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Agency and Collaborative Dependency:

Comments on Silvers and Francis

Anita Silvers and Leslie Francis have given us a book manuscript that explores the future of political liberalism. It is a feast for readers because it is deeply engaged with such a wide variety of recent work: for example, in constitutional law, feminism, disability studies, contemporary theories of justice. It is a challenge for commentators both because of its originality and because of its detailed, forthright, and rigorous argument -- argument that has been there, and done something significant, on every obvious topic a commentator might raise.

It is especially a challenge for me. In the course of preparing these remarks, I have discovered that I don't have objections so much as resistance to a few of the points they make, and the source of my resistance seems to be some sort of weirdness in my worldview. I will come back to that. (By the way, I'm not even allowed to use the term worldview on the East Coast. It's a pleasure to be in California.)

The central focus of the central chapters of the manuscript is on reconceiving the relationships among what the authors call the "subjects" of justice -- human beings who are capable of helping to define or "choose" the norms of justice in human societies, as well as capable of receiving the benefits and burdens of those norms.

One of the central normative theses in those chapters is that liberalism should once again expand the franchise -- but this time by transforming the very conception of agency itself to include people who represent something close its limiting case: that is, people with

profound, lifelong cognitive impairments -- impairments that escape our ordinary conceptions of moral agency and moral responsibility.

The central argument for that thesis is fascinating, and attractive. It seems utterly right to me about the test case of cognitive impairments, and deeply original as well. My main worries, as you will see, are not about the test case so much as about how far the argument goes for a theory of justice as a whole.

### Collaborative dependency

The argument I'm referring to is about what Silvers and Francis call dependent agency, and the kind of collaborative, justice-making activity possible between dependent and (relatively) independent agents. By dependent agents, the authors mean people who need special assistance or accommodations from others in order to act in a significant range of ordinary environments.

People who are mobility-impaired may need such assistance from others, and if they do, they are dependent agents. But that kind of dependence does not raise the question of whether they are agents at all, or subjects of justice. They are agents who have impairments; it is not their agency itself that is impaired.

Agents who are cognitively impaired, however, are impaired agents -- for example, to the extent that they cannot independently conceptualize, deliberate about, and choose courses of action. The authors take the most challenging range of even those dependencies -- people with severe, lifelong cognitive impairments that prevent language acquisition -- and describe a form of collaborative dependency that makes it clear that such people *are*

subjects of justice, and must be considered as such not only in our daily lives but in our theories of justice.

Recognizing this form of collaborative dependency involves paying close attention to the capabilities such cognitively impaired agents actually have. When we do that, we often find that they have stable likes and dislikes, aims and projects, and that they regularly behave in ways that are analogous to the expression of normative claims (effectively expressing prohibitions, requirements, permissions), and that they are trusting in some situations and distrusting in others. They need assistance in turning this form of inarticulate agency into genuine collaboration with respect to being choosers and recipients of justice, but that is just the limiting case of the familiar fact that human beings in social settings are always *inter*dependent, not purely independent or autonomous. We all need assistance in making ourselves heard and understood, in understanding others, and in formulating or dealing with the norms of justice. The fact that people who are severely impaired, cognitively, need more assistance, and more imaginative assistance, than some others does not disqualify them from being moral subjects.

The authors acknowledge that some nonhuman animals may well be subjects of justice in the same sense -- that is, that they too operate in a form of collaborative dependency with human beings. And the authors recognize that some human beings are so impaired, cognitively, that they are *not* subjects of justice -- people, for example, who lack any form of consciousness or subjectivity. But they leave these issues for another time. I'll come back to one of them briefly, later.

But even here, when I am wholeheartedly in agreement with the argument, I find myself wanting clarification. This is an example of the resistance I mentioned. I have

concerns about how we are to distinguish genuine understanding, choice, acceptance, and refusal of various norms of justice from forms of behavior that are mere look-alike behaviors. I want to be clearer about how to identify trust in these situations, especially as part of a collaborative process.

All of these things are easier in adult-onset impairments than in the cases addressed by Silvers and Francis. As they note, in adult onset cases, we have access to baseline information about stable (or unstable) temperament, dispositions, and preferences. We can use that as a starting point from which to interpret the person's subsequent behavior, and to raise warning flags about manipulation by others, or purely reflexive, adaptive responses. (p. 111)

We do not have such a reference point for lifelong impairments. But it is worth noting that we do have, even in those cases, a lifelong, developing personal history, some general developmental expectations for people living with such impairments, and a general understanding of interactions with them. This is what the authors emphasize, to good effect. [pp. 117-118] And variation in the trust levels exhibited by impaired agents does seem to sum up a good deal of what is behind the justice-choosing, and justice-building behavior the authors describe.

My problem is that we all know that trust can be manipulated. That's what confidence games are all about. And we know that both trust and distrust can be badly misplaced. Compared to the zeal with which the authors dive into the details of many other issues throughout the manuscript, these epistemological questions about trusting behavior are not, to my mind, similarly well-developed.

Yet this seems crucially important to separating genuine cases of collaboration from only apparent ones. The authors give us an illuminating discussion of the legal protections of trustee arrangements, and the institutional machinery for preventing abuses. But the institutional machinery needs evidentiary standards, and philosophically, it would be helpful to have a general idea of how psychologists, lawyers, and caregivers would construct such standards.

The source of my resistance on this point seems to be a nagging argument of the following form:

- 1) In every human relationship between an impaired agent and a non-impaired one, the non-impaired agent will be dominant. Think of very young children and their parents.
- 2) Dominant agents will ultimately see to it that their views about appropriate actions prevail over contrary ones expressed by more impaired agents -- *when outcomes matter*. Think about seeing to it that an elderly parent is protected against fraud.
- 3) When outcomes matter, dominant agents will tend to prevail in ways that are both efficient and effective long-term. Collaboration must sometimes be less than candid, and sometimes not even get started.
- 4) Efficient and effective ways of prevailing over subordinate agents, impaired or not, become more and more fixed and impersonal as we move from one-on-one long-term caregiving situations toward large-scale, high velocity, short-term interactions. Think of dealing with customer service agents at a huge corporation.

- 5) Fixed and impersonal dominance of this sort, when unrestricted by prior norms of justice, often leads to injustice of familiar sorts: manipulation, non-consultation, coercion.
- 6) Thus, prior norms of justice are needed to regulate the trust-building relationships between dominant and subordinate agents, including impaired and non-impaired ones.
- 7) In a theory of Justice, such prior norms of justice must be grounded; rationally defensible.
- 8) The authors' options for giving prior norms of justice a rational ground are to be found, roughly, in dignity-making or right-making characteristics of the impaired agents themselves, or in circumstances of justice external to the trust-building process, or in features internal to the trust-building process.
- 9) But it is hard to think the ground could be found within the trust-building process itself, since trust and trust-building seems to drop out of the picture altogether in anonymous, many-to-many, high velocity transactions. Think of interstate travel by car or airplane; electronic funds transfers; e-mail transactions with customer service. Interpersonal trust-building is replaced by a form of reliance that is not interactive or interpersonal at all, but rather a simple projection of expectations or hope. That reliance is sensitive to results in a general, trial and error way, and may be explicitly evidence-based, in the form of probability judgments. But even that reliance often disappears, to be replaced simply by a cultivated ability to stop worrying; the ability *not to think* about bad possibilities.

- 10) So on the assumption that fundamental principles of justice should be scalable, and found at a fundamental level all the way from intimate, leisurely, interpersonal relationships to anonymous, high velocity transactions, it looks as though the prior norms of justice needed to regulate trusting relationships will have to be found outside the process of trust-building itself.
- 10) That leaves two options: an appeal to inherit properties of subjects of justice themselves -- and regulative principles (such as rights) grounded in those properties -- or an appeal to other circumstances of justice. Either way, it looks as though we are going to need something like a traditional theory of justice to complete this picture of trust and trust-building. Either way, this may limit the scope of the authors' claims about the importance of trust building for theories of justice.

### Subject of justice

I am not sure how the authors would handle this question about prior norms, but some of what they say suggests that they would expect some of them to be grounded in the dignity-making or right-making characteristics of agents, both impaired and non-impaired. I'm not sure how much the authors actually endorse this effort; they don't pursue it at length, though they certainly reject the standard valorization of rational agency as a criterion. But they clearly want to ground an inclusive definition of subjects of justice -- that is, those moral subjects who are capable of being both choosers and recipients of justice -- in the characteristics of those subjects themselves. People with severe cognitive impairments, for example, must be included for reasons having to do with *what they can do*. Their status as participants and beneficiaries of justice originates in properties inherent in

them, rather than in properties (applied by others) that *adhere to* them like stickers or tattoos.

This is, at bottom, the quest for a marker of inherent moral considerability. The authors are rightly suspicious of attempts to identify such markers, because they have too often been used to perpetrate or sustain injustice, and to exclude groups of people from joining the effort to choose, as well as to receive, the benefits and burdens of justice. But they are clearly using *some* criterion very like a dignity-making one, and showing that it is surprisingly inclusive.

I have two comments on this -- one of them offered in a cooperative, optimistic spirit; the other in what I hope is a transient, dyspeptic mood generated by a weird worldview.

*The threshold of moral subjecthood.* The cooperative comment is that I think their account of collaborative dependency would be helped by greater clarity about the criterion used to make the moral subject/object distinction. In particular, I think they need to say something about the threshold level of consciousness, responsiveness to other subjects and the environment, and the forms of intentionality involved in all of this -- and then tell us why this threshold has such moral importance. The general point here is just that if we are being asked to adopt a more inclusive criterion of justice, it would help to know not only how far we are being asked to go, but why that far and no farther.

For example, the authors raise, and then largely postpone the question of moral subject-hood for some non-human animals who appear to be involved in collaborative dependency arrangements with human beings. Similarly, they put aside questions about living human beings in a persistent vegetative state. But the postponement seems odd to

the extent that we are clear about the criterion and about its moral significance. And to the extent that we are not clear about these things in general, the whole weight of the argument falls on how clear we are about the general nature of particular cases. Proceeding case-by-case, in the absence of a reasonably clear threshold condition, makes us vulnerable to paradoxical slippery slope arguments.

I fully understand why the authors are reluctant to offer a fixed threshold condition. Their agenda is to move liberal theories of justice toward greater inclusiveness, and they are rightly reluctant to say that the specific move they are proposing should be the last one. But it seems to me that even a provisional threshold condition would be useful. And it may be that there is an implicit one to be found by assembling various elements from different parts of their discussion.

For example, I would be interested to hear what the authors say about the following as a provisional threshold condition: the moral subject must have some intact sensory apparatus; must be aware of (conscious of) some of the information coming through that sensorium; must be self-aware of (conscious of) at least a vague and variable boundary between self and the other; must have some conative responses of primal (nonrepresentational) seeking and avoidance that are linked to primal forms of memory, desire and anticipation; must have a somewhat different repertoire of conative responses to animals than to inanimate objects; must have a somewhat different repertoire of conative responses to humans than to other animals; must have some identifiable, stable, learning patterns in conative responses to human beings; must have a developmental history of such learned conative responses that supports explanation and prediction.

It seems to me that all of these are likely to be necessary conditions for the sort of collaborative dependency the authors describe. In various places they make clear that collaborative dependency need not include the dependent person's ability to conceptualize -- to have representational forms of memory, desire, goals, projects and so forth -- even though it apparently must involve consciousness and some sort of awareness of a self/other distinction. But the question is how far beyond those impairments the boundary of moral subject-hood can lie.

My dyspeptic comment comes from the recurrent distaste I have for the whole quasi-theological hunt for a dignity-conferring property. I am skeptical. It is undoubtedly true that most of us are psychologically attached to ourselves, and to those who are dear to our dear selves. And perhaps some of us find human beings generally endearing. But admiring ourselves doesn't make us admirable.

Similarly, as noted earlier, I don't see the warrant for suggesting that an underlying conception of trust-building behavior can somehow replace conceptions of bargaining, reciprocity, and negotiation in our theories of justice. (pp. 165-168) That is, I don't see how this will work unless prior norms of reciprocity and so forth are brought into the underlying conceptions of trust, and trustworthiness.

Suppose, instead, that we take a different, old-fashioned approach: We begin with the recognition that despite the fact that human beings have certain charming prosocial propensities, we are pretty scary creatures, and in many ways disgusting ones. Without internalized norms of justice we regularly wind up behaving atrociously to each other and everything else, usually while continuing to wallow in self-love. So it seems that the hunt for human dignity as a *premise* for justice has turned things upside down. The premise

instead should be that what makes justice both possible and necessary is that without it, we have no special dignity at all -- just a thin, watchful form of cooperative social behavior concealing a ferocious, feral psychology.

And from that premise the theory of justice that comes most immediately to mind is one ultimately based on duties, and not on rights, bargaining, contracts or trust -- duties that originate in the moral necessity, for each of us, of turning our dear, feral selves into something more admirable, and dignified, and capable of living trustingly and collaboratively with each other. There is no special dignity-conferring property that we need to find in order to go down this path toward the justification of duties. Political philosophy got along in this way long before the invention of autonomy, and of rights originating in the glories of human nature itself.

Duty-based theories of justice can be very powerful, and need not be repressive, illiberal, or exclusionary. There are duties of benevolence, care, and cooperation as well as mutual advantage; duties of intervention as well as duties of self-restraint. All of them can be understood as originating in the inherent, self-defeating traits of the duty-bearers. But their existence as stable, internalized, prior norms of justice makes a safe place for the trust-building required for enlarging our conception of the subjects of justice.

The relevance of this line of dyspeptic reflection is simply this: a powerful way to pursue a project of inclusion for liberal theories of justice may be to get duty into the picture earlier than trust. This would ease some of the argumentative burden that now falls heavily on the concept of a moral subject. Making the theory of justice fundamentally duty-based might actually elevate the importance of the authors' analysis of collaborative

dependency and trust. And it might yield a stronger guarantee of inclusiveness and equality for people with severe cognitive impairments.

I suggest that it also helps to resolve a question about nonhuman animals. Many of nonhuman animals do have agency powers that are equal or greater to those of profoundly impaired human beings. Yet we may think we have duties of justice -- duties of care -- toward every such impaired human, but not toward every comparable nonhuman. And we may think this just because human beings with impaired agency are necessarily dependent agents in any accessible environment -- either among human, or nonhuman animals. They cannot care for themselves either among us, or among other animals. And they will surely not survive if left among nonhuman animals with agency powers similar to their own. By contrast, animals with those same agency powers are typically not impaired relative to their species. They are not especially dependent agents within environments that are survivable for their species. We have other duties to them, but helping them become subjects of justice may not be one of them.