

THE DISABLED CONTRACT

Social contract theories generally predicate the authority of rules that govern society on the idea that these rules are the product of a contractual agreement struck between members of society. These theories embody values, such as equality, reciprocity, and rationality, that are highly prized within our culture. Yet a closer inspection reveals that these features exclude other important values, relations, and even persons from the realm of contractual morality and justice, especially people with severe intellectual disabilities. Jonas-Sébastien Beaudry explores the moral status of intellectually disabled people in social contract thought and argues that this tradition needs to be revisited to include the most vulnerable. Addressing this problem will have concrete repercussions in law and policy because many issues that people with disabilities face are connected to deeply rooted assumptions about their status as full citizens or full members of our moral, political, and legal communities.

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The Disabled Contract

SEVERE INTELLECTUAL DISABILITY, JUSTICE
AND MORALITY

JONAS-SÉBASTIEN BEAUDRY

McGill University



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For Richard-Alexandre

Consider a birdcage. If you look very closely at just one wire in the cage, you cannot see the other wires. If your conception of what is before you is determined by this myopic focus, you would look at that one wire, up and down the length of it, and be unable to see why a bird would not just fly around the wire any time it wanted to go somewhere.

Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory*
(Crossing Press, 1983)

*Begin by imagining
a failure of will,
the boundaries of the body erased
like lines on a chalkboard.*

Sheila Black, “Playing Dead” (in *House of Bone*, Custom Words, 2007)

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Foreword

Philosophical verities take hold and maintain a tight grip on the philosophical imagination. But there are times when we come to recognize that a putative philosophical verity is not veridical. This reveal takes more than vision; it also takes careful, rigorous, and systematic argumentation. This is what Beaudry gives us and in doing so allows us to drop old philosophical chestnuts and adopt a more adequate understanding of justice and contract theory. Such a chestnut is one with which mostly all professors of philosophy have experience.

Each semester, I would proclaim to my undergraduate students in introductory philosophy courses: “Man is a rational animal” (adding that “man” is the generic term meaning men and women). Inevitably some student would raise her hand and ask, “[B]ut what about people with serious mental illness or people with severe intellectual disabilities?” I can’t recall how I answered, but I am certain that my answer conveyed the conviction that such a question was philosophically naïve. Yet I should have known better. By the time I was an assistant professor, I was already living with a person diagnosed with severe to profound intellectual disabilities. With my inadequate and inauthentic answers, I was playing the philosophy game: conveying the presumed wisdom of the great canonical figures – rather than actually doing philosophy – questioning dogmas, taking seriously what I saw and understood, and interpreting these with the toolkits of critical and analytic inquiry. I knew my daughter, then labeled “severely to profoundly retarded,” was just as human, just as morally valuable as anyone else, and yet I echoed a proposition that has stood since at least Aristotle. Beaudry is not playing at philosophy, but doing it here. And the philosophy he is doing is due in large measure to the fact that he has experienced a world constructed by and for neurotypical people, as seen through the eyes of his brother. As philosophers who have lived with a beloved person whose being gets occluded in the sorts of definition above, we know how much is at stake in getting the philosophy right. For in this definition of what it is to be human, we have the brick holding up the entire edifice of moral and political philosophy; ideas of robust

moral status, dignity, and justice rest on it. No more so than in the conception of justice based on a social contract between rational contractors.

Since John Rawls resurrected social contract theory in the early 1970s, the idea that has dominated political philosophy is that the principles of justice are self-chosen by able-bodied and able-minded independent rational actors who are contracting with one another for social cooperation, based on mutual self-interest. Contract theory also prevails in moral theory, either as contractarianism (based on a Hobbesian understanding of mutual self-interest) or as contractualism (based on Kantian respect for contractors as ends-in-themselves). But what happens to those who are not “rational animals” – the fully functioning rational agents of contract theory?

When I eventually confronted this question, there were few philosophical answers – indeed, the question seemed not to be on the philosophical horizon at all. As I pondered where in the philosophical understanding of justice do people such as my daughter fit, it became increasingly obvious that the naïve student’s objections pointed to a potential flaw in almost all traditional philosophical systems, for the claim to universality was belied by those people to whom the definition did not necessarily fit. Feminist philosophers and race theorists had already begun to dismantle the myth of philosophical universality. They revealed that the scope of the universal quantifier was never *all* human beings – no more than Jefferson’s “all men are created equal” was to apply to slaves or free women. It now seemed that questioning the long-standing definition of “man” as a “rational animal” might be out of bounds no longer.

By the 1990s, the cracks in the hegemonic approach to the nonstandard body and mind were evident. In the spirit of feminist philosophers, race theorists, and anti-colonial scholars, some philosophers followed the lead of scholars in other disciplines and began their critical philosophical study of disability. In the late 1990s, I finally undertook the task of addressing the question posed by the philosophical naïf: what about those humans who may not be rational, or who may lack certain rational capacities – how do they partake in the human moral universe? Taking my experience with my daughter as a fixed point, and Rawlsian theory as an exemplary formulation of contract theory, I asked whether a theory of justice that neglected the existence of people such as her could be an adequate theory of justice.

Beaudry tells us that “[i]ntellectual disability affects two to three percent of the general population” and, of these, about 5 percent are considered severely to profoundly intellectually disabled. It is this group that is least able to be accommodated by contract theories of justice. It is a relatively small group – it is the “hard case” for theory. Many philosophers will say that we should no more do philosophy than formulate laws based on hard cases. Still today, more and more philosophers concede that the question of whether a theory can include people with severe intellectual disabilities needs answering. At the very least, one needs to consider if the exclusion is, or is not, a significant fault.

Beaudry unequivocally takes the stance that excluding the severely disabled individual from the scope of justice and morality is a fault or error of some kind. He presumes the equal moral worth of all disabled people, including those with severe and profound intellectual disabilities. Happily today there are enough philosophical views on how to repair this fault to justify an entire volume; we've come a long way from the total neglect of disability in philosophy.

Beaudry lays out the various positions he explores with powerful clarity and thoroughness. We see a number of philosophers picking at the edges of social contract theory or even at its core elements, with the intent to make it fully inclusive. While some try to reconstrue contemporary contract theories, others insist on revising our understanding of people with severe and profound cognitive disabilities in order to retrofit them into the standard theories. Beaudry examines all these theories and finds each wanting. It seems that the following anecdote is pertinent here: A couple lost while hiking in New England come across an old native dweller and ask him for directions. The crotchety old New Englander replies, “[W]ell if I was trying to get to there, I wouldn't start from here.” Beaudry's arguments give us a very convincing reason to suspect that proponents of justice as a contractual agreement looking for a way to include people with very significant cognitive disabilities are like our lost hikers: their starting point will not get them to their desired destination.

The book that Jonas-Sébastien Beaudry graces us with is a carefully argued, analytically formidable response to all those whose starting point is contract theory and whose endpoint is the inclusion of people with severe and profound disabilities into a theory of justice. With precision, rigor, and generosity, he explores the most promising attempts to make contract theory compatible with a conception of justice for those with significant intellectual disabilities. He demonstrates how some attempts allow *almost all* to be included, but still leave out those whose disabilities are most significant. As he interrogates various theories, he demonstrates that in each case the view either ends up using the intellectually disabled in an instrumental fashion, leaves them with something short of full robust moral status, or includes them but only by unwittingly smuggling in noncontractual values and concepts. The comprehensiveness and thoroughness of Beaudry's investigation has no equal in the literature. It is a definitive work.

Should we then forsake contract theory? Some philosophers such as Martha Nussbaum have abandoned contract theory altogether, in some measure because it fails to explain why we owe justice to those with cognitive disabilities. For several decades, feminists and race theorists have pointed out the limitations of contract theory, arguing, for example, that the social contract is one made by men to control women and women's sexuality and reproduction (the sexual contract) or that the social contract is made between white men to rule over and control black and brown men and women (the racial contract) (Carole Pateman, *The Sexual Contract* [Stanford: Stanford University Press, 1988]; Charles Mills, *The Racial Contract*

[Ithaca: Cornell University Press, 1997]). That is to say, the contractual conception of justice depends on the subordination of some groups – those who were never meant to be contractors. Yet contract theory, whether it is Hobbesian contractarianism or Kantian-based contractualism, is a hard theory to give up for it has much to commend it, and arguably it can even be especially useful for those who were originally excluded. It gives us an understanding of when power is legitimate and when it is not. It offers a good understanding of how strangers might come to agree to cooperate under conditions that are deemed fair by all. It extolls values we cherish, such as equality and freedom.

Beaudry urges that we do not have to give up contract theory. Instead, we need to acknowledge that it cannot tell us what is just or unjust in every sort of relation, between every sort of relata. We need other ways to extend the concept of justice to include those who don't fit the Procrustean bed of the independent, rational, full-functioning cooperator or to help with those areas of life where we mostly need to act with other-regarding motivations.

Beaudry demonstrates the importance of including the significantly intellectually disabled in our philosophical considerations, not only because we can better understand what we owe to them, but also because doing so throws light on concepts such as contract-based theories of justice. The “hard case” shows us that we should not drop the intuition that this group of people have robust moral status and should be treated justly, but instead drop the conceit that contract theory is all we need for moral and political theory. As Beaudry writes, the difficulty lies not with contract theory, but with thinking that the “idealized model of non-tuist interpersonal relations, associated with a model of relations between strangers, will exhaust the moral roles that people play.” Acknowledging the robust moral status of the profoundly and severely intellectually disabled can best be done by recognizing the moral obligations in the roles we assume and the relations we have to this extremely vulnerable population, where other-regarding concerns predominate. This group is owed justice, but it is rarely justice as understood in contractual terms or for contractual reasons. Beaudry urges us to consider a role- or relation-based morality in which the nature of the relation figures in how we think of what is right and just in the different sorts of relations we enter and in the roles we assume.

In this book, we have a great resource for thinking about contract theory, its scope, value, and limitations – ones that emerge as we attempt to make contract theory more and more inclusive. What Beaudry has done has been to clear the ground for all who labor in these fields. By showing us what contract theory can and cannot do, it cuts through the thicket, opening better paths to take to arrive at the source and nature of the justice we owe to those who are noncontractors, but who cohabit the moral universe with us. As the book illustrates the philosophical value of beginning with the hard case, we find ourselves needing to concede that we need a morally pluralistic approach. Now we can stop wrestling with contract theories of justice – stretching, pulling, and twisting them to try to make them fit all sorts of individuals

to whom justice is owed. With respect to the question of contract theory and people with significant cognitive disabilities, Beaudry's is likely to be the last word. While we can keep contract theory for a limited set of relations, we also need to roll up our sleeves and locate a better "here" so we can go to "there."

Eva Feder Kittay
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