideration based on different moral principles.

Cora Diamond has highlighted not two, but three possible groups which do not necessarily overlap in making moral evaluations. Her formulation helps us to remember that the *author* (x) of the moral evaluation, the *agent* evaluated (y) and the *object* of the agent's behaviors and attitudes (z) do not need to be the same group of beings: 'We *x*'s assess together the character and conduct of us *y*'s so far as it affects ourselves and our fellow *z*'s.'[266] Diamond's conceptual categorization is a useful insight in practice, as it helps us to make certain conflation problematic and better detect voices that have been left out of the discussion. The PMD's evaluative standpoint is systematically excluded from the group *x*, generally excluded from the group of contractors *y* and sometimes even of the group of moral patients or passive citizens *z*.

In the present chapter, however, the variable of the *author* of the moral evaluation is not problematized by those who would theorize the passive citizenship of the PMD, nor would these authors problematize the group of the *agents* whose conducts are being morally

[265] Regan (n 272). To be a moral patient according to Regan means that one is owed moral duties directly, notably that of respect. His criterion for granting it is not relevant to our contractual enquiry.
[266] Cora Diamond, 'The Importance of Being Human' (1991) 29 Royal Institute of Philosophy Supplement 35, 37.

evaluated or prescribed.[267] They only want to extend the group of the *objects* of this conduct. Their basic idea is that the PMD ought to benefit from the social contract (i.e. have their interests robustly considered at some stage of the process) without being part of the legislative group, the contractors.

This confronts us with two (categories of) problems which will constitute the subjects of the two following subsections: problems with granting a RMS on a contractual basis to non-contractors and problems with the representation of the PMD in the contractual process.

Let me start by explaining how and why the questions of (1) who can make a contract, and (2) who can benefit from a strong moral status under that contract are often unnecessarily conflated, in order to show that this conflation is not necessarily warranted.

5.3.1 Why Contractees are Often Thought to be the Only Beneficiaries of the Contract

[267] It is however a variable that is worth problematizing within the social contract tradition, especially when we want to challenge the most basic assumption made by an author. When 'we' (x) wonder what 'we' (y) owe to 'each other' (z) as social contractees, the answer is likely to be different if the 'we' is, or includes the voice of parents of PMD, like scholars Peter Byrne, Michael Bérubé and Eva Kittay.

Some may object to considering the variable (x) on a par with (y) and (z). The author, they would hold, should not be challenged on the ground of personal elements, even prejudices. His argument's coherence and appeal must be considered at face value, and if it relies on implausible assumptions, it should be discarded because of this lack of plausibility. I personally do not think it is a problem if some want to say they are observing (x) in a way that pretends to be more aware of the author's background and some want to limit their analysis to the very assumptions at hand. (Those preferring the latter approach may insist that problematizing authorship risks to politicize philosophical analysis in a way susceptible to affect one's impartiality when analyzing a text. Those preferring the former will insist that it is a fact worthy of being taken into account that a philosopher authoring an argument is using certain assumptions, within his language and his expectations of being understood and of convincing his readership, with whom he may in fact share certain prejudices or propensities to grant too quickly the evidence of certain arbitrary assumptions or the neutrality or universality of certain notions.)

5.3.1.1 It is in the Nature of the Contract

In the contractualist/Kantian tradition, this conflation is best expressed by Kant, who held that only moral legislators, those able to enact the moral law, are owed non-derivative respect, i.e. are subjects of this moral law. Only respecters need be respected. A similar idea is found in Rawls' theory of justice, when he says that only those able to give justice are owed justice. The basic contractualist logic behind this conflation is that the only beings worthy of intrinsic respect are persons *qua* enactors of the rational law. What is worth respecting in them is their embodiment, or the portion of them that embodies, the moral law: their rational, autonomous self. Intrinsic moral consideration through the attitude of respect is thought to be a fitting response to these beings alone. And respect of autonomy is so central to this way of thinking about what truly matters in the world that there is nothing else considered worth granting a strong moral status when we think in terms of the status members of a moral and political (in Kant, the latter is based on the former) community have.[268]

Though this chapter is focused on contractualism, let me note that the same holds for the contractarian logic: we make a deal with people able to bring something worthwhile to the bargaining table, and we have no reason to bargain with the weak, the poor, or those less gifted intellectually, and so on, because they have nothing, or too little, to contribute. This implies a selfish stance: a focus on self-interest and an instrumentalization of others, and an

[268] Kant, *Groundworks* (n 31) 4:428 and 4:435 and *Metaphysics of Morals* (n 19) s 46; Diamond (n 278) 36; Nussbaum (n 19) 13. We will consider, however, an alternative reading of Kant by Korsgaard (n 287).

evaluation of their worth according to their instrumental worth for our private purposes. In its most radical form, there is no distinctive other value to be recognized: Hobbes wrote that those who have these capacities and refuse to consent to the social contract must 'justly be destroyed by the rest [or] (...) by any man whatsoever.'[269] It follows from this stance that what matters most when we reflect about our social arrangements is the ability to respect, and be accountable if we fail to respect collective bargaining rules and rules bargained for. As self-interested bargainers, we have no reason to grant a strong moral status to anyone else - others who cannot benefit or threaten us or those who cannot be bound by agreement are just potential nuisance.

These descriptions explain why we may think that the central case of a contractual beneficiary is that of a contractor, or why it may be easy to overlook other possibilities from moral and political standpoints which look at the human relations subject to justice in a contractual way. However, they do not make it analytically incompatible with these positions to grant a RMS to beings that are unable to contract.

On the contractualist account, instead of insisting on the 'Kantian split' between Kantian reasonable and rational persons and 'everything else in nature'[270], one could explore the mechanism underlying the attribution of value in order to see whether it could serve to value the PMD in a no less robust way than other citizens with contracting capacities. Christine M. Korsgaard will provide us with such a position.

[269] Hobbes (n 35) ch 13.
[270] Nussbaum (n 19) 138.

On the contractarian side, we could wonder how the PMD are in fact useful to us even though they do not have contracting capacities, as traditionally understood. If what is centrally normative on a contractarian account are the capacities to understand a contract, negotiate it, be bound by it, be able to have a word, to keep it, and to be accountable if we do not, then exploring notions of trusteeship seems like a plausible way to integrate the PMD. If what is centrally normative on a contractarian account is the fact that contractees bring a benefit or a threat to the table, however, and the philosophical focus is on the instrumental value of these elements rather than the way rational agents deal with them, one would explore the sort of value that the PMD can bring to the table regardless of their capacity to explain that they are doing so. The first part of this thesis has argued, however, that such arguments are not promising.

5.3.1.2 There is a Single Answer to Both Questions

The two aforementioned questions:

(1) who can make a contract, and

(2) who can benefit of a RMS under that contract

are subcategories of two more general questions which can, too, be conflated:

(1') how are we to solve, politically, what seems like irreducible disagreements about the good in our society?

(2’) who has a RMS?

Question (1) assumes that a contractual answer has already been provided to the more fundamental question (1’) and has moved on to identifying the conditions for participating to the contracting procedure.

Although questions (1’) and (2’) are distinct, it is possible that one kind of answer to (1’) implies an answer (or a partial answer) to (2’). The contractual answer is such an answer. It is *because* we can solve the social ineliminable disagreement on conceptions of the good life by using a contractual procedure that we ought to recognize a special status to beings able to partake of such a procedure.

If we answer, like Rawls, questions (1’) and (2’) by using such a theory of the right rather than a theory of the good, it becomes hard to see on what basis we would grant a RMS to the PMD. Theorists of the passive citizenship of PMD assume that it is impossible if we take RMS to imply to be a ‘primary subject of justice’ for instance. The PMD are not such subjects, so on what basis would we nonetheless give them strong, equal rights? Importantly, to remain within the contractual tradition, this basis needs to be contractual, that is, we must provide an answer to question (2) instead of to the broader (2’). Whether we use a Rawlsian or a Hobbesian framework, it is easy to see how having the status of a contractor would give one a RMS (and how, therefore (1) and (2) can have the same answer). The more controversial question is whether there are other contractual grounds for being granted the same RMS. Theorists of passive citizenship argue that there is. They argue that able

contractors will decide to include the PMD through the contractual process (therefore the PMD's status would be contractually based). This poses two apparent problems.

First, this decision would have to be the product of individual citizens' wills, who would agree that it is a good thing to grant a RMS to the PMD. This taints the kind of moral status that the PMD would have with an apparent derivativeness or contingence. Second, social contract theory relies on a constructivist and proceduralist method which puts the right before the good (because people disagree too much on the good but can still agree that there is a right way to settle their disagreement). Constraints that are put on the (kinds of) decisions that the participants to the procedure may take must be justified in terms of the fairness of the procedure rather than in terms of a contentious conception of the good life (including one's propensities to be charitable or show solidarity toward the vulnerable for instance). Thus, on many contractual accounts, notably Rawls', it seems that a conception of the right dictates who has the fullest moral status. This causes not only the aforementioned problem of derivativeness but also the possibility that any such status can never be as axiologically important or integrate the PMD too late in the process, structurally speaking. Let me explain.

Regarding the lesser ontological value of their status, Martha Nussbaum, for one, connects the statuses of 'direct' contracting participants and of citizens under the contract, at least in the case of Rawls, as these participants are the 'primary subjects of justice' (and therefore, one can legitimately wonder if it is conceptually possible to give to non-contractors a RMS). Nussbaum's idea is that the direct participants to the contractual

procedure or primary subjects of justice enjoy an intrinsically superior status, one reflecting the 'Kantian split between the rational/reasonable person and everything else in nature'. If the PMD are represented by trustees as passive citizens, the worry is that whatever status they are given will be somehow ontologically inferior.[271]

Regarding the primacy of the right over the good, John Finnis has pointed out that selecting the right (through the elaboration of discourse ethics or a contractual process) as the best way to solve the irreducible ethical pluralism affecting democratic, political discussions effectively deprives some human beings from moral status altogether. The answer to the question 'who has the capacities to partake to the right process?' inherently excludes people who cannot discuss or contract properly (notably the PMD), but it also imposes content-restriction on the discussants who can participate. It might be said that in the sense in which our identity, or at least our identity *qua* political participants, is concerned, rational and reasonable people are partly excluded: a part of their selves is excluded. The resulting negotiation or discourse misses some key ethical features of what a public discussion could encompass, and may not leave the discussant's autonomy, dignity and integrity so duly recognized or intact as thinkers like Habermas and Rawls may suggest. The discussion is impoverished, through the dismissal of unrefuted ethical arguments (for instance, views about the goods are categorized as irrelevant to a discussion about basic principles of justice in a Rawlsian frame because they are too subject-relative and irrelevant to the moral

[271] Nussbaum (n 19) 138. This kind of assessment is challenged by Korsgaard, as we will shortly see, though it probably remains that on a Rawlsian account, it is likely that both questions have a same answer, anchored in a conception of fairness. (However (a) we can develop accounts of passive citizenship on non-Rawlsian contractual grounds and (b) it does not exclude another type strategy to adapt a Rawlsian account to integrate the PMD, by extending a conception of the right, although this is not what this section is contemplating as it is assuming instead that it cannot be done.

discursive procedure). This constructed (and, Finnis says, mistaken) distinction between private conceptions of the good and public reasons, or between the ethical and the moral, cuts the participants to this circumscribed discussion 'from the very meaning of the discourse of his partners in discourse, or at least so radically misconceives their views that civil conversation with them is substantially obstructed.'[272]

Whether contractual society-building discussions could afford to weave in their logic more of the rich tapestry of conceptions of the good than what is strictly necessary for as unassuming and neutral as possible a reasonable discussion to take place is a deep and enduring disagreement that goes beyond the scope of my dissertation. Finnis' comments display the other side to those who prioritize the right over the good: the bet that a rich ethical discussion, though complex and messy, should be the one guiding our political deliberation about the principles of justice (by opposition to the bet that state neutrality through right processes is the only way to deal morally with ethical disagreements, themselves left out of the political discussion).

At least on a Rawlsian account of justice, the theorist of the PMD's 'passive citizen' status seems caught between a rock and a hard place. On the one hand, conceptions of the good involving benevolence toward the PMD cannot be integrated at an early stage of the Rawlsian legislative contractual process. Like Nussbaum says, 'the present-time sort of trusteeship would require them [the trustees in the Original Position] to know that they do have benevolence and how strong it is' which would go against Rawls' 'commitment to

[272] Finnis (n 260) 56.

parsimony of assumptions' about the parties in the OP.[273] On the other hand, if they are integrated at a later stage of the legislative process when the veil of ignorance is lifted (layer after layer), the status of the PMD seems to be less fundamentally anchored in the requirements of justice and more derivative upon individual preferences. Nonetheless, Cynthia Stark has argued that the latter solution conferred an appropriately robust status to the PMD. We will come back to her arguments and that of other authors whose work might help us overcome the obstacles that a theory of passive citizenship would face for the PMD once we have considered a few more obstacles.

Korsgaard and Cohen, on their side, argue that a contractually given RMS is as good a status as the one obtained through the direct possession of contracting capacities. Whether these claims are successful remain to be seen but such are the arguments that a theory of passive citizenship requires.

5.3.1.3 Equality Requires it: The PMD are too Unequal in Terms of Capacities to Grant Them an Equal Status

Another reason for holding that non-moral-agents cannot be granted the highest sort of moral status may be a commitment to equality. The claim would be that it is incompatible with this commitment to extend a strong moral consideration to non-contract-makers because, whereas contract-making capacities is a plausible candidate for a placeholder of (quite) universally equal ground for moral consideration, the various properties of beings in the world who are

[273] Nussbaum (n 19) 136-7.

not moral agents and the various relations we have with them does not seem to provide any secure ground to justify equal moral consideration.

For instance, both Kant and Hobbes, within their dramatically different conceptual frames of values, need to assume that people possess some properties *equally* to justify a strong equal moral concern. For instance, Kant notes that civil equality, one of the attributes of a citizen, is 'not recognizing among the people any superior with the moral capacity'[274] and Hobbes claims in the *Leviathan* that 'as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself.' [275]

This assumption of natural equality is reflected in an assumption of idealized equality or contingently required equality (for justice to obtain) in Rawls' theory. Hobbes' bet that every Goliath has its David and fears him enough to surrender his natural rights to a sovereign is echoed in Rawls' circumstances of justice, according to which there can be no exceptionally gifted people able to dominate the rest if justice as fairness is to be possible, and his description of the party in the original position as relatively risk-averse. Kant's assumption about the universal aspect of the capacity for moral law is echoed in Rawls' notion of range properties applying to the property of having moral powers.[276]

[274] Kant, *Metaphysics of Moral* (n 31) s 46.
[275] Hobbes (n 35) ch 12.
[276] Rawls, *A Theory of Justice* (n 1) 444-5.

It would seem unfair, on such contractual accounts, to grant an equal moral status to the PMD if they do not equally possess the capacities grounding this moral status.

This view is committed to equality in two senses. First, it is committed to give moral salience to the equality of physical and cognitive capacities. Second it is committed to equality of status within the political community.

To answer the former claim (that it would be unfair to grant an equal moral status to the PMD if they do not have equal natural capacities), one can say that it begs the question about fairness. It is possible that, on other grounds than these capacities, we ought to confer an equally important moral status to the PMD. It is less obvious how, however, this ground would be contractual, whereas the previous references to Hobbes, Kant and Rawls, indicate how it is obvious that individual capacities would be contractual grounds.

Regarding the second commitment to equality of status within a society, it is noteworthy that this equality is not analytically required by the nature of contract-making or even social-contract-making. When we make deals, people who hold the bigger end of the stick will simply get the lion's share. Why would the one holding the more comfortable position agree to put himself in a lesser position in order to imagine what the outcome of their bargain would be if they would have been equal? Potential reasons for that seem to evoke something that goes beyond mere contracting. What shocks or appears unfair to us about the idea of a social contract which would give various status to different citizens might, at the end of the day, have little to do with contracting *per se*. Perhaps it is something

historically contingent (like a need for recognition as equals within a particular kind of political and social arrangement, such as democracy, where anything less would be humiliating or undignifying and harmful to one's self-esteem) that justifies positing that people are all equal threats to one another or all equally gifted with reason or moral agency; equality may be a need rather than an empirical finding. We could imagine a social contract leading to unequal political statuses.[277] I cannot make justice to this hypothesis here, but there is no need to: no contemporary contractual theory (or more generally liberal political theory) would suggest creating a society where some citizens have a lesser political status, or are second-class citizens, which means more precisely that their voice and interests will count for less in public reasoning, and there is little reason to challenge this generally shared commitment to equality. There is a simpler, less radical solution, than to rethink the social contract tradition conceptual attachment to equality.

A commitment to equality[278] of moral status within society could plausibly be maintained while separating the question 'who is a moral agent' from 'who is a moral

[277] Some theorists, like Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (OUP 2003), prefer a scalar way of thinking about status, as it better corresponds to the actual variation of properties which provide reasons for granting a moral status. Although I agree, for reasons that I cannot explain here, that a scalar theory of moral status would be helpful in both moral and political theories, I want to note that it is helpful to distinguish a 'moral status' from a 'political status' (i.e. when the notion of 'moral status' is used in the context of granting the status of subject of justice). When we look at the issue of status from the point of view of the political community, it becomes more quickly obvious that there are good reasons for saying that citizens are equal even though their capacities greatly differ. For one thing, when we deal with political question, the gravity of the failure to consider intersubjective aspects of respect and moral consideration may be more apparent (if only because a political approach forces us to consider relations between members of a society whereas abstract thought experiments may more easily adopt a non-relational point of view making it less apparent that analyzing only internal properties may be missing something important).

[278] I am not personally invested in the issue of equality given my pluralist, relational view of what grounds a variety of moral attitudes, and I only think that some form of basic intrinsic concern happens to be equally given, as I will explain in the last section of this dissertation. Perhaps, however, there are good political reasons - probably having to do with the human need for social recognition and self-esteem - to consider equality

beneficiary' if we accept that moral beneficiaries can be granted an equally strong moral status on the basis of other reasons than their possessing roughly equal physical and cognitive capacities (or capacities which, though unequal, enable them to bring a sufficient contribution or represent a sufficient threat to others).

It seems to be conceptually possible for beings who do not have contracting capacities - neither the capacities to take part in a bargain and have something to put on the table for doing so, nor the capacities to take part in a table of negotiation where moral legislators are invited to sit - to nonetheless be the beneficiaries of this contract, more precisely, to have a RMS under it, the sort of status that the contractees who did take part to the contractual process would have negotiated for themselves out of self-interest, or self- and mutual respect.

While the aforementioned obstacles to this possibility had to do with the idea that the concept of a robust contractual *beneficiary* must absolutely be equated with the concept of a capable contractor, the next section will present problems which have to do with the concept of a *trusteeship*, more precisely, with the possibility that the use of a trustee may prevent the beneficiaries from this trusteeship from having as robust a moral status and being owned as robust a moral consideration as other citizens.

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important. I otherwise share Harry Frankfurt's skepticism about the intrinsic value of equality. See his 'Equality and Respect' (1997) 64 (1) Social Research 3.

5.4 Problems with Being Represented by a Trustee in the Contractual Process

Another set of problems with granting a robust moral status to the PMD comes from the very fact that they must be represented by trustees or by a kind of delegate who would occupy a more active or intrusive role than would the delegates for non-disabled citizens or contractees.[279]

The arguments I will explore is against the use of a trustee and would not hold against arguments which would suggest granting passive citizenship on other grounds, though it is hard to see how we would grant the PMD a robust moral status at the outcome of a contractual process within which they are neither contracting parties nor represented by one. (They also do not hold, or at least not without amendment, against the theories of active

[279] There are two ways of understanding the notion of a trustee here. The first one is the sort of common law interpretation of a trustee, because it holds that the benefit of the contract is a form of property which can be held on trust for a beneficiary. The second meaning of a trustee is the kind of modern statutory law framework which holds that even without the benefit of a trust, one can sometimes be represented by a guardian if they are lacking capacities. Such a guardian may act on the incapacitated person's behalf, for instance to sign contract, manage a bank account or help the incapacitated person in making decisions relating to her well-being more generally. There are more fine-tuned classifications of the degree of intervention (by contrast to supporting the person's autonomy) within the notion of guardianship, which is reflected in different legal systems that make provisions for different sorts of guardianship, ranging from a domestic mandate to making decisions for persons within one's family or couple to guardianships extending from specific actions or duties of assistance and of helping someone to express her will to speaking for that person, for her well-being's sake, with more or less consideration for her varying degree of ability to express her will.

I do not think that it is essential to work out such a typology for the purpose of this thesis. It is helpful, however, to state that I am generally talking about 'guardianship'. The chapter on active citizenship emphasized a self-effaced sort of guardianship where the trustee/guardian is mostly conceived as a 'prosthesis' facilitating the expression of someone else's will and interests. Perhaps only Adam Cureton's idea of constructing artificial parties speaking for the PMD would be more closely related to the common law kind of trusteeship than to the statutory kind of guardianship: Adam Cureton, 'A Rawlsian Perspective on Justice for the Disabled' (2008) 9 (1) Essays in Philosophy, Article 5. I repeat that I wish to avoid bringing the voluminous legal baggage associated with such question into this conceptual research.

citizenship which we explored in the previous chapter, as the PMD would then be taken to represent themselves.)

There are three arguments: a metaphysical one, a structural one and an epistemological one.

The first criticism is that we cannot grant a robust status to the PMD because they are not value-givers and must be given this status by citizens in real politics or by idealized contracting parties within a contractual process. That is the argument that I associated with Nussbaum in the previous section and which is that there is a 'Kantian divide' between people with moral agency, on the one hand, and the rest of the world, on the other. As we will see, Korsgaard provides an argument against it: being a value-giver does not necessarily make us more valuable; we can give as normatively stringent a value to non-rational beings as we give to ourselves and other rational agents. If we hold the view that we give value to entities rather than that we detect it in them, this seems perfectly possible.

We can already make this point by invoking some common sense intuitions about representation and passive representation which may serve to give to passive citizenship the gilt edge that it lacks in the mind of some. The idea that one is not being well represented in, or even excluded from, or exploited by, the political process because one is not a decision-maker within this process, if taken seriously and literally, would make

> modern democratic politics (...) a desperately non-inclusive affair in which the only individuals included (at all) in the agreements taking place in democratic

> legislatures would be the members of a tiny political elite; the vast majority of citizens would be straightforwardly excluded.[280]

It is true that in saying this, Nicholas Southwood appears to be criticizing only direct participation, but once we have conceded that it is acceptable to utilize simulacra of participation through representation or other forms of indirect representation, we should not take issue with the very indirectness or representational, conceptually constructed, or metaphorical character of the type of representation involved in passive citizenship. We can however take issue with a different aspect of being a decision-maker. One of reasons why we value the capacities of being a decision-maker as a form of legitimization of state authority is not that we directly partake to the decision process but that it enables us, afterward, to ratify, as it were (if only through indirect acquiescence), the norm imposed upon us, as meeting certain standards of reasonableness. Passive citizens are unable to do this. They therefore fail to indirectly and conceptually justify state authority and that their autonomy is respected.

If we hold the position that the capacity to legitimize State authority is part and parcel of what gives the active citizenship its metaphysical gilt edge, we will think that passive citizenship is deprived of it. I will come back to the distinction between being a value or authority giver and having value, or being subject to a legitimate authority. For now, I only note that on a more paternalistic understanding of the State, which would legitimately exercise its authority if it is meeting the citizens' needs, the difference between passive and active citizens would not be so relevant, insofar as we hold that the capacities for individually understanding (and, as it were, ratifying, *qua* moral legislators) the legitimacy of

[280] Southwood (n 215) 110.

a norm would serve not only as a way to legitimate state power but as a way to ensure that the individual's basic need for control over her existence is not violated. If we took such a view, we would see that the fact that the passive citizens cannot 'ratify' the norms to which they are to be subjected does not harm them in that particular way like it would if they were autonomous. Even though it is a statement of proto-philosophical intuitions rather than an articulated argument, these comments may assuage two reasons for worrying that passive citizenship may be a second-rate kind of status: because of the artificiality of the representation that it requires and because its structure is not sensitive to the subject's autonomy.

A second proto-philosophical (socio-historical) comment worth prefacing our first contractual argument is that the fact of being disabled and of not meeting the benchmark of what is taken to be the central case of a person or a political participant or citizen is associated with an intrinsically inferior value has a long History: 'In almost all places and among all people' Anita Silvers notes, 'individuals with certain physical or intellectual anomalies are assumed to be, by the very nature of their condition, inferior'.[281] As such, disability has not only long been assumed as a terrible fate, but also as a somehow deserved one - and therefore not worthy of the sort of pity, compassion or fair compensation that we would be inclined to give to the victims of sheer bad luck: 'From antiquity the traditional explanation for their disadvantage has supposed that there is some moral flaw, not necessarily theirs but perhaps that of their progenitors, for which failing they must suffer.'[282]

[281] Silvers, *Formal Justice* (n 189) 56.
[282] ibid 57.

We must be aware of this (undergoing, though mutated) background of human affects when we analyze philosophical arguments purporting to support them.[283]

The epistemological issue is that the trustee may not be able to detect what is in the interest of the PMD, or to correctly balance whatever conception he has of the PMD's interests with the PMD's own expression of desires, which he may also have trouble figuring out. We will come back to the epistemological obstacle of representing PMD when we deal with Silvers' notion of a cognitive prosthesis. For now, we can simply answer that these epistemological difficulties are unavoidable when dealing with the best interests of beings who cannot express their opinion about what they want or who are not in a good position for doing so (like a child or someone under the influence of drugs). However, if the trustees are well-meaning and duly informed about the best course of action available to them to overcome epistemological obstacles, there is little else that can be required from them (or from their appointers) morally. Although this is too complicated an empirical matter to be solved by any simplistic *a priori* assertions, one cannot help noting that, no matter how handicapped and how different they are from non-disabled people, the PMD are humans and are in many important senses like the rest of us and it is plausible that this biological fact alone should make us optimistic about securing some reliable knowledge about ways in which we can make their lives go better. Finally, although epistemological obstacles would render the institution of trusteeship for PMD absurd if they were serious and insurmountable,

[283] Worldviews may change, but the need to fault or blame disabled people for their state is perennial. (Insofar as their fate is considered 'bad' and we naturally tend to look for a culprit when badness occurs, it is all too tempting to take the 'victim' physically/phenomenologically closest to the bad event as a scapegoat.) Although this no longer takes the form of saying that they inherit the debt of their ancestors' sins, it surfaces in other forms. For instance, the PMD are often conceived as a burden to others - the burden is not imposed by bad luck, but by them.

less dramatic epistemological obstacles are more likely to affect the accuracy of the trustee's decisions rather than to downgrade the PMD's status, i.e. these obstacles would not be so intrusive on the contingency of the passive citizen status of the PMD as to support the claim that their status would be made significantly politically inferior for it.

One of the structural issues is that, even though in theory trustees representing those unable to represent themselves ought to be guided by their beneficiaries' interests alone, some fear 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.'[284] This concern is shared by Nussbaum, Silvers and Francis, and this structural worry is made worse when connected with the epistemological one:

> [T]rustees 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.[285]

It seems that some precisions need to be added to this fundamental fear that the trustee would be partial to his own interests. First, one should note that the fear that delegates think about their own well-being (and prioritize it covertly) sometimes more than their role makes it moral (or legal), it is not a problem that is unique to the PMD's representatives but one that

[284] Silvers and Francis, *Justice Through Trust* (n 42) 53, referring to Martha Nussbaum's Tanner Lecture (n 114), I note that this quote has been edited out of the Lecture as currently available online.
[285] Silvers and Francis, *Justice Through Trust* (n 42) 53.

can affect any political representation, though it is a plausible worry that the epistemological difficulties may make it easier for the dishonest delegate to cover his tracks, though not as easy, perhaps, as Silvers and Francis suggest.

Second, the concern that trustees speaking for the PMD will be unduly influenced by their own interests is certainly plausible if we are talking about trustees in real life politics, but it is possible, at least conceptually, to imagine a non-corrupted trustee. Indeed, this is an amendment to Rawls' OP that Adam Cureton has suggested: to appoint trustees in charge of speaking for the PMD, and them alone.[286] This escape route through an ideal process may be a dead end, however, considering that sooner or later, a real person (like Rawls or you) needs to imagine what these idealized trustees would say about the PMD's interests.

Another major structural issue - not about the structure of a trusteeship but about the structure of the contractual process within which this trusteeship would take place - is that the PMD may be entitled to speak too little or too late in the contractual process. Even supposing she will know the PMD's interests and put them before her own, the trustee's representation may be ineffective, or not sufficiently effective, to promote the PMD's interests. Why would the trustee be entitled to speak only too little or too late? On some contractual accounts (at least those we are considering in this section, which assume that the PMD cannot participate as full cooperants to the social contract but are only to be conferred a status as one of the outcomes of the social contract) the PMD can only be integrated when some fundamental decisions about the order regulating our society (like Rawls' principles of

[286] Adam Cureton (n 279).

justice) have already been made. In Rawls' theory, for instance, only primary subjects of justice or actual participants would be entitled to participate in the early sequences of the contractual process.

The PMD will also not be expected nor invited to speak about all subject matters. The social contract tradition generally limits what participants to the contract have to say to the things that will affect them. (In a way, the whole point of resorting to a contract is to avoid having them disagree about how the polity should organize itself or, for instance, what objective teleological basis should direct the shape of our society and to impose the preferences or beliefs of some over others.) Nonetheless, individuals have a personally vested interest in choosing certain procedural rules of justice, as well as other rules regulating collective endeavours to which they will participate or that will affect them. Accounts conceptualizing the PMD as passive beneficiaries can be expected to limit what the PMD's trustees are entitled to say about social projects to which the PMD do not actively participate. The PMD do not (or rather, are thought not to) have an interest in participating actively in such projects, but only in not being hurt by them, and in being otherwise cared for. If some projects have some negative impact on the PMD, then their trustees may be considered to have grounds to voice their interests. By then, however, many fundamental rules and projects have already been agreed to, and the trustees' intervention is more likely to provide some form of compensation rather than to more fundamentally challenge what is harming the PMD. As a result, the corrective or compensatory measures may prove unsatisfactory (and though this way of thinking about the disabled in a compensatory way can be challenged by theorists of the active citizenship of the PMD, as we have seen in the

previous chapter, it is much harder to imagine how to do so within the frame of passive citizenship). This can interfere with the PMD's accessing both abstract and concrete kinds of social advantages, and is susceptible to affect all kinds of disabilities. For instance, deaf people may be given subtitles or interpreters to accompany movies, but had they had more of a say, they might have asked their municipality to invest in an artistic center offering more visual entertainments instead of only in theaters. This portion of the problem may not be a structural one: perhaps they are not asked to speak on certain subject matters simply because the way in which it will indirectly affect them has not been properly assessed rather than because there are justifications to neglect some of their interests. It remains that when these interests would require their trustees to represent them at a stage where only active citizens are expected to be heard, it is at least *likely* that the fact that their absence from the process will affect them may go unnoticed. Moreover, as mentioned, even if their needs *are* taken into account, they may be heard too late and dealt with in a compensatory way once the set-up structures have already excluded them.

5.5 Indirectly Acquiring Direct Moral Considerability because the Contractors make Provisions for it

In her Tanner Lecture, *Kantian Ethics and our Duties to Animals*, Christine Korsgaard made the argument that, on a (neo-)Kantian account, animals can be intrinsically valuable even though they are not the source of their own value. In other words they would be intrinsic sources of moral claims, though in an other-authenticating rather than in a self-authenticating way. Her argument replies to the metaphysical worry that the status of the PMD as passive

citizens is doomed to be too contingent and derivative in a way that makes it normatively weaker, less stringent, or otherwise inferior to the status of non cognitively disabled citizens. Although it is about animals, it applies, *mutatis mutandi*, to other non-rational beings as well.[287]

Andrew I. Cohen has offered a similar argument although it would fall within the contractarian tradition.[288] Following Christopher Morris[289], Cohen distinguishes between primary and secondary moral standing. The only difference between both is that in the first case, one has negotiated contractually to obtain one's *own* status; in the latter, one has contractually negotiated for a robust status to be given to an individual unable to make a contract. This implies (1) that the status did not preexist the contract (which implies a similar

[287] Christine M. Korsgaard, 'Fellow Creatures: Kantian Ethics and Our Duties to Animals' (The Tanner Lectures on Human Values, University of Michigan 2004) <http://tannerlectures.utah.edu/lectures/documents/volume25/korsgaard_2005.pdf> accessed 27 April 2013. Early on, she generalizes the problem of exclusion from the 'Kingdom of Ends' to all non-rational beings (p.81). She does add that people who 'are at stages of their lives when reason is underdeveloped, inert, or non-functional' still possess the standing of 'rational beings under the Kantian conception', which might point to the 'nature of the kind' arguments, i.e. arguments grounding moral status on the fact that a being belongs to a kind, a *genus*, but which might also be limited to humans who will at some point reach a rational stage (p.82). She also explicitly limits her project to non-human animals as 'the one group' among the ones she mentioned who is not constituted of rational beings, which indicates that she does not see a problem in categorizing the PMD as beings possessing the standing of 'rational beings under a Kantian conception'. I believe that she focused on animals because, like most philosophers theorizing the rights of marginal cases and non-philosophers, but *contra* Peter Singer and many utilitarians, she assumes that the case of the PMD is unproblematic. When she asks, '[w]hat about infants [...] or the very old and demented [...] the severely retarded and the incurably insane [...] non-human animals? Are none of these to be regarded as ends-in-themselves? And if not, does that mean that we are allowed to use them as mere means to our ends?', the latter question only seem to apply, in practice, to animals. (p.81) It is therefore possible that Korsgaard would disagree on my application of her argument to the PMD on the ground that she would have included the PMD through a 'nature of the kind' argument. I am not discussing the validity of this argument in this dissertation, though I can mention that, like other variants of human exceptionalism, I find it an insufficiently convincing way to justify the RMS of the PMD.

[288] Andrew I. Cohen, *Contractarianism, Other-regarding Attitudes, and the Moral Standing of Nonhuman Animals* (2007) 24 (2) Journal of Applied Philosophy 188.

[289] Christopher Morris, 'Moral Standing and Rational-Choice Contractarianism' in *Contractarianism and Rational Choice: Essays on David Gauthier's Morals by Agreement* (Peter Vallentyne (ed), CUP 1991) 76, 89-90.

view of value to Korsgaard's) and (2) that it is not required for any other reason than that the parties happen to want to contract for it.

I will focus on Korsgaard's more detailed contractualist argument, but let me start with Cohen's, as the problems of his argument are easier to detect, and as it will be more natural to move on from contractual principles to metaphysical ideas underpinning them than the other way around. Also, I find Korsgaard's argument more persuasive and thus think it fitting to introduce it as a solution to the shortages of Cohen's arguments, though it creates problems of its own that cannot, I believe, be solved.

5.5.1 The Problem with Piggyback Moral Statuses

Cohen's strategy is to say that 'the only difference [between primary and secondary moral standing] is in the genesis of the standing'[290] and that this genesis does not matter: the standing obtained is as metaphysically strong. First, I could argue that it is rather as metaphysically weak. It is a natural reply to his argument against the criticism that, in his example of Peter extending 'direct moral regard' to Emma because James makes this contractual demand to him, James could change his mind, and stop asking anything from Peter. 'Nontuist that he is', Cohen writes, the contractor (Peter) 'would stop extending [the beneficiary party - say, Emma is a disabled child] any moral regard'.

[290] Cohen (n 288) 191.

The key problem, as Christopher Morris notes, is that we cannot satisfactorily explain, on this (contractual relational) account (of status) why the PMDs or children would have a RMS vis-à-vis their protectors or parents. Morris concludes that '[i]t appears that someone need not have moral standing in relation to the agent(s) who is the vehicle for one's secondary moral standing'.[291] This is an admission that a contractarian account cannot offer an account of why parents should intervene contractually to protect their child rather than to honor neckties. 'If that is their choice', Cohen concedes at one point, 'so be it'.[292] Yet, Cohen attempts to circumvent (if not solve) the problem of optionality in three ways. First, he suggests that there may be other non-optional grounds for moral standing outside of contractarianism[293], which does not solve the issue of optionality from a contractarian point of view. Second, he makes the relatively familiar claim (among theorists working on the notion of the status of children and of the disabled) that others will care for them if their parents will not. This is a descriptive rather than normative claim and it therefore does not explain why this concern is morally warranted and even stringent. His third argument comes in later, in the last portion of his paper, where he borrows from Simon Blackburn's 'projectivist quasi-realism' to suggest that '[c]ontractors *ought* to extend direct moral regard to any being with a particular characteristic(s) such as sentience or a distinct capacity to flourish.'[294] I more or less agree with this view, for reasons that need to be argued on non-contractual grounds and that I begin introducing with Korsgaard's argument. The word 'contractor' in the previous quote is unnecessary however: the obligation applies to all moral agents and is not rooted in contractarianism. He would suggest that we should wed

[291] Morris (n 289) 95.
[292] Cohen (n 288) 193.
[293] ibid 191 and fn 12.
[294] Cohen (n 288) 197.

contractarianism and this - or potentially another - theory about the robust status of animals (his argument applies to the PMD: he actually refers to infants and Morris referred mostly to infants and the infirm and only mentioned animals passingly). When he writes that '[c]ontractarianism is not committed to saying that it is permissible to torture animals if the contract ignores them', he is repeating that there can well be another ground for moral standing external to contractarianism. Insofar as I take him to narrow the reach of contractarianism to a more limited domain of morality, I agree. However, I suspect that his marriage of quasi-realism with contractarianism aims at more: instead of narrowing the application of contractarian theory, it would constrain it. People would be *wrong* to make certain contractual agreements or fail to make others.[295] Cohen assumes that critics like myself worry about the contractual/constructivist subjective view on the foundations of value. However, I do not; my own account is similar to his. What I worry about is the coherence of his argument when he calls this non-contractual account contractarian. If it constrains contractors normatively, then it subordinates the contractarian commitment to the parties' will to a greater good that ought to trump this contractual will. The contract metaphor would be reduced to a means of carrying out a theory of the good. Cohen's suggestion that they are, instead, compatible and can be married seems unwarranted.

Korsgaard's contractualist standpoint allows her to make this marriage: she can explain why we ought to extend the contract to benefit the PMD in a way that is not incompatible with (indeed, emanates from) contractualist assumptions, even though it would have been incompatible with contractarian ones.

[295] ibid 197-8.

5.5.2 Extending the Contract to All Intrinsically Valuable Beings and The Problem of Prioritization

Korsgaard's key idea is that a RMS or rather, the kind of value which grounds it, is conferred by moral agents through certain acts of will. The metaphysical criticism, which insisted that moral agents have a special value based on their internal properties (which PMD do not have) and held that the PMD's status was worth less because it was only derivative and given to them by the moral agents (and, one may add, contingent upon these agents happening to care for them) therefore does not arise. All valuable beings have been given their status by acts of will, not only the PMD.

Instead of emanating directly from internal properties, people are conferred value through a kind of interpersonal attribution of value. While it could still be said that moral agents are able to attribute this kind of value to themselves, whereas the PMD depend upon moral agents conferring it upon them, the PMD's characteristics can still warrant direct moral consideration, that is, a non-contingent, non-instrumental kind of consideration. There is simply no justification, on her account of how things are or come to be valuable, why a more indirect way of acquiring intrinsic value would make a being's moral status any less important or demanding.

This account of how beings acquire a special kind of value (including the RMS that interests us) does not mean that moral agents can confer value or a RMS to anything they

want, contractually or otherwise. We must, she suggests, grant the special value we grant to ourselves to all who partake of our 'natural good'. I will explain what she means by this, but I already note that this would encompass the PMD, non-human animals or any being that 'matters to itself', in the sense that something that is good for this being is good from its point of view.[296]

I will present three elements of Korsgaard's arguments important for our purposes: the Kantian theory of value which she is utilizing and two conceptual distinctions that she draws (and that Kant himself failed to draw) but which would have allowed him to grant intrinsic value to certain non-rational beings.

To already state my conclusion, the problem with realizing that we, contractors, share a flourishing nature with the PMD and that this requires us to recognize their moral status on grounds compatible with contractualism, is that we also share it with all living things. I find that Korsgaard cannot provide a contractual criterion for prioritizing some intrinsically valuable beings over others. Although I can imagine some non-contractual criteria to do so, I cannot think of a contractual one that would preserve the kind of value that she has secured for the PMD. In fact, all that Korsgaard does (not that it is a small feat) is to show that Kantians can agree with the (accurate, I believe) idea that beings partaking of human goods are intrinsically valuable, in the sense that they are important 'like us' instead of important 'for us' or, in yet other words, that they have a well-being of their own and ought to be regarded as such morally. This is the kind of conclusion that thinkers endorsing a 'list of

[296] Korsgaard (n 287) 104.

goods' theory, like Nussbaum, endorse with much less hesitation. To think anything else, Finnis simply said, is to be 'buried in untruth.'[297] Korsgaard takes us through the Kantian psychological and moral route to flesh out a case for this conclusion from a Kantian point of view and, although I am personally more attracted by psychological and moral explanations relying on the notion of empathy (moral and psychological) to make this case, I find her Kantian meta-ethical case convincing.[298] Nonetheless, it faces the problem that any of these other accounts face: it gives reason and motivation for recognizing the intrinsic value of a variety of non-human beings, but does not provide us with an account of how to prioritize some beings over others. In fact, even though Korsgaard refers to the Kantian notion of passive citizenship, she does so to make her point about the special *value* that animals have rather than about their moral status.

The issue of why the PMD would be contractually given a robust kind of value is solved, but the issue of why they would be given a robust moral and political status and a robust set of rights is not unless we assume that all beings sharing our 'natural good' will have such a RMS and such rights, or provide an account of the relative normative stringency of different moral statuses, or of why and how certain intrinsically valuable beings would make certain kinds of demands upon certain moral agents.[299]

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[297] Finnis (n 260) 48.

[298] It would fall beyond the scope of this dissertation to compare the merits of her case with available alternative, notably because her own can still be presented in a contractual frame and because I must bracket many meta-ethical issues which could constitute a different dissertation altogether.

[299] Or short of coming to over-pessimistic or odd conclusions, such as assuming that all living things ought to make stringent demands on all of us all the time but that we are doomed to fail morally and that no moral guidance can be found to make the best of, even without overcoming, this failure.

The only *contractualist* way to justify why, other things being equal, a PMD should be given water before a plant is watered that Korsgaard points to would be that moral agents happen to care more for PMD in ways that

First, let me recap Korsgaard's explanations of the elements of a Kantian metaphysics of value and of how it relates to the notion of a moral community within which members owe obligations to one another in a way that could be understood within a contractualist frame.

As for the Kantian metaphysics of value, there are three key elements to understand Korsgaard's argument and its appeal: (1) the Kantian account is a 'fitting attitude' account of value, (2) which correlates a conception of moral agents as value-givers and 'ends-in-themselves', (3) and comes with valuing constraints.

On a Kantian account, like in other accounts of value which reject value realism, moral legislators create value rather than detect it in the world. In Korsgaard's words, 'we do not desire things because they are valuable; rather, we take them to be valuable because we desire them.'[300] Korsgaard therefore rejects the idea that human beings (or anything else) 'simply have intrinsic value': 'The decision to regard ourselves as the source of legitimate normative claims is the original act that brings the world of normative reasons and values into existence.'[301] Her lyrical concluding sentence perhaps makes a better case for her agent-emanating view of value than a rational argument could, as it invites the reader to share her proto-philosophical intuitions about the matter: 'We are the only beings who (...) can shake

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would render them noninstrumentally valuable or valuable for their own sake, but yet not the source of their own value, not 'ends-in-themselves': Korsgaard (n 287) 88, fn 24. This would not defeat the metaphysical criticism however. Korsgaard's criterion for attributing intrinsic value (having a good for oneself/itself, i.e. a well-being of one's own) defeats the metaphysical criticism, but at the cost of creating a politically unmanageable passive citizenship.

[300] Korsgaard (n 287) 93.

[301] ibid 101; see also Korsgaard, *The Sources of Normativity* (CUP 1996) 161-4.

our fists at the uncaring universe, and declare that in spite of everything we matter [and, implicitly also assert the value of all beings sharing our mysterious fate, or more precisely what we think is valuable about this fate].'[302]

The conception of ourselves as value-givers is fundamental in Kantian moral thought. It is part of our psychological makeup rather than a chosen, posited conception. It is a fact about us that we are 'rational beings, who are conscious of our choices and [their grounds]' and that 'we can pursue our ends only if we are satisfied that doing so is good - that is, that our ends are worthy of pursuit.'[303] Value is the necessary implication of our rational nature: 'Because we are rational, we cannot act without at least implicitly endorsing the principles upon which we act.'[304] This particular way of desiring and valuing ends imply that we see ourselves as 'sources of values': 'What matters to me (...) really matters, and is worth pursuing, because *I* matter.'[305] This conception of ourselves is what Kant refers to when he says that we are 'ends-in-ourselves'. This term of art serves to distinguish between things that are good 'for' something else and things that are good in themselves. The ends that we chose 'are not good in themselves, but only relative to our own interests'. They are good for us, but we, in turn, are not good for something else in the same way. This is not so much a statement about the value that we (or anything) have, but about how we humans value things,

[302] Korsgaard (n 287) 109 and 105.
[303] ibid 93.
[304] ibid 95.
[305] ibid 93. For a similar position, see J. David Velleman, 'A Right to Self-Termination?' (1999) 109 Ethics 606, 611: 'Of course, we assume that a person's good does matter. But we make this assumption only because we assume that people matter—that everyone has a value that makes him worth caring about. (...) our appreciation of value that accrues to someone depends on a prior appreciation of a value inhering in him.' On the idea that the value of a good for a person is not a 'categorical' value, to put it like Velleman, or that the value of such goods is not intrinsic to certain states of affairs but rather nested in the intrinsic value possessed by the person undergoing such states, see Anderson (n 123) ch 1.

and it is implicit in our way of valuing that we must take ourselves to be ends-in-ourselves. This is why Korsgaard notes that 'even the special value of humanity as an end-in-itself comes from our own legislative acts': 'the very act of treating our own ends as good and worthy of pursuit, in spite of their lack of any inherent value, we in effect *confer* the status of end-in-itself on ourselves.'[306]

However, it is not because valuing precedes value that valuers can confer any kind of value upon anything they wish. There are various constraints making certain valuing attitudes fitting and others improper. We are not only valuing things in isolation of other valuers, but we are 'moral legislators' in the sense that we are 'sources of [legitimate] normative claims that are binding [on all rational agents].'[307] This is because all rational agents can recognize valid reasons and respond to 'legislative acts', and the fitting stance we adopt to decide whether we have a reason to do something - the one we naturally adopt - is one that can be shared by all rational agents. In the Kantian moral system, 'that amounts to asking the question of the categorical imperative - whether the maxim "I will do act-A for the sake of end-E" can function as a universal law.'[308]

Now, how do these elements of a Kantian metaphysics of value relate to the notion of a moral community on a Kantian account?

[306] Korsgaard (n 287) 94-5. Of course, a value realist account may hold that we are mistaken in doing so and that our psychological inclinations to implicitly endorse a conception of ourselves as ends-in-ourselves are not where we should start.
[307] ibid 93.
[308] ibid 94.

The result of considering that others are, like ourselves, ends-in-themselves and that their autonomous choices, their ends, are valuable and should be promoted like ours is a community of rational, autonomous beings respecting one another, which Kant calls the 'Kingdom of Ends'. Korsgaard defines it as a 'notional community, constituted by the relations among human beings with a shared commitment to a conception of themselves [as ends-in-themselves]'. More than a spiritual Kingdom, it is 'a kind of constitutional democracy, in which each citizen has a legislative voice', by which they express moral laws, which are the laws of this notional community.[309]

This counts as a kind of social contract theory. As we saw, the idea that moral laws are the product of the subjects' will, meaning that the legal subjects are lawmakers is 'the animating idea of contractualism.'[310] This seems to inevitably imply the exclusion of non-rational beings.

Before I state Korsgaard's solution to extend this Kantian account of a ground (intrinsic value) for granting a robust status to non-rational beings as well, I need to state the two conceptual distinctions that she makes.

The first distinction seeks to open up a conceptual possibility that Kant seems to be closing when he creates a simple dichotomy between *persons* or rational beings, on the one hand, and *things* or all the rest of nature, to be valued only as means instead of in themselves, on the other. Korsgaard notes that this is incompatible with the way in which Kant himself

[309] ibid 81.
[310] Darwall (n 28) 5; Southwood (n 215) ch 3.

holds that we value 'the ends we pursue in our actions'. Some of what we value, we value for its own sake, i.e. as an end, though not an end-in-itself. A natural object may thus gain 'the status of a relatively valuable end' if someone 'happen[s] to care about it'[311]. In other words the ends-means pair does not necessarily correspond to the dichotomy between self-authenticatingly valuable and exernally-authenticatingly valuable. One's value as an end can be externally authenticated.

Korsgaard says that such a middle-ground status 'could not be used a general duty to animals' because of its contingence. I am unsure, however, why this is the case. If there is no constraint upon our valuing, this status would be contingent upon our fancy. But it may not be the case that we can fittingly agree to the maxim that it is acceptable for us to disregard the welfare of animals (like we could choose with more optionality, say, not to take piano lessons). Indeed, such is the argument that Korsgaard will make. She may want to preserve a different conceptual space, precisely, for ends like piano lessons, but I am not sure how these cases (piano lessons and animals) differ in terms of being conferred externally the value of an end. Rather, they differ in terms of the kinds of constraints limiting the agent's option to confer them this value or not.

Her second distinction better tracks what makes the difference (or rather, what is mistakenly thought to make a difference) between the kinds of properties or traits of a being that would justify a non-optional constraint to value it as an end. It is the distinction between being a source of robust normative claims (i.e. 'claims that must be recognized by all moral

[311] Korsgaard (n 287) 88 fn 24, contrasting *Groundworks of the Metaphysics of Morals* (n 33) s 4:428.

agents') and having the capacity to confer this robust normativity. In other words, it is the distinction between being a (robust) value-giver and having (robust) value (where 'robust' refers, in the Kantian account, to the final and self-authenticating character of value, as well as its agent-neutral normativity), that we explored in section 5.3.

Korsgaard justifies the integration of non-rational beings to the moral community by making use of this second distinction. She explains how we give value to those non-rational beings just like we give value to ourselves. Her conclusion is that 'we *legislate* that the natural good of a creature who matters to itself is the source of normative claims.'[312] We do so because when we take ourselves to be ends-in-ourselves, we do not only take our *autonomous nature* to be 'the source of legitimate normative claims'. We do not only respect our autonomous choices, but also 'the content of those choices', and it is a constant choice that we moral agents do to 'choos[e] to pursue what [Korsgaard calls] our "natural good".'[313] On Korsgaard's account of what a 'good' is, any entity has a natural good in the sense of what 'enables it to function at all and to function well'[314]. Living things, however, have a good of their own. When something is good for a car, it is because it allows the car to perform its function which, in turns, serves the good of some other entity than the car. When something is good for a living thing, by contrast, we may be referring to what is good for this living thing itself, from its point of view.[315] This is because living things have needs or a well-being of their own. By treating the pursuit of such a good in ourselves, we are effectively affirming or conferring a normative value to this kind of good in others, i.e. we

[312] Korsgaard (n 287) 106.
[313] ibid 102.
[314] ibid.
[315] ibid 104.

are legislating that 'the kind of natural good characteristic of creatures who experience and pursue their own good (...) is the source of normative claims.'[316]

I believe that Korsgaard's account suffices to ground the intrinsic value of PMD. Her Kantian argument for recognizing that animals are ends-in-themselves is sound and can be applied to the PMD. My criticism is that, while it justifies that many beings have intrinsic value, it grants a robust value to such a large variety of beings - without telling us how we should prioritize between the claims that all these beings make on us - that it seems too abstract or ideal to be satisfactory as a contractualist account. I hold a view similar to hers concerning the criterion indicating that a being has intrinsic value, but personally think that we must as a second step resort to the normative content of various relations to explain what kind of duties weighs on who, toward whom and to what degree. I cannot explain this sort of supplementary relational theory here, but it is not contractual. I do not see how her Kantian account could provide us with clearer instructions, except by developing an argument according to which moral agents can (contractually, legislatively) choose which beings to prioritize. However, if it does so, it would resort to putting non-rational beings in the category of 'relatively valuable ends' which she contemplates in her first distinction described above, granting that this was insufficient 'to ground a general duty to [non-rational beings].' I would add that this status would not only be unsatisfactory because it would not be universal, but also because it would not provide a sufficiently robust status to the PMD in the further sense of being affected by this very optionality or contingence.

[316] ibid 105.

Korsgaard's account can plausibly justify that we ought to grant intrinsic moral considerability to non-rational beings such as animals and the PMD, but is it enough to ground the PMD's RMS? And can it do so on a contractualist ground?

5.5.2.1 From Intrinsic Value to Robust Moral Status

Rational agents can, *qua* legislators in the Kingdom of Ends, contractually will a strong status for the PMD, but this status would do a much more limited moral and political work than what a contractualist theory expects a RMS to do.

The problem is that the criterion of having a good for itself could include plants, not only animals, and not only the PMD. This floodgate of intrinsically valuable beings is, I believe, justified, but we cannot grant a robust status to all beings that are merely alive, unless 'robust' is taken in a less meaningful sense to allow for more easily defeasible obligations. The mosquito and the lettuce cannot make a robust claim on me to continue into existence when their lives must be shortened for the good of my child. Something more needs to be said (more precisely, I personally think, something about the relations I have with all the entities involved, and their respective forms of life and needs).

This means that we have only solved the problem of their being intrinsically valuable, but we have not established the sort of status it would correlate and why. Korsgaard's theory of passive citizenship for fellow (non-rational) creatures successfully explains why passive citizens are to be taken seriously, i.e. are as intrinsically valuable as active citizens, but it

comes at the cost of saying that all living things are passive citizens. Korsgaard recognizes this: 'Why shouldn't we have obligations to all living things but if we do, how can we meet all our obligations?' [317]

She discusses the issue of whether 'ought imply can', but her answer that Kantian moral standards are ideal ones which we may not be able to reach but toward which we must strive does not help us in organizing the striving in a moral way - assuming morality has *something* to say to the less-than-ideal strivers that we are (something contractual theories do assume). It does not answer urgent questions which need precise answers within a contractual frame: who has rights, and what is the nature of these rights? How to manage a massive conflict of rights and to prioritize between intrinsically valuable beings in a non-arbitrary way? How is this to be formulated as a contractual theory? Her saying that we can at least 'do our best', 'as far as we possibly can', starting by not hunting and eating our fellow passive citizens, is far from comforting for anyone worried about the possibility that the status of passive citizen is a precarious one, and here, it seems, an explicitly second-rate kind of citizenship.[318]

The question is not only whether we matter intrinsically, but whether we matter contractually, i.e. in a way that calls for a specific series of society-governing principles and rights and explains why it is important to give water to a PMD before watering a plant if the survival of both depends on a glass of water. The question of intrinsic value is only relevant if it can answer the contractual question, which it does start answering. Because it does not

[317] ibid 107.
[318] ibid 108.

explain why and how passive citizens are as important as full citizens within the political or legal community, it does not provide a satisfactory contractual answer[319], unless we take the social contract tradition to a place where it has never been before and conceive of society as Nature and the social contract as a unilateral act of will. The problem is not only that we would have to re-imagine many key concepts of the tradition (like reciprocity) but that the notion of social contract as a substantial or heuristic device to vehicle our moral intuitions would run out of steam. Whatever notion of community between moral agents and nature may emerge, it would be counter-productive to this (potentially enlightening) de-anthropocentric endeavour to express moral agents' complex (non-contractual) relations with their fellow creatures in terms of a paradigmatically human kind of interaction: a contract. Even contracts between very different beings (say, God and mankind) have not fictively posited the abilities of parties to the contract to understand its terms.

5.6 Why Contractors ought to extend passive citizenship to the PMD

The previous section dealt with the structure of a contractualist (and, briefly, contractarian) argument for passive citizenship. It showed that there was no particular problem in indirectly granting the PMD a direct respect. The very fact of giving direct moral consideration to beings who cannot contract, value, or themselves grant this moral

[319] By suggesting that 'we' should try not to eat passive citizens and certainly, not to hunt them for fun, Korsgaard is already pointing to double standards suggesting that active and passive citizens are not equal. Or at least that, although they should *ideally* be equal citizens, in practice, they will benefit from less stringent rights. As I mentioned, contractualist thought would generally hold that morality and justice should provide us with more precise guidance than that. Otherwise, a more idealized brand of contractualism giving up on explaining how to morally prioritize between intrinsically valuable beings would be unappealing by comparison with alternative moral accounts.

consideration is not in itself (metaphysically) problematic. I was concerned, instead, with the issue of whether this moral consideration correlated a RMS. More precisely I was concerned with the particular contingency of this standing (with regard to Cohen's argument) and with the low threshold to grant it, or rather the inability to prioritize between the beings passing this low threshold (with regard to Korsgaard's). This does not necessarily prove that one could not come up with a contractualist or contractarian account of passive citizenship which would not meet these structural problems, but it does indicate that it is hard to imagine how one could, especially since the problems of contingency and over-breadth are (at least sometimes) connected: by hammering one problem down, we may cause the other to poke its head out.

In this section, I will present a few more contractualist strategies to explain why the contractors ought to grant this passive citizenship to the PMD. I have analyzed various arguments made to that effect (notably those of Harry Brighouse, Adam Cureton, Thomas Scanlon and Nicholas Southwood) but I will only deal here with the arguments provided by Cynthia Stark, for reasons of space, and because her account is the most detailed and promising. Moreover, although all these theorists make very distinct and original points, like Korsgaard, their arguments ultimately invoke some sort of normative relation/bond or good that falls beyond the scope of the social contract tradition, though it can supplement it. Scanlon refers to a 'tie of birth', Stark refers to a moral response to people's basic needs, Southwood refers to the significance of being affected by a contractual decision to which the affected party has not participated and Cureton assumes too quickly that we are to integrate

the PMD before focusing on explaining how that could be made possible through the construction of trustee representing them behind the veil of ignorance.[320]

5.6.1 Granting the PMD a Passive Citizenship on the Basis of the Normativity of Basic Needs

Cynthia Stark argues that a 'suitably modified' Rawlsian contractualism can 'provide grounds for meetings the needs of people who are not able to contribute to the production of the goods necessary to sustain them.'[321]

Stark and Southwood deploy a similar strategy: they both integrate the PMD for broad, but appealing reasons (Southwood: the PMD are 'affected' by the decisions; Stark: the PMD have basic needs) that seem intuitively right but fall beyond the scope of the contractual frames they use (Southwood, his own; Stark, a Rawlsian one). Southwood's and Stark's arguments build upon one of the most important kind of justification that can be given for granting passive citizenship to the PMD: their needs. Having needs only takes us halfway to a contractual justification however: one must also have capacities to fulfill other people's needs. In this last section, I will explore different need-based justifications for

[320] Even Korsgaard's argument, by referring to the recognition that non-rational creatures are 'like us' in some morally compelling way, could be suspected to sneak non-contractual elements into her (neo-Kantian) contractualist account of passive citizenship. I have not made this argument, however, because one could reply that although Korsgaard *could* be seen as making reference to such non-contractual elements (for instance, the role that empathy may play in the recognition of such likeness), it is still plausible for her to state that these elements are part of a contractualist account. I can only suggest, as I did, that I would find another explanation more compelling.

[321] Stark (n 30) 127-8.

granting a RMS to people who do not possess such capacities and explore whether they are compatible with Rawlsian or other contractualist commitments.

As Stark only suggests to consider the PMD's interests at a later stage of the contractualist Rawlsian constructivist process, some may worry that her account does not yield to a good enough status for the PMD. These concerns relate mostly to the contingency of this status and the possibility of structural exclusion associated with being integrated at a later stage of the process of designing a fair society, when the basic structure has already been set up. We have covered some of these grounds when introducing *prima facie* objections to passive citizenships and when dealing with theorists of active citizenship who do not believe that passive citizenship suffices or is the most morally appropriate way to conceptualize the PMD's status. Stark can still plausibly be said to argue for a kind of a passive citizenship for the PMD, insofar as passive citizenship is defined as (1) not correlating the capacities of a contractor (a 'fully cooperating party') but nonetheless (2) implying a RMS. As for the second definitional element of passive citizenship, her account suggests that the needs of non-cooperating PMD in terms of 'shelter, food, clothing, transportation, utilities and the like' would be minimally met, and this minimum would be 'high and comprehensive.'[322] As for the first definitional element, like passive citizenship theorists, she is not trying to construct the severely disabled (at least the non-cooperating ones) as fully cooperating parties by reconceptualizing the standards of cooperation. She believes room can be made for grounding strong duties toward the non-cooperating within Rawlsian theory. She finds this ground in 'Rawls' scattered remarks about a guaranteed

[322] ibid 138: 'as high and comprehensive as possible, within the constraints imposed by the difference principle'.

social minimum.'[323] The problem is that this minimum is designed for the fully cooperating. She argues that it need not be.

The scholars who have responded to her article (Christie Hartley and Sophia Wong) disagree with her that the PMD cannot be considered to be normal contractors instead of passive citizens (to use my terms), i.e. they disagree that the first definitional element of passive citizenship should hold with regard to the PMD. Hartley argues that Stark does not have a correct view of the social product[324] and Wong argues that it is not possible to distinguish between cooperating and non-cooperating like Stark assumes it is.[325] By contrast, as before, I am granting for the sake of arguments that the PMD are not contractors, and rather take issue with whether the robust status that Stark carves out for the PMD (the second definitional element of passive citizenship) is coherent with the contractualist frame that she is evoking.

The ground she suggests for the PMD's passive citizenship is the plausible idea that 'one's being a non-contributor and simply having needs, especially unusual needs, is also a reason for being owed a particular share of the social product.'[326] I will call this the 'General Need Principle', to distinguish it from three more particular 'need principles'. At first glance, this principle does not seem to be required by a contractual relation if the claim is based on the very fact of having needs, rather than occupying some contractual role *and* having such

[323] ibid 129.
[324] Hartley (n 27) 32.
[325] Sophia I. Wong, 'Duties of Justice to Citizens with Cognitive Disabilities' in Cognitive Disability and its Challenge to Moral Philosophy (Eva F. Kittay and Licia Carlson (eds), Wiley-Blackwell 2010) 132-3.
[326] Stark (n 30) 135.

needs. Therefore, the first question that comes to mind is whether she is invoking grounds that are part and parcel of a contractualist theory.

In that sense, Stark faces the same sort of challenge that Korsgaard did. Like Korsgaard, she nests her needs-based argument in a contractualist frame (Rawls' instead of Kant's) but she needs to explain why it structurally needs to be implemented there, rather than added because it does not affect much the contractualist core commitments while assuaging concerns that are not really contractualist at all.[327]

I suggest that Stark's expert use of Rawlsian contractualist notions does not ultimately justify the incrementation of the General Need Principle within the contractualist frame, so much as it technically allows it (and this lack of justification makes this allowance seem arbitrary or *ad hoc*). What does the real justificatory work is not really discussed - it could be benevolence, for instance.[328] Korsgaard's argument, by contrast, made the case for a conceptual necessity for some non-rational beings to have intrinsic value; it just did not

[327] If that were her line of argument, which is not the case, she would face the sort of challenges that I would raise against Adam Cureton's (n 291) argument.

[328] I say benevolence because nothing excludes it in her article. I am struggling to understand what is the source of normativity for including the PMD in her account, other than the same 'common sense' motivating Rawls to say that, of course, we owe 'a duty towards all human beings however severely handicapped', which she is quoting: Stark (n 30) 130. The existence of needs is not, in my eyes, the reason. We will look at needs and try to fulfill them because something else, X, requires us to do so. Detecting and fulfilling needs becomes a means of accomplishing X. Whereas this X is well-defined in the case of non-disabled people within the social contract tradition, it is often referred to as an unarticulated evidence by authors who try to integrate the disabled into the social contract through 'passive citizenship'. Rawls' and Stark's comments on the nature of this X illustrate this, and support the idea that they may not feel compelled to say much about it because, precisely, it falls outside of a contractualist frame.

Beside, within a Rawlsian frame influenced by Kant, it seems plausible that this sort of general duty toward all human beings correlates the kind of imperfect duty that we generally have in mind when we refer to 'benevolence'. See Rawls' open-ended comments in *Justice as Fairness* (n 1) 176, fn 59. While Stark's suggested frame to deal with the PMD is not supererogatory, it is possible to think of stringent obligations of benevolence, insofar as we do not incorporate the notion of optionality within benevolence, but rather mean 'other-regarding'.

translate into a sufficiently explicit and complete contractualist account of a RMS or of how to prioritize between all these duties. Stark's suggestion, on the other hand, yields to a well-defined (though potentially second-rate) status for the PMD within a contractualist account, but one is left worrying about the necessity of the way she arranges Rawlsian notions to reach her conclusions.

5.6.1.1 Fully Cooperating and Non-cooperating

Stark distinguishes the 'fully cooperating' from the 'non-cooperating'. The non-cooperating, 'whom Rawls wishes to idealize out of his theory' are handicapped in an 'absolute' sense, i.e. in the sense that society does not possess the technological capacity to enable them to be cooperative members. Such people may include 'people with severe brain or spinal cord injuries whose motor or communication skills are severely limited'.[329]

As this example shows, she differs from Rawls in that she does not assume that possessing the two moral powers suffices to make one fully cooperating. The two moral powers warrant 'justifiability' as we will see, but not a fiction of cooperation. Stark correctly detects a potential contradiction in Rawls' writing. On the one hand, he says that having the two moral powers (or that being a person, which corresponds to having the moral powers: a sense of justice and a conception of the good) is a 'necessary and sufficient condition for being a fully cooperating member of society.'[330] On the other hand, Rawls assumes that citizens 'have, at least to the essential minimum degree, the moral, intellectual and physical

[329] Stark (n 30) 131.
[330] Rawls, *Political Liberalism* (n 1) 18 and 302.

capacities that enable them to be fully cooperating members of society over a complete lifetime.'[331]

One could suggest two ways to reconcile this apparent contradiction that would favor keeping Rawls' idea that having the moral powers is not only necessary, but also a sufficient condition to be a fully cooperating member of society. First, it may be a case where a more precise prescription takes precedence over a broader one. The need to be a cooperative member is a requirement that Rawls '[has] assumed throughout [his writing on justice as fairness], and shall continue to assume'[332]; it is 'the fundamental organizing idea of justice as fairness.'[333] The suggestion that merely possessing the two moral powers is a sufficient condition to be considered as able to take part in social cooperation would be either a more specific suggestion, or one that is compatible with the broader one because it does not contradict the requirement of being capable to cooperate but rather stipulates a fiction or idealization (presumably justified on the same ground that justifies that someone standing at the lower end of the range of capacities would still be an equal member of society).[334]

Second, when Rawls writes that citizens need to have the minimally essential 'moral, intellectual and *physical* capacities' to be 'fully cooperating members of society'[335], why not assume that he means that citizens must have the capacities that it takes to have the moral powers (rather than to cooperate). Since he has already conflated the notion of 'person' and

[331] ibid 183.
[332] ibid.
[333] ibid. 15.
[334] ibid 183-4, 302.
[335] ibid 183.

of 'fully cooperating'[336], one could read the previous statement as saying that people must have enough capacities (whatever their nature: moral, intellectual or physical) to be persons, i.e. to have the moral powers. If one cannot breathe or communicate, although it may be strictly physical, one still may not be able to exercise the moral powers.

This raises the question of whether one needs to have the moral powers *in potentia* or be able to actually exercise them. I would tend to think that just to have them would call for respect in principle, because of the sort of being one is, though contingent (physical) circumstances prevent one from expressing one's (contingently inexpressible) capacities - because this contingence is not morally significant. However, it seems to be morally significant on a Rawlsian account at least under what seems its most plausible reading, which is that the moral powers allow for people to be reliable contractors,[337] rather than confer a special value, a 'dignity' upon them which, in turn, would call for respect. Respect, in this reading, seems more like an attitudinal by-product of what is really desirable and valued within a political conception of justice, the fact that people *can* be contractors in facts, not just *in potentia* or in theory. (This incapacity is different from the people who actually can exercise the capacity but choose not to.)

For these reasons and because we are trying to define (and evaluate the plausibility of) as integrationist as possible accounts of contract-based moral status, I do not see a strong

[336] ibid 18.
[337] Wong clearly links the moral powers to social cooperation: 'the capacity for a conception of the good enables people to see the point of social cooperation and thus to be willing to engage in it (...) The sense of justice enables people to be committed to reciprocity - which involves a commitment to abide by agreed-upon fair terms of cooperation even when doing so contradicts one's own advantage - and thus be *able* to engage in fair social cooperation.' Wong (n 325) 133.

enough reason to discard Rawls' assumption that possessing the two moral powers is a necessary and sufficient reason for being a fully equal member of society and it seems that we must restrain the applicability of Stark's argument only to the PMD who do possess the moral powers.

5.6.1.2 Balancing Three Valuable Principles

Stark's article aims at achieving a balance between three potentially conflicting principles capturing different valuable grounds owing for robust duties within a Rawlsian contractualist frame.[338] We can call them (1) the Cooperation Principle, (2) the Justifiability Principle and (3) the General Needs Principle. As we saw, the basis for including the severely disabled within Rawlsian contractualism is the third one, according to which 'simply having needs (...) is also a reason for being owed a particular share of the social product.'[339] To better analyze how it works and whether it succeeds to fit within Rawls' contractualist account of justice, we can divide Stark's General Needs Principle into three variants: (a) the Humanity Principle, (b) the Basic Needs Principle and (c) the Social Minimum Principle. Let me describe these principles.

(i) The Cooperation Principle

[338] I use the word 'principle' in an ordinary sense, I am not referring to Rawls' 'principles'. I could have said 'value' but the notion of 'principle' conveys the additional idea that this 'value' must be implemented within a theory of justice.
[339] Stark (n 30) 135.

A Cooperation Principle would stipulate that a theory of distributive justice should recognize the importance of individual cooperation to the social product.

In Rawls' account, this principle is fundamental. Society is essentially 'a cooperative venture for mutual advantage'[340] and a just society is a 'fair system of cooperation over time, from one generation to the next.'[341] As we saw, it is 'the fundamental organizing idea of justice as fairness', which means that the other ideas must be 'systematically connected' in a way that fits within or complement the cooperation principle.

The most fundamental intuition behind the idea that we ought to compensate those who contributed to the social goods may be one that links morality and power, or prudence. On such an account, for instance, one could say that only those capable of being soldiers deserve to be citizens, because the welfare of a nation ultimately boils down to brute power. It is not only because power speaks louder than other reasons. If it were the case, the way this power is exercised and acquired would not matter, which seems counter-intuitive. It seems that what gives a moral gilded edge to the exercise of 'contributory capacities' is the idea there is some basic value in dedicating one's life to the pursuit of some project or the accomplishment of some labour. We want to acknowledge and recognize this value interpersonally (i.e. in our own life and, by a kind of implication or natural extension, in that of others). One way of doing this is to grant people some privileged connection or

[340] Rawls, *A Theory of Justice* (n 1) 4.
[341] Rawls, *Political LIberalism* (n 1) 15.

entitlement with the object or product of their work or pursuit. There is some basic sense in which it is unfair to deprive an agent from that recognition.[342]

Within a Rawlsian frame, the recognition of this value is done through giving effect to terms of reciprocity: 'all who are engaged in cooperation and who do their part as the [publicly recognized and accepted] rules and procedure require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison.'[343] This appropriate benefit or compensation takes the form of having one's interests represented during the process determining the basic structure of society in a principled way which will 'specify basic rights and duties within its main institutions and regulate the arrangements of background justice over time.'[344]

Stark agrees that it is important to exclude the non-cooperating from the early stages of the design of a fair society. The (non-cooperating) PMD would be excluded from the original position, when the fundamental principles of justice are selected. Contrarily to being white, male, 'tall enough to slam dunk' or atheist, the fact of having participated in the production of the social product is a 'legitimate reason for being owed a particular share' of it and fundamental principles of distributive justice (including the difference principle) should reflect this.[345]

[342] It is easy to see how securing that recognition can go too far and disregard other elements of people's lives which also have a moral significance that ought to be properly recognized.
[343] Rawls, *Political Liberalism* (n 1) 16.
[344] ibid 16.
[345] Stark (n 30) 135-136.

Note that one could recognize the importance of investing oneself in one's work or pursuing a project otherwise than by granting the worker or the project-pursuer a greater say in the design of political institutions. One could, amongst other things, reconceptualize the notion of cooperation as connoting some broader form of engagement (like Hartley does, as we saw) or by associating personhood with more passive social roles than what Rawls allows. Such modifications, however, would go against basic Rawlsian contractualist commitments and assumptions.[346]

(ii) The Justifiability Principle

The Justifiability Principle requires that a theory of justice provides the subjects of justice with a justification that they can find reasonable and fair (even though they disagree with it) for exercising power over them.

This principle recognizes the wrong that would be done to a being able to govern himself through reason by overriding his will through the exercise of sheer power. Rational people are the kind of beings who can receive justifications in a way that render external exercises of power over them compatible with their autonomy, as they can recognize the desirability of the power/norm for themselves. The Justifiability Principle boils down to a recognition of the value of autonomy and more specifically of the way in which it is exercised within a society governed by norms or in more insular interpersonal situations, i.e. the way in which moral agents can provide, and are responsive to, reasons; and the way in

[346] E.g., Rawls, *Political Liberalism* (n 1) 18.

which they have higher-order desires (desires about their desires) which reflect a particularly meaningful exercise of their autonomy (the moral will is one such kind of desire, and reasonable justifications speak to such a will).[347]

Rawls calls the Justifiability Principle the 'liberal principle of legitimacy'[348] and connects it with the 'constitutional stage' of his contractualist constructivist process. Let me distinguish the stages sequence as Stark makes use of their distinctiveness.

Rawls' 'four-stage sequence' describes four 'appropriate point[s] of view from which certain kinds of questions are considered.'[349] The veil of ignorance is gradually lifted along the four legislative stages, so that the two fundamental principles of justice[350] framing the basic structure of fair society decided during the first stage (the original position) can be concretely applied (and of course, for the sequence to be meaningful, the norms established at a earlier level cannot be modified at a later one). The three following stages are, in order, constitutional, legislative, and judicial/administrative. Whereas in the OP, the parties know only 'the principles of social theory', at the constitutional stage, they are given 'general facts about their society, that is, its natural circumstances and resources, its level of economic

[347] This principle is echoed in the work of J. Habermas, T. Scanlon and J. Rawls, among other liberal constructivists, and it is relevant to note that it is an indication among many of the great importance that the liberal tradition grants to the need of having our autonomy (before other human needs) respected. One can better sense this when we see the Justifiability Principle as a tribute to the 'nature of citizens (...) as capable of being justified to' (Stark (n 30) 111) rather than a tribute to an abstract state of affairs where individual autonomy is being realized.
[348] Like Stark, I prefer the term 'justifiability', because it tells us more specifically what makes political principles, legal norms and other exercises of power legitimate: justification.
[349] Rawls, *A Theory of Justice* (n 1) 172.
[350] For the statement of principles in Rawls' mature work, see *Political Liberalism* (n 1) 291.

advance and political culture and so on.'[351] The constitution is meant to 'design a system for the constitutional powers of government and the basic rights of citizens.'[352] At the legislative stages, they design particular laws and policies, compatible with the previously enacted constitution, on the basis of further knowledge of 'the full range of general economic and social facts.'[353] Rawls constructs the conditional stage as implementing the first principle (the 'equal liberty' principle) and the legislative one as implementing the second principle (which include the principle of equal opportunity and the difference principle).[354] The fourth stage is the judicial and administrative application of laws and policies to particular cases which implies that all facts about people's characteristics and circumstances are known.[355]

Rawls calls the 'Justifiability Principle' the 'Liberal Principle of Legitimacy' because it is the way in which political liberalism legitimates the use of State power over citizens: by justifying it in a way that respects the fact that they are reasonable and rational beings. This legitimation is accomplished by subordinating this power to constitutional requirements, 'the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.'[356]

[351] Rawls, *A Theory of Justice* (n 1) 172-173.
[352] ibid 172.
[353] Rawls, *A Theory of Justice* (n 1) 172.
[354] ibid 174-175: '[T]he constitution establishes a secure common status of equal citizenship and realizes political justice.' '[The first principle's] main requirements are that the fundamental liberties of the person and liberty of conscience and freedom of thought be protected and that the political process as a whole be a just procedure.' 'The second principle comes into play at the stage of the legislature. It dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties being maintained.'
[355] Rawls, *A Theory of Justice* (n 1) 175.
[356] Rawls, *Political Liberalism* (n 1) 137 and 217.

Stark is careful to distinguish the Justifiability Principle from the Cooperation Principle in a way that leads to a potentially unattractive result because, as we saw, she has also said that possessing the two moral powers is not enough to be considered a cooperant. This latter view, along with the distinction between the Justifiability Principle and the Cooperation Principle, makes room for us to tell the people who cannot be cooperating members of our society: 'Surely, being reasonable and rational, you understand why we have obliterated your interests (and your existence as subjects of justice) from the original position' and, although Stark argues that we can avoid it, we may add: 'you must also understand why the Constitution and laws and policies were made without having you in mind (or perhaps, considering you as a natural burden to some citizens). You must be, like us, responsive to the importance of the Cooperation Principle. We are still showing respect to you, by justifying to you why you are excluded. The justification is that we must "guarantee that members of society have similar claims on a share of socially produced goods, namely one that is influenced by their engaging in social cooperation".'[357] This last quote is reminiscent of the simulacra of assertions of equality between people of different sexual orientations or physical abilities by stating that gays and lesbians are equally entitled to marry someone of the opposite sex or that someone in a wheelchair is equally entitled to go up the marble stairs of a court of justice. A plausible response is that one may well be rational and reasonable and still think that one is entitled to be considered as a subject of justice when the basic institutions of a fair society, or the principles upon which they will be built, are being designed even though one is unable to cooperate. This, Stark correctly concedes, is fundamentally incompatible with Rawlsian contractualism. Her strategy, as we

[357] Stark (n 30) 136 and 138.

will see below, is to suggest that to allow the constitutional conventioneers to represent the non-cooperating as well as the cooperating is compatible with Rawlsian contractualism.[358]

(iii) General Needs Principles

The reason for integrating the PMD at the constitutional stage would be because their needs, by and of themselves, entitle them to a share of the social product. This raises two kinds of issues. First, does that share correspond to a robust enough moral status? Second, assuming it does, can it be justified within Rawlsian contractualism, i.e. (a) will a Rawlsian 'Need Principle' extend to the PMD and (b) if it does extend to the PMD, is it still coherent with Rawlsian contractualism? Let me introduce three kinds of 'Need Principle' to see whether any of them would allow Stark to answer yes to these questions, as she implicitly does.

(a) The Humanity Principle

The 'Humanity Principle' is based on a powerful and widely shared intuition that we owe some moral obligations to all human beings and yet, it is unclear what duties it would imply. Such an idea could have (and has) been developed to justify the PMD's moral status as well as its extent and implications, but I do not think it would provide a complete picture of the PMD's moral status, because (at least a variant of) it focuses on what moral agents owe to 'naked' human beings. The most promising variant of it focuses on the relations between human moral agents and all human beings, *qua* human beings and nothing more. The

[358] ibid 138.

problem is that we are rarely as metaphorically 'naked' as this standpoint requires us to imagine. We are, notably, part of many relations which entitle us to claim some rights and privileges. I believe, though I cannot argue it here (and it may be an axiom that cannot be argued so much as it can be illustrated) that the very fact of being human provides one with intrinsic value and a relatively strong - if not robust in the political sense we have been using - moral status, but I also believe that there are other relations that will play such an important normative role in explaining what we owe to the PMD that the basic rights stemming from their 'naked' humanity would be rendered superfluous, as they would benefit from more extensive and stringent rights on the ground of other relations. If anything, our duty to people *qua* human beings might be to place them (back) within relations that would benefit them. Given the social and relational nature of human beings, it is not an implausible claim. For instance, an orphan may be placed within a host family. A stateless individual may be given a citizenship. In these examples, moral agents' contribution to the welfare of the 'naked human' may be best exercised by placing her within a relational frame rather than to relate to her personally. Though they could do the latter, my suggestion is that in many cases, what will most help the 'naked human' is to be placed in some kind of relation fitting to her nature and needs. (for instance, the PMD may be placed in fiduciary relations). The humanity principle should not be forgotten because it is too basic. It can in fact act as the last wall between human decency and barbarity when essential relational frames break down, as when genocides occur.

The vagueness of the humanity principle is present in Rawls' definition: 'I take it as obvious, and accepted by common sense, that we have a duty towards all human beings,

however severely handicapped. The question concerns the weight of these duties when they conflict with other basic claims.'[359]

This 'self-evident' duty is therefore not fleshed out by Rawls, nor does he claim that it can be fitted within his contractualist frame. It could yield to fairly minimal obligations like the basic moral requirement of preventing something 'really awful' from happening to someone else 'if you are the person in the best position [to do so] and it won't cost you much', like the ones implied by Anthony Appiah's 'emergency principle'.[360] It could yield to quite a comprehensive set of rights, notably if the fact of being human is seen as providing a claim to a citizenship equal to the 'fully cooperating' surrounding someone. It is not clear, therefore, that the humanity principle would yield to the kind of robust status for the PMD that we are trying to justify on the basis of the social contract tradition. Stark notes that Rawls 'does not tell us whether these are duties of *justice.*'[361] Indeed, Rawls leaves it opened whether the principle of humanity grounds duties of justice, duties of justice as fairness, or other kinds of moral duties. He also leaves it undetermined whether the principle of humanity, properly theorized, could be an extension of justice a fairness, a supplement to it, or a basis to reject it, should they be incompatible.[362]

When Rawls writes that '[a]t some point, then, we must see whether justice as fairness can be extended to provide guidelines for [the case of the non-cooperating]', we are tempted to think that the guidelines were not so much an extension of the theory of justice as

[359] Rawls, *Justice as Fairness* (n 1) 176, fn 59.
[360] Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Norton 2006) 161-2.
[361] Stark (n 30) 130, fn 10.
[362] Rawls, *Political Liberalism* (n 1) 21.

fairness itself as a way to structure the theory of justice as to make it hospitable to some external, presumably non-contractual, theory. This is not to say that all strategies of extension on contractualist grounds are *prima facie* implausible. On the contrary, all the authors being explored in this thesis are extending contractual notions, criteria or grounds. These strategies are different from the attempt to show that a principle of humanity can be derived from such contractualist ground. Conciliating such a principle with Rawlsian contractualism seems like quite a challenge - one that Stark does not take up, focusing instead on the notion of a social minimum - but which makes her quote of the humanity principle[363] a kind of mismatch for her own argument rather than a support for it.

The reason why this conciliation is *prima facie* implausible is because of the apparent incompatibility between the variety of bases that the principle of humanity could have and the primary Rawlsian contractualist commitment to working out 'fair terms of cooperation when society is viewed as a system of cooperation between citizens regarded as free and equal persons, and as normal and fully cooperating members of society over a complete life.'[364]

(b) The Basic Needs Principle

Rawls' 'Basic Needs Principle' is thus stated:

[363] Stark (n 30) 130.
[364] Rawls, *Justice as Fairness* (n 1) 176, fn 59.

> The first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.[365]

Like the Humanity Principle, it is determined on the basis of needs. This principle is justified within Rawls' contractualist frame because, as Rawls explains, it is 'necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties.'[366] By the same token, however, it would not benefit the non-cooperating who are not the citizens that the first principle aim to entitle to exercise rights and liberties.

Sophia Wong ingenuously proposes that this 'Principle of Need suggests that the structure of society should be changed to make it more inclusive' because it would justify enabling the citizens to enjoy the primary goods that the two principles of justice are meant to distribute.[367] However, assuming that her argument is conceptually warranted, not all PMD can be enabled to partake of rights and liberties. If we assume, on the other hand, that the rights and liberties in question will necessarily fit them because it was tailored for them as well, this implies that the fully cooperating assumption has been lifted in the original position, which begs the question. The principles of justice are thought out to fit and benefit fully cooperating people who can reciprocally benefit one another. The Basic Needs Principle offers a plausible ground to not only enable non-disabled people to enjoy the goods secured by the principles of justice, also disabled people as well, but only insofar as they can be thus enabled to become fully cooperating members. To think otherwise would unfairly

[365] Rawls, *Political Liberalism* (n 1) 7 and *Justice as Fairness* (n 1) 44 fn 7 and 46-8.
[366] Rawls, *Justice as Fairness* (n 1) 44.
[367] Wong (n 325) 137.

and factually inaccurately deny the social aspect of certain handicaps. Stark and myself have bracketed this category of PMD as unproblematic for the present discussion however, in order to focus on the truly non-cooperating.

(c) The Social Minimum Principle.

Stark essentially relies on that third version of a general need principle: 'Rawls believes that claims of need, among other things, should be addressed by means of a guaranteed social minimum. Since the claims of nonparticipants are claims of need, their claims should be met, on Rawls' account, under the auspices of the social minimum.'[368]

The concept of what a social minimum should be, who should be considered when defining it, and what factors it should be sensitive to are controversial issues that are unnecessary to deal with to make my point. We can simply use Stark's definition of the notion as:

> the funds collected through transfers (income or consumption taxes) that are necessary to e.g., sustain an active and productive work force, rear and educate children, provide for the retired, establish a national defense, ensure savings for future generations, provide healthcare for the fully cooperating and meet the basic needs of all (fully cooperating) citizens.[369]

As Waldron writes, we could fix it 'cardinally', that is, 'on the basis of an assessment of the resources that basic human needs require'. Social wealth could also be distributed

[368] Stark (n 30) 137.
[369] ibid.

'ordinally', in the sense that 'nobody's share should be greater than anybody else's'. In the former case, the social minimum would be determined in reference to a theory of what human beings need 'to lead decent and tolerable lives' and that it will not go up simply because the average social wealth is going up. In the latter one, the social minimum would be characterized by an egalitarian commitment, making the social minimum a kind of 'social dividend'.[370] Rawls' approach belongs to the second kind of justification. It does not matter whether we should refer to the relative levels of *persons*' wealth or to *persons*' basic needs: the question is whether the PMD are such persons. Neither justifications do, in principle, cover the PMD as they address only the fully cooperating. If the former refers to 'human needs' full stop, then it exposes itself to the criticisms that apply to the Humanity Principle and the Basic Needs Principle.

Stark's proposal is 'to retain the fully cooperating assumption in the original position but to drop it at the constitutional stage of the theory.'[371]

If she were proposing to make the PMD benefit from the social minimum established for the fully cooperating, on the basis that their needs are similar and overlap, it would not correlate a robust enough status for the PMD, whose 'social minimum' is particular, in addition to seeming arbitrary (even if the PMD's needs were easy to integrate because their needs would be similar to ours, it is unclear why we would integrate them). However, Stark wants to say more, as she claims that the constitutional conventioneers ought to imagine they

[370] Jeremy Waldron, 'John Rawls and the Social Minimum', (1986) 3 (1) Journal of Applied Philosophy 21, 21-2.
[371] Stark (n 30) 138.

might be disabled. It is not clear why and how that fits within Rawlsian contractualist commitments. First, if it is based on any form of personal doctrine held by the conventioneers (such as believing that we should care for the PMD), it cannot be used as valid public reasons.[372] Second, the principles of justice decided in the OP must be functionally implemented. To start incorporating the PMD at a later stage, one would think, is to do indirectly what could not be done directly. It is no longer time, at the constitutional stage, to decide fundamental questions such as who should be a subject of justice, but rather to work out the principles already decided and see how they will be applied in practice.

Another difficulty with lifting the fully cooperating requirement at the constitutional stage is that it seems to be an arbitrary or an *ad hoc* strategy to recognize both the value of cooperation and the moral pull of human needs, without having previously explained why these two considerations *must* be balanced (within contractualism). Rawls did not provide a structure that allowed for explanations as to why it was best for justice as fairness that the 'full cooperation' assumption be lifted (if ever) at the constitutional stage. On the contrary, constitutional conventioneers designing the social minimum are 'subject to the constraints of the principles of justice already chosen'[373]) which, Brian Barry has written, 'leaves precious little to the convention exception points of details.'[374]

Ultimately, Stark seems to say that her solution is the only way to satisfy the Cooperation Principle and the General Need Principle, but only the former principle is

[372] Rawls, *Political Liberalism* (n 1) 225-6.
[373] Rawls, *A Theory of Justice* (n 1) 196.
[374] Brian Barry, *The Liberal Theory of Justice. A Critical Examination of the Principal Doctrines in A Theory Of Justice by John Rawls* (OUP 1973) 138.

compatible with Rawlsian contractualism. The 'General Need Principle' is only justified by Rawlsian contractualism when it refers to the needs of the 'fully cooperating' alone. When it refers to the PMD's needs, it seems not only rooted elsewhere than in Rawlsian contractualism, but incompatible with it. I struggle to find in Stark's argument (or to imagine on my own) a justification that would not be met with this criticism. Stark provides excellent contractualist reasons for excluding the PMD at the OP stage, but fails to provide a positive reason for 'removing the fully cooperating assumption at the constitutional stage' other than that it 'allows for the adoption of a comprehensive social minimum that is compatible with the norm of reciprocity mandating adequate compensation to full contributors.'[375] This resembles Cureton's argument which seemed to assume that we want to include the PMD and should do it if it is not incompatible with contractualism. I do not think that this compatibility has been established, but even if it were, it is not compatibility that should be shown but that the basis for the 'General Need Principles' are not to be found (and even more plausibly found) elsewhere than in contractualism. Certainly, as we saw, it cannot be found in Rawls' version of the Humanity Principle, which stands outside of his contractualist theory of justice and may even threaten its plausibility as he concedes (i.e. it is Rawlsian but not contractualist).[376]

5.7 Conclusion

[375] Stark (n 30) 139.
[376] Rawls, *Justice as Fairness* (n 1) 176, fn 59.

I do not think that attempts to integrate the PMD at a later stage of the contractual process of building social institutions overcome the problems associated with the contingency of their status, unless we invoke some other justifications which do not fit a contractualist logic. This supports the conclusion that theories of the passive citizenship of PMD cannot succeed on contractualist grounds. (Nor can they on contractarian grounds, as we saw.) It remains open to argue that the PMD could be integrated at an earlier legislative stage of the contractual process, or to generalize it to non-Rawlsian contractual theories, that the PMD could be active contractors rather than passive citizens. On a contractarian account, this would mean that the PMD would in fact benefit us more than traditional contractarian accounts have assumed. On a contractualist account, it means that they could take part in the sort of 'Kantian reciprocity'[377] more than traditional contractualist accounts have assumed. We have seen in previous chapters that arguments to that effect tend to be either implausible or question-begging.

Ultimately, my conclusion is that social contract theorists of the status of passive citizens for the PMD are caught between the devil and the deep blue sea. On the one hand, they can integrate the PMD at a late stage of the contractual process of building the rules regulating a society. Indeed, they can even leave it to the citizens within a society to decree (because they so desire) that the PMD shall enjoy a political status equal to theirs. Conceptually, it leads to a fragile, possibly paradoxical posture. In spite of Korsgaard's and Cohen's metaphysical reinsurance about the capacity of 'full' citizens to confer intrinsic value onto the PMD, we notice that the full citizens would grant the status of full citizens to

[377] Term used by Nussbaum to qualify a Rawlsian understanding of justice as taking place between people with the 'Kantian moral capacities': Nussbaum (n 19) 137.

the PMD because they value them. Presumably, these value-giving citizens make this assessment on the basis of their conception of the good (in their own lives and that of the PMD). Insofar as social contract theory puts the right before the good, there is something paradoxical in indirectly giving to the PMD the status that they could not be given directly. More importantly, practically, this decree comes too late, and is contingent upon the full citizens' wish rather than being structurally required by the kind of society we live in.

On the other hand, we may think that it does not matter whether a full citizen's status is given to the PMD early or late in the society-building process, as it is grounded on a stringent moral pull that they have on full citizens (and pre-social human beings) just because they have needs or just because they are affected by the fully capable people's actions. That kind of moral status, however, would not be granted on a contractual basis.

This does not refute the more general hypothesis that we could conceptualize the PMD as honorary guests, fictitious members or passive citizens of our political community on other grounds than contractualist or contractarian ones. However, my own opinion is that any such account, contractual or not, runs the risk of misconceiving the nature of human society and the form of life that the political beings we are share with the PMD (by imagining the notions of society and subjects of justice according to a reductionist conception of the autonomous subject from which we should start any ethical investigation and social design, and by reference to which we define marginal cases for whom accommodation must be made).

6 CONCLUSION: BEYOND CONTRACTUAL RELATIONS

6.1 Why Contractualism or Contractarianism Cannot Fully Integrate All the PMD

We have seen that there were three main strategies that social contract theorists could take to include the disabled among the rank of full subjects of justice, or to confer a robust moral status upon them:

(1) Pointing out that they actually possess the contracting capacities, contrary to what was assumed. This can take the form of an empirical argument focused either on the PMD's actual capacities, or on the social structures that prevent them from exercising these contracting capacities or do not facilitate their exercising such capacities.

(2) Better explaining, reinterpreting, broadening or otherwise modifying, conceptually, the nature of these contracting capacities or of the values underlying them in a way that would explain why the PMD actually possess them.

(3) Conceding that the PMD do not have the required capacities, but arguing that other reasons justify their representation in the contractual procedures in a way that would confer them a robust moral status and that these reasons are compatible with contractual assumptions inherent to these procedures.

We have explored various difficulties and tensions within these inclusivist contractual theories. Their two main shortcomings are that (1) they cannot convincingly ground a RMS for the PMD and (2) they do so at the cost of making this status too derivative or contingent. Let me summarize these two problems.

First, the conceptual adjustments made to integrate the PMD seem arbitrary or question-begging in a way that suggests that implicit non-contractual justifications (may they be moral reasons or speciesist prejudices, or non-moral partiality, preferences or affective responses) are at work. Their arbitrariness is apparent because the PMD's claims to possessing contracting capacities are too shaky or far-fetched and the reconceptualization of the scope of these contracting capacities or how and why the PMD can take part to a contract-based mutually beneficial 'joint venture' stretches these concepts beyond coherence, plausibility or beyond the scope of social contract theory. Many feminists have intuited the conclusion of this thesis: in many cases it is wrongheaded to insist normalizing the PMD into contractual frames. For instance, Virginia Held wrote that '[i]t stretches credulity even further than most philosophers can tolerate to imagine babies as little rational calculators contracting with their mothers for care.'[378] Eva Kittay considers that if her own PMD daughter could be sufficiently supported and made to live in a group home with 'around-the-clock attendants' it might be called 'independent living', and that if she were 'made to partake in one tiny step in an assembly line production, and [were] given some practical compensation, we [could] call this "working" and being "productive"'. However, she holds

[378] Virginia Held, 'Non-Contractual Society: a Feminist View' in *Feminism and Community* (Penny A. Weiss and Marilyn Friedman (eds), Temple University Press 1995) 209, 215. See also Hampton (n 41) 21.

that '[t]o so stretch these concepts both empties them of meaning and undermines the possibility that dignity is compatible with life-long dependency'.[379]

My analysis of contractual inclusivist arguments gives me little hope that further ingenuous conceptual tinkering would dispel their implausibility or the derivativeness of their results. It is more promising to highlight the idea that social contract theorists seem to appeal to a kind of moral concern the foundation of which lies outside of the social contract tradition.

As for the second problem, we should be critical of too derivative or contingent a moral status because:

(1) Of its potentially harmful impact on the PMD. Such potential harm is not a only a contingence made more or less likely by particular social contexts, but an inherent feature of contractual structures and the ways agents are expected to act within it.[380]

(2) It makes their status less robust than that of other citizens. This is a problem if we think that citizens should have an equal status. As I have said, I am not concerned about equality for equality's sake, but given the benefits that it confers, it would be surprising that an unequal status be robust enough. This is notably because the social contract

[379] Kittay, *When Caring is Just* (n 45) 267; Held, *Non-Contractual Society* (n 378n) 211.

[380] See, e.g., Nussbaum's and Silvers' arguments in chapters 4 and 5. Eva Kittay also notes that 'If such thinking [based on an indirect status] is the basis for providing aid, the aid will, of necessity, be a low priority in any public distribution of resources. It will tend to be minimal, except in cases in which individual acts of generosity surface.' Kittay, *When Caring is Just* (n 45) 272. I also refer to Peter Byrne's quotation that I put in epigraph. Byrne's claim that the PMD's lack of contracting capacities (notably autonomy) or the derivative or indirect character of their 'participation' necessarily correlates a lower moral status is what this dissertation set out to challenge. However, even though contractualist and contractatian thinkers suggested that the indirectness or derivativeness of the PMD's contractual moral status did not affect its robustness, we have found that it does.

tradition does not make room for a kind of inequality of status that would not imply some sort of lesser value for some statuses, and this liberal tradition stayed clear of developing anything like second-rate status or citizenship.[381]

(3) It gets morality wrong. This claim ultimately depends on the success of an alternative theory or, at least, of how disturbingly this derivativeness clashes with our strongly held moral intuitions.

If the social contract tradition cannot make room for the disabled, what do we do now?

There are three possible options:

(1) This failure to justify a robust status for the PMD is bad news for social contract theory, which has proven its limits and must be at least partially rejected.

(2) It is bad news for the PMD who must be excluded from the sphere of justice, and perhaps of morality altogether, in spite of our ordinary intuitions against this conclusion.

(3) A third possibility is to accept the limits and co-existence of particular moral theories which may have to compromise with other moral frames to deal with certain relations that all of us see as imposing robust obligations, but that still do not fit the contractual

[381] As we have seen, a criticism of this 'second-rate' status can take a metaphysical form or a practical one. For instance, if we grant a great value to autonomy, the PMD are less of a locus for such a value to occur. Even if through the autonomy of other agents, they would gain a strong moral status, the fact that they are, as it were, twice removed from the source of value, may make them 'twice-removed' citizen. While we have seen that such an argument is not so convincing, except as a description of prejudices, these prejudices are still harmful. This problem would not be so much that of the theory itself than of its reception, though the fact that the theory fails to address this reception may be regarded as problem of the theory itself. More directly relevant to the structure of the theory, however, is the fact that some capacities, such as autonomy, allow for autonomous individuals' needs to be given priority within a theory of justice.

mould. The work to be done, therefore, is not to replace social contract thought, but to supplement it. Indeed, the social contract tradition succeeds in integrating the most capable PMD and partially explains the integration of PMD who can still participate to contract-like relations although they also, and perhaps more so, participate to non-contractual relations. We must (1) develop alternative moral frames to explain the significance of these relations, such as fiduciary or caring relations and (2) reflect on how to conciliate these frames and solve conflicts between them.

My conclusions do not induce me to reject social contract theory altogether, nor to suggest that an alternative theory to explain our duties for the PMD (like care ethics) should, in turn, be expanded to the whole of society (like some care ethicists have suggested). On the contrary, my findings only point toward urging different moral theories to stay within the boundaries of the relations, people and circumstances to which they apply, and refrain from claiming to overtake the whole of morality and expel other normative sources to its 'margins', or beyond its 'frontiers'[382], into the realm of the supererogatory and (non-moral) emotions.

At least, this is the hypothesis that I would like to suggest in this conclusion as it strikes me as the most plausible and constructive way of criticizing the social contract tradition with regard to its failure to provide a complete and satisfactory account of the PMD's moral and political status. The argument that it points to would require (1) defending a relational theory of morality and (2) defending that the central case of moral relations we

[382] It is not a surprise that Kittay's and Nussbaum's criticisms of the exclusion of the PMD are respectively entitled *At the Margins of Moral Personhood* (n 247) and *Frontiers of Justice* (n 19).

have with the PMD are not contractual ones, but rather (at first sight) fiduciary or caring ones. I cannot deal with these two major undertakings in any depth here, but I want to at least suggest their *prima facie* plausibility. Assuming (rather than arguing) that caring relations are as morally significant as contractual ones to justice and morality, I can then proceed to consider a preliminary objection to the aforementioned hypothesis, namely: how are we to deal with such a moral plurality?

This concluding chapter is exploratory. My choice of alternative solution to explain the robust status of the PMD (caring relations) and problems to explore, such as compatibility of morally robustly demanding relations, is motivated by my intuition about the kind of moral account that would allow us to make room for both contractual and non-contractual alternatives and for the strong moral intuitions underlying both. This conclusion is an opportunity for me not only to suggest that (1) social contract theories fail to some extent but also (2) that this is not necessarily bad news for either the PMD or the social contract tradition but pointing to a substantial, rather complex, account of why that would be.

6.2 Taking Relations Seriously

The idea behind a relational morality is simple: every situation where a moral issue arises can be presented relationally and every moral dilemma can be solved by an understanding of what is morally fitting to do for an agent occupying a certain role, within a certain relation, in

certain circumstances.[383] This structure of morality notably coheres with a compelling view of human nature according to which people develop their identity, individuality and integrity by choosing to endorse (or not) certain roles.[384]

This may be different from role morality, or at least, its most common understanding. Role morality finds its most widespread and, its proponents would say, useful expression when dealing with particular professional roles which are likely to raise ethical conflicts as people are acting in different functions and may be legitimately excused from ordinary morality. My suggestion is to extend the idea that we wear various moral hats to many more social and personal roles. It notably challenges the exceptionalism within a common version of role morality by suggesting that ordinary morality is itself to be understood in this role-based way. In this sense, while many role morality theorists would carve out a moral space differentiated from ordinary morality to make sense of people's particular social roles (like that of a lawyer or a medical doctor) and the way they conflict with ordinary moral expectations, I am taking a relational view of ordinary morality.[385]

[383] The first objection to this view will probably be that not all moral dilemma involves a 'relation'. For instance, when I hesitate between ice cream and my good health, it seems odd to say that I have conflicting relations with ice cream and with myself. Yet, these two cases of 'relations' are extremely common. The former is an instrumental relation, perhaps nested in a relation to ourselves, and the latter - the relation to ourselves - must only assume that we can think about ourselves from an 'outsider's perspective'. I cannot offer a defense of these views here, only mention them, and add that the last one does not involve any complicated metaphysical conundrum: we often tell people to take a good look at themselves or to take care of themselves, as though the 'I' we were addressing could direct its attention (as a subject) to that interlocutor (as an object). (The shared identity of the subject and object will affect the nature of this attention, but not prevent its possibility.)

[384] Consider, for instance, that how we identify ourselves to the various existential, social and moral hats that we choose to wear, how we earn admiration and blame through such choices, or how our identity or integrity are threatened when they are taken from us. I am also tempted to think that we do not see ourselves so much as holding values x, y, z as we conceive ourselves as disposed to act in x, y, z ways when confronted with different relational demands.

[385] Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' (1991) 28 (1) American Philosophical Quarterly 73.

I think that this is particularly evident in the case of professional roles, because the phenomenon of role is so salient in the moral problem at hand (the conflict of professional obligations with other ordinary ones) but the same can be said of many - perhaps all - other situations. The relational aspect of a moral problem often simply falls in the background because another notion becomes salient in philosophers' mind (in caring relations, for instance, one may focus on vulnerability of dependents like Robert Goodin, or the injustice endured by unsupported carers like Eva Kittay; in other widely shared relations, like a background solidarity between human beings, or a generalized respect for every rational person's dignity, the use of the notion of relation falls in the background because of its universality, standardized aspect, or minimalist content: it is so present that it becomes invisible).

An immediate objection to such a broad relational understanding of morality is that the idea of relation either adds nothing to a moral investigation, or makes relationality trivial: a semantic way to formulate problems that are not primarily about relations. I cannot answer here to an objection of superfluousness but only state my intuition that all moral conflicts can be expressed in terms of relational conflict, and this holds the promise of (1) allowing us to give effect to the intuited moral significance of a plurality of relations, and of moral capacities and attitudes as well as (2) of a way to order and prioritize them and deal with conflicts, and be realistic about situation where principled morality may not be able to provide us with an answer.

Another germane model of morality would be the relational and affective models advocated mostly in feminist literature. They have the advantage of explaining why a relational moral prism could plausibly have this fundamental importance by connecting it to a theory of how the self is defined and relates to the world. For instance, Eva Kittay writes that 'being a person', and therefore a subject of justice as per her account, 'has little to do with rationality and everything to do with *relationships* - to our world and to those in it'.[386] Explaining models of the self as defined through separation and connection symbolized by Jake's (mainstream, masculine) and Amy's (relational, feminine) voice, Gilligan writes:

> Describing himself as distinct by locating his particular position in the world, Jake sets himself apart from that world by his abilities, his beliefs, and his height. Although Amy also enumerates her likes, her wants, and her beliefs, she locates herself in relation to the world, describing herself through actions that bring her into connection with others, elaborating ties through her ability to provide help. To Jake's ideal of perfection, against which he measures the worth of himself, Amy counterposes an ideal of care, against which she measures the worth of her activity. While she places herself in relation to the world and chooses to help others through sciences, he places the world in relation to himself as it defines his character, his position, and the quality of his life.[387]

Note how this feminist model of relational morality tends to assume that the 'masculine' moral voice is not relational. Such theories often carry the unspoken assumption that there can be no meaningful 'relation' other than relations characterized by other-regarding concern, like the central case of parental nurturing relation from where a significant amount of this literature has sprung. Commenting on Michael Slote's book on the ethics of care and empathy, Carol Gilligan thus notes that Slote 'argues for a Copernican revolution in moral

[386] Kittay, *When Caring is Just* (n 45) 266.
[387] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (rev edn, Harvard University Press 1993) 35.

philosophy, moving empathy and relationship from the periphery to the center of an ethical universe.'[388] Contractual relations, however, among other relations very different from care or love, are still relations, no matter how different the moral capacities and attitudes they involve are. Slote's efforts, like Gilligan's and countless feminist writers to emphasize the moral weight of some relations thought to have no or little moral significance needs not imply that very different relations (e.g. characterized by self-interest, generally taking place with strangers in a way that makes the 'relational currency' fungible, universal in a way that makes the personal identity of the person related to secondary) should be in turn marginalized.[389]

Perhaps the best way to suggest that a relational approach to morality is promising apart from pointing to the existing literature supporting (versions of) it is by pointing how closely it maps our common way of approaching beings of all kinds and of all capacities in our everyday lives. We immediately think of their identities: of the social and cultural groups/communities they belong to. We decide how to act by taking stock of (1) their identity, (2) our own identity, (3) in a way that does not artificially construct (a) as an anonymous container of properties and (b) as an detached, impartial moral agent, (4) the macro and micro social context (i.e. the social norms and scripts regulating the kind of

[388] Carol Gilligan, Front matters, *The Ethics of Care and Empathy* (n 65).

[389] The case that empathy is at the very root of our human moral responses is a different sort of claim and though I endorse a similar view myself, it need not imply that relations characterized by other-regarding concern, partiality, and direct attitudinal attachment - though chronologically prior in terms of moral development - have to be considered as more central to the moral universe than the types of relations featured by impartialist, universalist traditions. Similarly (because this is also a possible confusion of issues) the fact that some actions necessitate primarily relational capacities (e.g., trust or love) while others call for primarily internal or individually exercised ones (e.g., a capacity to elaborate a conception of the good) does not mean that the latter kind of actions are a-relational or that moral problems arising from them cannot be termed relationally.

encounters or relations currently occurring and the particular circumstances of both agents in this relation), (5) our inclinations (to act properly or not).

Economists, psychologists and moral philosophers are interested in different aspects of this rather uncontroversial process. What is puzzling is not so much that moral philosophers would focus on relations (given how naturally we think in relational terms) but why they would not, and would rather push the fact of relational pluralism in the background once they have chosen to hone in on a particular kind of relation such as the contractual one. Surely, the reply will be that this is a choice based on a reasoned belief that one is tracking value and is ignoring the rest deliberately, because it has no value, or not the special kind of value one is concerned with. Perhaps we should be skeptic toward such an answer and suspect instead that some of these theories simply focus too much on a single kind of value (like autonomy or survival, in some variants of contractualism and contractarianism) or relation (contractual relation between self-interested agents fending for themselves) to the detriment of others. Once these valuable capacities, states of affairs or relations have been embedded in a unified theory, it is all too tempting to expel competing values challenging this unity at the periphery of morality rather than to meet their challenge. The fear of pluralism or the appeal of generalization is far from a trivial suspicion. Annette Baier, among other feminists, insists on the contingent aspect that most philosophers were men, busy with certain kinds of relations (at work, in politics, in their clubs) and not others, indeed, probably contemptuous of these other, lesser endeavors, like caring for and raising children. That they would model justice itself - or anything that is worth their thinking about in morality - after these particular relations that they personally spend most time worrying about and the social

scripts/norms of which they spent most time understanding, is hardly far-fetched. Susan Moller Olkin wrote of Rawls that his 'discussion of rational plans of life and primary goods might be focused more on relationships and less exclusively on the complex activities that he values most highly, if it were to take account of (...) traditionally more female contributions to human life.'[390]

The point I am making here is more modest than a defense of a relational view of morality. I am suggesting that when we wonder what we owe to the PMD, we should think about our relations with them and try to detect what we believe to be morally salient about these relations, while being willing to revise these intuitions. We will at least adopt this relatively commonsensical approach in this conclusion, on the simple ground of its *prima facie* evidence.

6.3 Taking Relations of Other-Regarding Concern Seriously

I cannot defend an alternative relational theory that should supplement social contract theories here, but I believe that some of the faults and problems exhibited in the contractual variants could be overcome if the contract idiom, and the values underlying it, was replaced by a relational account making room for other-regarding concern.

This intuition stems from reflecting upon the central case of relations that we have with the PMD and that we would ordinarily think of as morally stringent. This relation would

[390] Susan Moller Olkin, *Justice, Gender, and the Family* (Basic Books 1989) 108-9.

generally be considered to be a fiduciary relation or a relation of care, that is, a relation in which a carer or a fiduciary is in charge of promoting (certain aspects of) the welfare of a beneficiary or a cared-for. Importantly, these relations would be ultimately grounded on some affective responses or dispositions on the part of the carer and would involve other-regarding moral attitudes.

To give a weighty moral significance to some special relations with the PMD is not only closer to our ordinary intuitions about why we are stringently obliged to them (than a contractual explanation) but it is also commonly held that these intuitions have a *moral* component, and should correspond to a RMS. For instance, the value of a kind of special relation, caring, has been put at the very center of morality by various care ethicists, Nel Noddings leading among them. She has argued that '[h]uman caring and the memory of being cared for (...) form the foundation of ethical response'.[391] Caring and being cared for is not only something human beings naturally want but it is also morally important in itself on her account,[392] notably because she locates the source of morality in some of the natural affective responses of an agent and the agent's pursuit of an ideal ethical self[393] - a view, I note, that could advantageously be framed within a relational morality where agents realize themselves by assuming or endorsing certain roles. Yet, even though the reality of human vulnerability and dependency are so central to human life and to many moral relations to which we participate from birth to death, it has been excluded, to put it as boldly as Alasdair

[391] Noddings (n 43) 1.
[392] ibid 7.
[393] ibid 43, 48-51.

MacIntyre does, from 'the history of Western philosophy', dominated by the values of self-sufficiency and autonomy.[394]

I do not mean to necessarily advocate care ethics as the alternative that should be pursued instead of, or in addition to, a contractual approach. I only use it here because it is probably the best available example of theoretical trend that give a serious meta-ethical and ethical weight to relations.[395] The difficulties this trend faces when theorists adopt it into a theory of justice also illustrates the danger of only recognizing the central value of *one* kind of relation. Some theorists of care and empathy purport to replace justice by care, or put these attitudes at the heart of justice and dismiss those other attitudes usually taken to play a greater role (typically in a contractual frame), something that drew many criticisms to the recent work of Michael Slote, for instance. Similarly, reviewing Virginia Held's recent expansion of the Ethics of Care into the political domain, Carla Bagnoli writes:

> How exactly [Held] sees [care and justice] to be integrated, however, remains highly problematic. At times Held suggests that they pertain to different domains, and that they should be allowed priority in their respective spheres of competence. At other times, she claims that care may "provide the wider and deeper ethics within which justice should be sought", questions the priority of justice, and argues for the priority of care. (...) But then Held admits that "the ethics of care may not itself provide adequate theoretical resources for dealing with issues of justice".[396]

[394] MacIntyre (n 66) ch 1.

[395] For a different approach, consider for instance, MacIntyre's argument to expand virtue ethics in a way that accounts for human beings' animal nature, in particular our vulnerable and dependent nature. In order to flourish, we need to pursue 'genuinely common goods', such as a 'network of relationships of giving and receiving' (ibid 108, 118). MacIntyre offers a list of the 'virtues of acknowledged dependence', which are the qualities required to participate to these networks properly. See also, Nussbaum's recent *Frontiers of Justice* (n 19).

[396] Carol Bagnoli, 'Virginia Held, The Ethics of Care: Personal, Political, Global' (Online Book Review, 4 June 2006) Notre Dame Philosophical Review <http://ndpr.nd.edu/news/25040-the-ethics-of-care-personal-political-global/> accessed 27 April 2013.

The challenge resides, I suspect, in developing a pluralist relational account of morality. Almost twenty years before, Virginia Held was already both attracted by and unsure about such an account. In her essay 'Non-contractual Society', she wrote: 'I doubt that we should take any one relation as paradigmatic for all the others. And I doubt that morality should be based on any one type of human relation.' And she refers to her 1989 book, *Rights and Goods*[397], in which she 'argue[s] for different moral approaches for different contexts, and try to map out which approaches are suitable for which contexts' while adding that she may change her mind and will perhaps 'eventually suppose that relations between mothers and children should be thought of as primary, as the sort of human relation all other human relations should resemble or reflect'.[398] Yet, her most recent book is still affected by this tension (between pluralism and monism of moral ground), and my intuition is that neither her, nor Noddings, nor Slote, can let go of the centrality of other-regarding attitudes or disposition like care and empathy because they sense their fundamental motivational, affective and epistemological importance. My own view on the matter, which I can only present but not substantiate here, is that such a key other-regarding element (which I tend to think of as 'concern') does occupy a foundational role in moral human life, but at a deeper level, and when we come at a later stage of practical reasoning, other-regarding attitudes (like concern) play a great role in some relations (those generally perhaps unduly reduced to 'caring' in the literature) but not in others (those generally perhaps unduly reduced to 'justice' or 'contractual relations' in the literature). At this later level of moral reflection, however, the shared similarity (in other-regardingness) between a foundational concern or

[397] Virginia Held, *Rights and Goods: Justifying Social Actions* (University of Chicago Press 1989).
[398] Held, *Non-Contractual Society* (n 378) 211.

empathy, at the most basic level, and some caring relations, at a more applied one, need not give these caring relations a superior centrality. I believe it is Held's earlier insight that ought to be fleshed out and formalized.

6.4 A Pluralist Relational View: Care, Contract and Beyond

Taking a relational pluralist approach, we can more easily see that the social contract tradition (like other moral systems or theories) may be taken to provide a good analysis of the moral significance and implication of *one* kind of (contractual) relation and take *that* relation to be the central case of moral relations (and the capacities or properties required for that relation to occur to be the properties that matter for gaining a RMS).

Looking at the relations moral agents have with PMD in various ordinary social contexts, we can reflect upon what is salient about these relations (whether morally so or not). As I suggested, once liberated from the contractual idiom and its conceptual constraints, we intuitively, rather obviously, find that in many cases, the relation is characterized by caring and dependence, and that the properties such as our ability to care, falling within one's sphere of influence or help or care, and vulnerability are much more central in explaining our relational obligations than the presence of contract-like features.

As the conclusion of our chapters indicates, the social contract tradition can hardly put this type of fiduciary relation at the center of their theory without challenging some of their key assumptions. Yet, we can imagine that both types of relations can trigger robust

moral obligations, even without being reducible to one another. A full defense of non-contractual grounds for the RMS of PMD remains to be done. I note that the literature on care ethics, empathy and dependence has only started to seriously theorize this reality in the last 15 years. (In fact, philosophical work on mental disabilities and the profound meta-ethical and ethical changes that need to be done to make sense of the moral status of the PMD were being published or written as I was working on this dissertation.)

Such a pluralist relational account would meet important challenges, including from theorists in the social contract tradition. The three most likely objections are the following: first, this relational account would grant an undue moral weight to psychological phenomena, such as affective dispositions or responses. The second objection is that, even granting that the psychological facts central to fiduciary relations are morally relevant, they are not relevant to justice. The third objection is that their value can be nested in, or explained by, a traditional autonomy-based or contractual account of morality. This third objection is a shared problem between both the contractual and the caring camps: there is a strong tendency to subsume or reduce the value of all relations to a particular, fundamental kind of relation. While the strategy of choosing a common denominator appears useful to overcome the problem of clash between relational obligations, it may not always be necessary and may be to an important extent misleading.

I believe that the way to approach responding to these objections is by vindicating the moral significance of certain other-regarding attitudes and the importance of roles and relations in framing our moral obligations and the way to fulfill them. In other words, we

need to go beyond normalizing the disabled into existing philosophical structures. Although this has been the strategy (successfully) deployed by philosophers and lobbyists to vindicate the rights of traditionally marginalized groups, and although incremental changes to mainstream moral philosophy and political thought are less radical, my thesis supports the claim that this strategy fails, at least in the case of the PMD. We must instead question mainstream assumptions about the meta-ethical starting point(s) of moral investigations (such as a requirement for an impartial, universal and a-relational stance) and the fundamental criteria for a society to be just and for a being to be a subject of justice.

The most obvious challenge posed by a relational theory of morality insisting on taking the normative codes associated with various roles/relations seriously (instead of trying to reduce them to a more fundamental principle expected to offer us guidance, including in situation of conflicting duties) is the difficulty to decide which relational obligation shall trump in case of conflict. Sometimes a contractual relational frame is warranted to think about certain aspects of the way we relate to a person and sometimes other frames are needed. Sometimes these frames conflict and sometimes they can overlap, especially if they are addressing different dimensions of the person's needs/capacities/roles. (For example, instead of opting for respecting someone's autonomy *or* caring for someone's vulnerabilities, we probably must do both for all of us to various degrees.) How are we to know, then, which role to endorse, which moral hat to wear?

Instead of feeling overwhelmed with the daunting prospect of moral pluralism, let us remember that we, moral agents, are constantly called to make such judgments. We say 'I'll

be late for the game, sorry, I must pick up my kid from school'. We find it entrenched in the law (for instance, when witnesses cannot be called to testify against family members in criminal cases). We are pleasingly hesitating between engaging with literary characters (or their author) by reading our bedside novel or to play with our cat. We are tormented over giving someone paternalistic, but potentially condescending advice or respecting her by letting her learn the hard way. Though we rely on a relatively steady hierarchy of relational obligations, we rarely give an absolute priority to a particular type of relation or to a particular person we relate to.

We are blamed and congratulated by ourselves and our peers when we fittingly endorse or not different roles in a way that suggests that (1) there is a right and a wrong way to strike a balance between the relational obligations we owe to ourselves and to different individuals and groups, (2) some relations are more valuable than others and some roles make more stringent demands than others and (3) it is more or less morally or ethically optional for moral agents to endorse a role or to choose between conflicting relational duties depending on the nature of the relation (and the circumstances within which this relation plays out).

If there is any more fundamental attitude nesting both responses, or some higher moral gauge helping us to decide which one is most appropriate (e.g., how fitting it is to respond caringly or respectfully or what balance between both must be struck), it may be something like solicitude, concern, Iris Murdoch's (loving) 'attention', or Aristotle's virtue of practical wisdom (*phronesis*). This ground would not - or not necessarily - offer us

practical guidance in a given situation of normative conflict: it may rather be a form of practical-epistemological wisdom, an insight helping to recognize the morally salient features of the situation we find ourselves in (and, if a relational account can help to clarify this process, to associate it with a relation) and which roles are proper to endorse or prioritize. While we may not need such a basic meta-notion to balance between different relational obligations, I believe that the complex notion of concern could fit this bill, if we properly developed its affective, conative and cognitive dimensions.

I painted in very broad, intuitive, brushstrokes the multi-leveled axiological components of what a relational theory of morality could look like. I believe that within this broad account, we can best make sense of the various relations we have with the PMD. It intuitively seems that the most salient and stringent of these relations weighing on us as a society is one of caring. Understanding the social script and normative codes associated with caring relations, as well as their weight as a matter of morality and justice is therefore where, I suggest, the bulk of the work has to be carried out to understand the RMS of the PMD. Less disabled people are, on the contrary, likely to benefit (sometimes more so) from the contractual understanding of relations between citizens. Importantly, not all relations 'stick' to a certain group of people at all times or always hold between particular people, though some, it seems, would (like some kinds of love or family ties). We may relate to an individual, disabled or not, both as a cared-for or as a contractor, depending on the context. Not all of us may be autonomous and rational in a way that is required from the subjects of justice and moral patients in the social contract tradition, but all of us are vulnerable and dependent.

The PMD may contribute to our understanding of our vulnerability and of the importance of caring relations in human life. They may very well lighten our existential burdens by playing their role, even though the scripts they have been assigned in the parts available in our 'human comedy' are hardly those of bargainers, soldiers or moral philosophers, and even though their 'contribution' would hardly be sensical in the contractual idiom of mutual advantage or mutual justifiability. However, reducing the morality of human relations to their contractual aspects is a mistake, though it is a promising political strategy of procedural reconciliation between disagreeing strangers. Social contract theorists must thank the PMD for guiding us toward a conclusion that improves our self-understanding, as individuals and as a society, though I believe we must recognize the PMD's value whether we thank them or not.

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