MORAL STATUS: WHAT A BAD IDEA!

Why discard it?  What replaces it?

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I. ASCRIBING MORAL STATUS
I.A. NOT SOOTHING BUT SEETHING

This is a paper about the notion of moral status. Moral status is a very bad idea indeed. Not long ago philosophers generally did not agree with my view that basing moral, political or legal judgments on whether or not an individual has moral status is useless – or even worse – in resolving troubling questions about justice. So philosophical theories about what did or did not have moral status – neonates, fetuses, corporations, non-human primates, trees – were abundant. And the controversies they stirred up seethed.

Much contentious text has been lavished in arguing about whether, for consistency’s sake, certain kinds of nonhuman entities - especially animals – should be accorded moral status because some humans who seem less worthy than some animals are accorded this state. And much anguished breath has been expended in arguing about whether certain kinds of human entities – especially people with cognitive anomalies – should be denied moral status because they seemed less worthy. Far from smoothing out differences of view about how such kinds of entities should be respected, appreciated and otherwise treated with the justice they deserve, these debates about moral status exacerbated the initial policy disagreements and escalated the antagonists’ anger and fears. This is not the result we philosophers hope to achieve from an adequate analysis of a crucial moral concept. Nor the result from whatever theory of justice eventually is found to be most compatible with such a clarified and reconstructed moralized conceptualization of personhood.

Today, I am happy to report, the tide of philosophical enthusiasm is turning against attempts to attribute moral status. We cannot dismiss moral status so
easily, of course, because the philosophical idea of moral status has been linked to a juridical idea, that of legal personhood. Unlike the notion of moral status, which usually is invoked with reference to seemingly natural differences that are supposed to divide things that have moral status from those that don’t, legal personhood is more aptly understood as a status assigned not by nature but by human convention. Nevertheless, such juridical conventions often have been inspired by convictions about the standard that is reached and the value in question when an entity is considered to achieve moral status.

The concepts of moral status and legal personhood are connected, although they neither are the same idea deployed in two different domains nor are they necessarily linked. As this discussion unfolds I shall contend that the idea of legal personhood should be distanced from that of moral status so that the problems of the latter idea are not transmitted to applications of the former. For when legal personhood is thought to derive from moral status or is understood on the model of moral status, the flaws of the latter infect the former. As we shall see, injustice festers in these same faults.

Accordingly, I shall contend that “moral status” is essentially an exclusionary notion. It also is what philosophers call an essentially contested concept. These features are magnified into dangerous faults when the concept of moral status becomes a constituent of theories of justice. Judgments structured by a concept so unsuitable for making progress about justice cannot help but be antithetical to fair flourishing in a stable cooperative scheme. In sum, as I shall argue, to link legal personhood to moral status is to introduce injustices that pervert the promise of equal protection under the law.

Despite urging that appeals to moral status be shunned – whether these be invoked to protect, or instead to justify abandoning, an individual or kind of entity – I do not propose to disregard the circumstances in which such justifications have been attempted nor the purposes they have been supposed to serve. These will enlighten us about legitimate conceptual goal(s) from which contentiousness over moral status is an unfortunate distraction. Consequently, after presenting reasons for rejecting the framework imposed by the idea of moral status, I shall propose an alternative philosophical approach to conceptualizing the subjects of justice, one better aligned with value(s) that inspire both moral and legal justice. Mine is a philosophical theory of justice free from presumptive delineations of moral status, a
progressive theory motivated to embrace rather than rebuff innovative collaborations among very different kinds of individuals.

I.B. ASCRIBING MORAL STATUS: A FATAL ATTRACTION
I.B.1. Moral Status Arguments and the Expansion of Justice
Moral status is supposed to grant its possessors moral considerability. To accord persons (or other things or kinds) considerability is to acknowledge that they matter for moral judgment. Entities with such moral standing may not be treated any way we wish; we are morally constrained in regard to what we do with and to them. The attraction of predetermining the kinds of individuals to which such considerability is owed, and being able to shape theories of obligations and rights with just these in mind, is conspicuous and beguiling, but treacherous as well.

On one influential account of moral status, deserving moral respect is the outcome of possessing considerability, which in turn is a consequence of being accorded moral status. Our intuitions that certain individuals have moral status thus is supposed to determine the sorts of entities that deserve moral respect. On another equally influential account, however, there is a reversal of the determinative connection. On this second account, moral status is thought to be the product of, or entailed by, respect rather than its cause.

On the first account, intuitive moral responses to particular individuals prompt embracing a principle of respect for things of that kind. On the second account, it’s the principle of respect that inspires the particular responses to individuals identified as being of the requisite kind. Thus, while on the first account the entity’s salience is noticed and moral respect is the response, on the second account the entity becomes salient only by being a “named” subject of principled moral respect.

To illustrate the first account, suppose I am rolling down a path across which slowly moves a snail. Its fragility, protected only by a brittle shell, calls out for my attention, as does its courageously tenacious travel. These perceptions fill me with respect for this persevering creature: I refrain from rolling on my way until it has safely crossed the road and as a further result adopt a policy of being attentive to avoid harming similar entities that come across my path. On the second account, which reverses the relationship between perception of individuals and principled valuation, I am convinced that all creatures - large as whales and small as snails – should be respected,
so out of respect I am careful on principle to peer intently at the road ahead of me, for which reason I notice the snail moving across in front of me and slow down to let it pass. Although they are antithetical, both accounts seem to comply with some moments of our moral experience. This should suggest that the epistemology of moral status judgments, and especially the phenomenology of the moral intuitions about considerability that sometimes inform and sometimes are informed by such judgments, are both so complex and ill understood that appeal to moral status is unlikely to provide a procedure for resolving difficult moral and legal cases.

There is, nevertheless, a stubborn tradition of invoking moral status for just such a purpose. Arguments for extending the attribution of moral status often proceed by insisting that there are entities lacking in but deserving of considerability, and that moral status should be accorded these entities because they are importantly similar to things that already enjoy it. This strategy is also employed to energize the political process through which statutes extending legal personhood are adopted, and similarly to expand jurisprudence so that status or standing previously accorded some (kinds of) individuals is extended to other (kinds). For example, a famous or infamous (depending on your viewpoint) argument recently deployed by some contemporary philosophers who support according (more) rights to animals begins with the premise that children are protected because they have been accorded moral standing. The strategy proceeds by arguing that, because some animals display more of the enabling properties or capacities than some children, it is unfair to privilege the deficient children over the more proficient animals.

Contrary to what one might expect, however, the privileging of rights claims of children over animals has not always been so. About 150 years ago, a progressive strategy for expanding justice for children was advanced by arguing that children deserved the same right to protection against being beaten and starved by people in whose custody they were that the law already bestowed on animals at risk of similar harms. In New York in the 1870s, for example, animals had moral and legal standing to be protected against being cruelly beaten and starved by their owners. Children, on the other hand, had no similar protections against being beaten and starved by the natural or foster parents who had moral oversight over, and legal property rights in, them. Typically such treatment was perceived as beneficially corrective rather than egregiously cruel. This state of affairs changed only when the Society for the Prevention of Cruelty to Animals
assigned its attorney to represent an 8 year old child beaten and starved by her foster mother and won the child’s freedom to be transferred to another family by arguing that protecting animals better than children is both irrational and biased, the reverse of the argument made in favor of strengthening animal rights today.

I.B.2. Analyzing Moral Status Ascriptions: Their Fatal Flaws

Arguments that invoke moral status to condemn divergences of the treatment of different (kinds of) things inevitably claim that, despite their variations in other respects, the kinds share whatever property effects moral status and that they resemble each other in doing so to at least the decisive degree. Two categories of property each has been presumed to be the kind that is the basis for assigning moral status. One kind of property is a broadly construed psychological or mental property. The other kind of property is a broadly construed biological or material property. In this section I briefly summarize both these views, as well as their fatal flaws.

Moral status based on psychological capacity is equated with the entity’s ability to conduct itself reflectively, or be aware or self-aware, or intend in a certain way. Ordinarily on this line of argument, the capability of rational adult humans to execute the requisite kind of cognition – whatever that has been proposed to be – has been used as the standard for attributing moral status. This sort of argument usually unfolds in the following way: the crucial cognitive or other kind of psychological capacity is what makes humans different from (some, most, all) other things and, further, the difference that makes humans exceptional is the source of our moral obligations to each other.

As might be expected, philosophical advocates of animals have been quick to insist that at least some animals seem to possess the requisite capacities to be self aware, to plan to improve their situation or to avoid suffering, to cooperate or to communicate with each other and across species with humans to a higher degree than some individuals that are biologically human. Advocates have called for consistency, not necessarily to deny moral status to humans who appear deficient in the requisite capacities (although some have infamously also done so) but to demand just treatment for animals as well.

A full picture of the philosophical (and especially the bioethical) landscape adds to these calls the additional controversy fueled by claims that moral status derives from the possession of these psychological capacities, namely,
that individuals who are biologically human but do not manifest behaviors indicating their possession of the crucial capacities thereby do not warrant the usual moral and legal protections humans deserve to enjoy. This line of argument has been rolled out especially to defend denial of life support, or even active euthanasia, to neonates and to people with severe brain injuries. In such versions, the reported absence of the requisite cognitive capacity is advanced as itself a source of suffering that humans in general would not want to undergo or that the particular individual indicated prior to the injury s/he did not want to undergo.

The presence or absence of the relevant mental capacity may be held to be detectable by making measurements on some kind of scale. But there are serious difficulties in establishing claims to measure intention, cognition, self-awareness or similar psychological capacities, and then to correlate the measurements with the characteristics that contribute to moral considerability. And because their functioning may be anomalous, the full capacities of individuals with disabilities often go unnoticed. Even were there plausible scales for measuring these capacities, therefore, measuring individuals with disabilities on these scales is likely to erroneously underrate them.

To illustrate, there is an infamous tendency to underestimate the degree to which a non-verbal person is conscious of himself and of others, the most striking evidence being the centuries of misdiagnoses of hearing impaired people as being cognitively impaired just because they did not speak what they thought. This rudimentary descriptive mistake still is embedded in the law of some jurisdictions around the world. Indeed, although the denial of the capacity for autonomy in people with cognitive impairments is commonplace, the preferences of even the most cognitively limited individuals are not impossible to discern, as are their attempts to intervene in their environment. Let me add here, previewing the discussion to come, that these manifestations are the basis for acknowledging a dimension of self-determination in all things with sentience alike.

Moreover, as Wasserman and McMahan observe in a forthcoming entry on cognitive disability and moral status in the *Stanford Encyclopedia of Philosophy*¹, even if there were a consensus about the moral status of people

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¹ Wasserman, David and Jeffrey McMahan, “Cognitive Disability and Moral Status,” forthcoming in the *Stanford Encyclopedia of Philosophy*. I appreciate their sharing a draft of this article with me and am indebted to them for several crucial points presented in this section.
with cognitive impairments, a host of contentious issues would remain. How should their decision-making capacity be assessed and what scale should be applied to decide when, if ever, to respect their decisions? What measures are appropriate to gauge their well-being? Should they be treated as equals in justice and in interpersonal relationships? Or does justice demand they be given preferential support, and compassion urge they be objects of special caring? And, if so, is a concomitant constriction of their pursuit of their own preferences called for, on the ground that extraordinary dependence equates with incompetence. Or is privileging their access to care on the basis of their extraordinary needs an obligation rather than a benefit with strings attached?

Wasserman and McMahan also note that moral status may not convincingly map on to psychological state. At different points in their lives people vary in the degree to which they possess each of the psychological capacities that have been advanced as central to enjoying moral status. But moral status is supposed to be a bright line dividing fellow moral beings from entities with no such claims on us. It should not be portrayed as a sliding scale. Identifying moral status with mental or psychological capabilities thus offers tenuous moral protection. Children must achieve it, while elders and other adults who are injured or ill easily lose it. Yet an important test of the strength of other people’s moral character and the power of their moral judgment lies precisely in how well they take responsibility for enabling these most vulnerable individuals to fare.

In contrast, the biological basis on which other philosophers rest moral status does draw a sharp line. On earlier versions of this approach, some humans – for instance, those lacking certain sexual characteristics or possessing certain racially identified physiognomies or epidermal pigmentation – were supposed to lack moral status on account of their biological state. Thus, for example, Aristotle’s well-known characterization of women as being merely deficient – because infertile – men whose place is to be subservient to men because of their obvious biological deficits. Or the even more notorious equation of the biology of African lineages with indolence and consequently with moral deficiency in the 19th and 20th century U.S. Originally, philosophers shifted to mental and away from material bases for according moral status because the former properties

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2 To illustrate, in his earlier less nuanced and qualified writings on euthanasia of disabled neonates, the Australian philosopher Peter Singer felt called upon to specify the number of days a new-born needed to be alive before being accorded moral status.
seemed more generally distributed among humans and therefore less apt to be divisively exclusionary. As we have seen, however, this turned out to be far from so: psychological criteria simply divide humans and other beings along somewhat different lines from biological criteria.

Today, adherents of deriving moral status from the facts of human biology adopt a much more generous stance. They are mostly inclined to hold that all members of the human species have moral status, whereas all biologically different species do not. This is speciesism, of course, but those who hold the view find nothing objectionable in this biological exceptionalism that acknowledges claims of members of the same species on each other while denying that species members have the same obligations to other species that they have to their species kin. Indeed, the power of kinship is the driver of moral status on this view.

The venerable idea here is that we humans are constructed to be concerned for ourselves and for our closely related biological kin as well. We bond to our offspring, and ally with the smaller and larger circles of humans on whom their welfare will depend. Moral status is not won by eliciting the necessary attitudes from or satisfying the key interests of other humans. Instead, cooperative interaction is enabled simply by the special status humans accord each other. All humans are biologically related to each other; as humans, we equally enjoy similar moral status because we are all equally products of the same biological and social evolutionary processes.

As with psychological exceptionalism, however, biological exceptionalism is inherently divisive and therefore cannot beget the conciliatory benefit moral status judgments are expected to achieve. Although meant initially as a basis for distinguishing proper treatment of humans from how we are permitted to treat other animals, biological exceptionalism also lends itself to privileging some humans and marginalizing or excluding others.3 Because the emphasis here is on kinship as the source of moral considerability, some

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3 For an example of biologically based discrimination, see my discussion of the social exclusion of people with albinism in "A Fatal Attraction To Normalizing: Treating Disabilities As Deviations From 'Species-Typical' Functioning" Enhancing Human Traits: Conceptual Complexities and Ethical Implications, ed. by Eric Parens. Washington DC: Georgetown University Press, 1998: 95-123.
individuals will enjoy a more secure moral status than others, depending on how widely their extended familial connections reach. Indeed, moral status on this view seems to invite a kind of tribalism based on biological inheritance.

Surely we should not ignore how easily such a basis can devolve into exclusionary racist, sexist or other unjust policies. In some societies, various marginalized populations – such as women, racial and ethnic minorities, and similar groups – may now have overcome the political and legal disabilities that once designated them as non-persons or lesser persons because they diverged from the dominant group’s biological norm. They may now enjoy the moral respect and legal standing that was denied when they were conceptualized as being so deficient or deviant that they deserved to or even benefitted from being regard as possessions rather than as people. But this was not always so, nor is it uniformly so across the world. Nor is there a guarantee of societies that have progressed beyond such biologically based exclusions never slipping backward if biological similarities and differences are the basis for drawing moral, political and legal lines.

Moreover, the history of constitutional protection against discrimination in the U.S. reveals that, when wrongly conceptualized, progress toward equal treatment for one such biologically distinctive group can come at a cost for others. The U.S. Supreme Court has accorded greater or lesser equality to different groups based on the justices’ sentiments about the comparative functional negligibility or significance of each group’s biological differences. According to this jurisprudence, unequal treatment based on skin pigment requires strict scrutiny because presumed rarely or never justified, unequal treatment based on sex requires only heightened scrutiny because presumed usually unjustified, but unequal treatment based on disability needs only to purport to have some kind of rational basis to be deemed justified.4

II. PROGRESSING TOWARD JUSTICE
II.A. A DIFFERENT BASIS FOR JUSTICE

Sorting things into categories is important to human beings as a species, as is awareness of similarities and differences. Ordering is crucial to our dealings

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with the world. We categorize the individuals we encounter into groups. By doing so, we formulate effective policies for engaging with them. There are, of course, ways in which the human capacity for organizing particulars can go awry. One such problem occurs when our attention searches obsessively for similarities, and the world we experience is made artificially rigid by our imposed orderings. This problem (which counts as a disease when diagnosed in people but not when found in philosophical positions) is manifest in both the psychological and biological accounts of moral status.

Both the psychological and biological interpretations of the basis of moral status assign exceptional status to some kinds of entities through what seems like fiat, while denying it to others in the same imperial way. But lines drawn this way between so-called deserving and denigrated kinds of individuals invite challenges and impede advancing toward agreement, thereby draining rather than deepening social stability. Rather than continuing to throw up these conceptual walls and then defend them, we could ask whether we need to draw lines dividing kinds of individuals from each other just to determine to which justice is not owed. Can justice be cast in any more progressive way?

In answering I draw from a new approach to the philosophical theory of justice that I have been developing, with various collaborators – mainly Leslie Francis and Michael Stein – for several years. Articles that now are incorporated into the plan for a now nearly finished book have been appearing in print throughout the last decade. The theme of my approach is “justice for difference,” a version of social contract theory but one influenced by Iris Marion Young’s writing promoting the philosophy of participatory democracy.

The preeminent value guiding justice on this new theory is inclusiveness, not

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5 Leslie Pickering Francis is Professor of Philosophy and Alfred C. Emery Professor of Law at the University of Utah. Michael Ashley Stein is Executive Director, Harvard Law School Project on Disability, and Cabell Research Professor, William and Mary School of Law.
6 This book, written with Leslie Francis, will present an account of inclusive justice considered both as ideal theory and as partial compliance theory (that is, as a progress-making theory of justice-under-conditions-of-injustice).
self-interest, rational self-determination, or other traditional contractarian or contractualist grounds. Aiming for inclusiveness over-rides arguments about moral status. This is because valuing inclusiveness prohibits concluding \textit{a priori} or by definition that this or that kind of thing lacks considerability.

Aiming for inclusiveness, as I understand this value, proceeds on the assumption that every kind of entity possesses \textit{prima facie} considerability. We are directed by this value to ask about every kind of individual not whether it is worthy of our collaborative engagement but instead how collaborative engagement with this kind might be achieved. The burden of engaging our moral attention thus lies not with others’ impressing their worthiness on us, but with each of us attending to the possibility of casting others as potential partners in collaborative enterprises. Thus this theory of justice calls for all of us to conduct ourselves so as to bring others’ potential to be cooperators, and thus to be moral subjects, to light.

On this theory justice always remains a work in progress. Among many points in support of the progressive nature an adequate theory of justice should have is that, although we are categorizers, we humans also are disposed, and even driven, to forge better routes to facilitate collaborative responsiveness across categories, and especially in regard to populations viewed as inexplicably remote from interacting in the usual ways. An illustration of this human disposition is the motivational drive to research whether at least some humans diagnosed as being in a state of coma retain capacity for organized sentience. Similarly illustrative is the fascination with research into whether some nonhuman animals can gain capacity for systematic complex cooperative communication with humans. Both these lines of investigation are expressions of our human disposition to expand the boundaries of cooperative relationships. It is the mutually respectful regulation of this enterprise that is the business of justice.

Justice is both of and for its subjects. Chapter IV of the manuscript examines at length how the most influential theories of justice construe moral personhood and what role(s) they assign to this notion. The aim is to locate and eliminate accounts of justice that enable exclusionary entailments debarring vulnerable populations from being considered full subjects of justice. The chapter, and its predecessors, incorporate the claim that the kinds of individuals whom history reports as likely to be victims of injustice are subjects whose equitable (but not necessarily preferential) treatment serves as a test of the adequacy of any theory of justice. Chapter V, called
“Justice Loves Company,” presents an account of relational autonomy and collaborative dependency aimed at showing how all people, and not just disabled individuals, must rely on others in realizing moral agency. The chapter proposes that people with and without cognitive disabilities can realize the same powers to have agency as moral subjects. To a very compressed summary of this account of moral subjects and the possibility of prosthetic cognition I now turn.

II.B. POWERS OF INDEPENDENCE AND PROSTHETIC COGNITION
II.B.1. Relying on prosthetics
To begin, the kind of collaboration this theory of justice centers upon cannot accommodate surrogates who step into the subject’s role. Nor is supported decision-making an exactly apt description of the moral agency achievable by individuals with cognitive disabilities whose decision-making is formulated through prosthetic cognition. Instead, as a proper prosthetic arm or leg executes some of the functions of a missing fleshly one without supplanting or confused with the original or usual fleshly limb, or being experienced as a constricting external augmentation as a brace or other orthotic might be, a collaborator’s reasoning and communicating can execute some components of a subject’s own thinking processes without substituting the collaborator’s own idea or direction as if it were the subject’s own.

Prosthetics are operated by the subject, by some as automatically as fleshly limbs are moved, by others with conscious effort. Even the least sophisticated prosthetic – such as a pegleg – causes both subliminal and salient feedback to its user (as do fleshly legs). So the connection of a prosthetic to its user technically is interactive. But even in the case of bionic prosthetics, it is customary to attribute the prosthetic’s functionings to the agents using them. Microchips and motors no more are the agents of a person’s bionic left arm movement than are the agent’s nerves and muscles when he moves his organic right arm. It is the racer, not the metal foot nor the engineers who designed it, who is taken to be running the race.

Individuals facilitating people with cognitive disabilities in the formulation and expression of personalized notions of their good should be similarly responsive to their subjects’ motivation. Of course, individuals with different kinds and degrees of cognitive disability will benefit from different kinds of facilitation. And as is true of prosthetic mechanisms in general,
there will be some signature differences as well between non-prosthetic and prosthetic decision processes, just as there are differences between, for example, a racer’s fleshly foot and a prosthetic racing foot (to propel the runner forward effectively, the latter is an elegant metal arc longer than and curving in reverse from the fleshly human foot). Nevertheless, it is helpful to note the increasing recognition of prostheses as integral components of an agent.

The disposition to think of them as external aids that may bestow undeserved advantage has begun to wane. Here are some illustrations. For example, when being tested in math, children today compute totals on calculators rather than counting on their fingers as was once thought the natural thing to do. For a different kind of example, Andrew Clark and David Chalmers use the example of a person with Alzheimer’s disease relying on a notepad to record information forgotten too easily. They contend that the notebook should be regarded as part of the individual’s cognitive processing. And as a third example, the International Court of Arbitration for Sport has concluded that there is no evidence that running on metal feet takes less energy, effort or skill, or is less legitimately competitive, than running on fleshly feet. These are among many instances that testify to the growing acceptance of the naturalness of reliance on prosthetics.

II.B.2 Relational Autonomy
People with cognitive disabilities have been characterized as lacking autonomy because they often are not able independently to articulate, let alone argue for, ideas of their good. But philosophers recently have been acknowledging that autonomy in practice is relational, not solitary. With such an account, assisting people with cognitive disabilities in forming moral standpoints becomes simply a more extensive and enduring version of commonplace conceptual midwifery. In itself, depending on others to articulate goals should not undercut the legitimacy of the conceptual products of assistive thinking nor reduce the respect conceptualizations formed through such prosthetic cognitive processes command. In some, this argument establishes that people generally, and not just those with cognitive disabilities, need and receive help in conducting themselves morally and proceeding justly. That is, almost all people’s ideas about morality,

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8 Discussion of this point during the workshop inclines me to issue a caution here. “Relational autonomy” is not a different kind of autonomy that is to be substituted for “autonomy” in standard references to such things as “
including justice, emerge from interactive social processes to which dependence on the responsiveness of others is integral.

What remains to be shown, however, is that cognitively disabled individuals can receive effective assistance or accommodation so that their conduct is shaped by moral agency. Such assistance in thinking must function as a prosthesis, aiming at amplifying the functioning of the subject who is being assisted rather than being used as a tool of the assistant to his or her, instead of the subject’s, ends. Assistive thinking must be propelled by respect for the assisted person. This is important to safeguard against substituting the assistant’s standpoint for the person’s own.

We shall see that individuals with cognitive impairments can, through the practice of prosthetic cognition in which they engage with collaborators, possess the functional equivalents of traditional moral powers. These are powers people have been thought required to possess to be full-fledged cooperators who command considerability. Having these capacities has been associated with independence because they enable their possessors to bring to bear various kinds of self-control. Subjects of justice do not usually exercise these powers in isolation, however. Further, subjects still may be said to have such powers despite being unable to command them fully on their own.

II. B. 3. Subjects of Justice and Powers of Independence
II.B.3.a. power of responsibility
A claim about the self-control that individuals accorded considerability should show relates to the power to exercise responsibility for moral and political aspirations. Effective thinking envisions plausibly achievable goals, and thinkers should be sufficiently immune to the attractiveness of fantasy to eschew barren because unrealizable ambitions. The effective thinker will reform extravagant thoughts by reference to practical possibilities for achievement in his or her own real world.

Responsibility is about control in the sense of self-determination: for example, agents must be in control of their thoughts about the good rather than allowing an idea of the good to take control of them. Conceptualizing individuals with cognitive disabilities as responsible beings in matters they are, with assistance, physically and mentally capable of carrying out, is necessary if a system of justice is to be fully inclusive in regard to the subjects of justice the system is by and for. But impairment of executive
capacity often is an element of cognitive disability. Some people with cognitive disabilities do not have this capacity of reviewing their idea of the good to assess whether it is a proper aim for them, and some others have the power only to an attenuated degree.

Yet individuals with cognitive disabilities are neither the only, nor the majority, of people who are quixotic. And it is not unusual for others in one way or another to assist such beguiled people, whether cognitively disabled or not, in refining their goals so these are achievable. Most of us do not build responsible aspirations independent of our responses to other people, nor are we expected to do so. Nor are nondisabled people held to an unmitigated standard of self-control in regard to the achievability of their conceptualizations of the good. And as they are not, why should disabled people be?

What is crucial when heuristic interaction that redirects aims is facilitated by collaborators is that the refinement or alteration of objectives becomes the subject’s own. Collaborators can assist people with cognitive disabilities to be in control of, rather than controlled by, where they want to go. For all of us, the power to disengage from inappropriate goals is important for both mental and physical well-being. Collaborators for people with cognitive disabilities can provide prosthetic cognitive probing by engaging in processes of assistive thinking. Collaborators in prosthetic processes of thought should not just draw their subjects away from pursuit of fantastical goals but should also be attentive to attracting them to more satisfying ones. Broadly, such assistive thinking should be goal-appraising, with the collaborator introducing calculation, reflection, reconstruction, extrapolation, focus or other parts of the process the dependent subject cannot independently supply. But collaborators should be especially careful to avoid importing societal biases that stifle rather than sustain ambitions for such opportunities as, for example, to be a parent and participate in a family of one’s own making.

**II.B.3.b. powers of self-origination and self-authentication**

Being self-originating is yet another kind of self-determination that individuals accorded considerability have been thought to need to command. According to Rawls, the most influential later twentieth century Anglophone theorist of justice, this is the ability of people to take themselves, rather than the society external to themselves, as the source of their duties and obligations. To discharge their duty in this respect, collaborators should
proceed in recognition that the subjects whom they assist must inspire the
ideas they are mutually formulating. Neither the general society nor the
collaborators themselves may be the sources of, nor may they substitute their
own, conceptualizations of the good for cognitively disabled people.

Such ideas cannot emerge authentically except where the subject is the sole
inspiration for the conceptualization the collaborator advances. Every
component of the idea should be personalized to the subject and in this
regard be singular. The conceptualization should be stripped of the
personality of the collaborator. A fit collaborator also will be someone
whose identity is not invested in executing a guardian’s or caregiver’s role,
so as to be able to abstract his or her personal interests and inclinations from
the collaborative process and its product.

Fulfilling the role of collaborator is no casual occupation. Offering assistive
thinking demands attentiveness and insight, as well as the imagination to see
how the world may alter so the subject will better flourish. An interactive
process that refined the disabled subject’s goals should be in evidence. Such
a process might be discursive, but need not be so. Competent collaborators
should have communication skills adequate to elicit, and be guided by,
responsiveness even from inarticulate subjects. Collaborators do not
represent their subjects as a result of this process. Rather, assistive thinking
enables their subjects to configure and communicate ideas so as to represent
themselves as the process unfolds through their use, via prosthetic
functioning, of the collaborators’ cognitive and linguistic skills.

These are duties that accrue to those who accept or are thrust into providing
prosthetic cognition for individuals with cognitive disabilities. My account,
at least as presented here, should not be expected to serve as a prophylactic
against people presenting themselves as collaborators when they do not
satisfy the standards of the role, nor against people assuming the role to
exploit rather than assist individuals with cognitive disabilities. No moral or
political theory has such a directly protective impact on the world. Nor can
theory alone guarantee the abolition of such problematic instances as when
subjects are intentionally or inadvertently represented as if they would value
what they actually would not. But the account supplies grounds for
condemning pretenders by delineating powers that genuine collaborators
assist their subjects in exercising, which powers are incompatible with the
subject’s being a means instead of an end.
To summarize, I have sketched out a practice of assistive thinking that enables the inclusion of people with cognitive disabilities as full subjects of justice at all levels of a theory of justice. This prosthetic practice differs in extent and implementation, but not in nature, from commonplace social interactions that normally facilitate people’s development of their notions about the good. I have proposed that collaborators’ cognitive skills can be deployed prosthetically to enable conceptualizing and communicating by and for cognitively disabled subjects. To do so, the collaborator interacts with the subject, enabling, expanding or otherwise facilitating the exercise of self-determinative powers crucial to the moral realm.

III. IMPLICATIONS OF THE CONCEPT OF PROSTHETIC COGNITION FOR LEGAL STANDING

III. A. DECISION-MAKING FOR ALL, JUSTICE FOR ALL

The logic of the concept of prosthetic cognition establishes that there is no essential difference between the process people who have been diagnosed with various kinds of biological or psychological impairments engage in to arrive at personal policy decisions of various sorts, and that engaged in by people free of such diagnoses. Any epistemological discrepancies between these groups are superficial only. Except, that is, in regard to the standpoints the different parties bring – these are of crucial importance because each contributes vital perspectives on the practice of justice, but none is more important than the others.

Everyone’s decision-making is supported by others in a variety of ways; all of us depend on or invoke such support to different degrees at different times of our lives. This emphasis explains my uneasiness about the current attraction to the expression “supported decision-making”. The locution “supported decision-making” could mislead egregiously by suggesting that only psychologically or biologically deficient individuals require such social support.

It is true, of course, that in past ages prosthetics were passive devices that could do little more than support, as a peg leg is a device that supports the body’s weight. Today, however, prosthetic design focuses on interfacing the user’s existing biological capacity for executing actions – for instance, brain

patient autonomy. This is a mistake. The claim that autonomy is relational basically means just that being dependent on others in some respects in the formation of values does not necessarily preclude being autonomous.

9 I make this observation because Rawls (in)famously relegates the inclusion of disabled people to a level several steps removed from the initial grounding of justice and therefore to a subsidiary role,
activity transmitted by external or internal electrodes – with the means to manipulate or mobilize the prosthetic device – such as a brain-wave operated computer mouse. Perhaps in science fiction stories computers and other devices plot to take over people. In real life people still control computers, whether with our fingers, our voices, or our thoughts. In real life, indeed, the more interesting question will be whether any computers can successfully traverse the route corporations travelled in the past 200 years to become legal persons, at least in the U.S.  In which case they will be recognized as collaborators rather than possessions of people.

III.B. PEOPLE ARE NOT TO BE POSSESSED: THE PURPOSE OF LEGAL PERSONHOOD
Legal personhood is a status that gives individuals *prima facie* visibility for the law. While human persons are of woman born (at least until reproductive technology brings us prosthetic uteruses), legal persons are born of statutes and judicial decisions. Legal persons are subjects on whom duties are impressed, but they also are subjects with the agency to exercise rights. This latter aspect allows them to have legal standing.

Legal standing is a notion similar to but not identical with moral considerability. To have moral considerability is to matter for moral valuations. Entities with legal standing also matter, but in a somewhat different way. An entity has standing in relation to a particular legal action if that individual has rights the exercise of which is relevant to the action or has obligations the fulfillment of which is relevant to that action. Legal standing thus enables an entity to bring an action seeking relief or redress of a harm directly to judicial attention.

To succeed in such endeavors, however, calls for being recognized as both a subject with agency and as one that has standing. A subject with agency is no one’s passive possession. Thus legal personhood gives individuals the ability to seek relief or redress when they are harmed by being treated as possessions.

We have now come to the protection that Article 12 of the CRPD promises disabled people, namely, to be protected by the law so as to ensure their treatment as equal people and not as possessions. For at least the past two

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10 In U.S. case law, *Dartmouth College v. Woodward*, decided in 1819, established the right of corporations to be parties to contracts and to have these contracts honored. *Santa Clara County v. Southern Pacific Railroad* 118 U.S. 394 gave corporations legal personhood for purposes of Fourteenth Amendment equal protection.
centuries certain medical diagnoses have had the power to transform people into possessions, just as women in English law countries once were their husband’s or father’s property, and African Americans once were their owner’s property under U.S. law. Before courts reconceptualized patients as autonomous agents, whoever was hospitalized became the possession of health care professionals, to be subjected to medical treatment regardless of their consent. Even after decisions of the 1970s and 1980s that established the obligation to respect patient autonomy, in some places some diagnoses still permit treating individuals as unpaid workers, denying them education and other means of elevating themselves, directing where they physically can and cannot be, prohibiting their having or raising children, and giving their property over to others. These diagnoses also have had the power to make people into legal nonpersons, to preclude their having standing to seek relief or redress through the courts.

What I have described here is of course the practice of placing people under guardianship, based on a medical diagnosis, that historically has turned disabled people into objects controlled by the state and as such has exposed them to the incompentences of those in whose charge they have been placed and made them vulnerable to exploitation. It is not insignificant that, of the various provisions of the CRPD, states appear to have recorded the most reservations in regard to rolling back their power to make people with disabilities into nonpersons.

III.C. PERSONHOOD AND THE EXCEPTIONALISM OF RECEIVING SPECIAL CARE

In this paper, I have tried to clear away two barriers to responding effectively to such reservations. I have, I hope, revealed the dangers moral status claims pose for theories of inclusive justice. Such theories by their nature abhor drawing definitive divisive lines that a priori or by fiat rule out some kinds of beings as potential subjects of justice. In contrast, moral status ascriptions by their nature presume that justice is to be reached by accepting such lines but helping a few excluded kinds to cross over them. In addition, I have indicated how inclusive conceptualization of moral subjects should proceed. My approach to doing so suggests some standards for a collaborative process enabling cognitively disabled individuals fully to manifest their personhood through a practice of prosthetic cognition. The discussion helps, I think, to distinguish substituted valuations from the cognitively disabled party’s own.
To conclude, however, let me turn to a criticism that may be launched not only against my approach but also against Article 12 of the CRDP. By emphasizing how people with cognitive disabilities are similar in autonomy and other morally relevant respects to everyone else, we may seem to jeopardize exceptionalist policies entitling them and their caregivers to levels of protection and support more generous than those accorded everyone else. This is the argument deployed by the U.S. Supreme Court a quarter-century ago\textsuperscript{11} to deny systematic equal protection based on disability, despite having earlier affirmed it based on race and sex. (The great African American Justice Thurgood Marshall dissented from that rationale at the time.) Broadly, this argument has been deployed at least as perniciously as denials of moral status to defend the denial of full legal personhood to people with disabilities and to justify other forms of disability discrimination.

Dependence on or benefit from special practices that are characterized as care undoubtedly will be an argument used once more in the context of implementing Article 12. Can an inclusive approach to justice allow for, and even require, exceptional protection and other kinds of care for some but not all, without reinstating the problems for equality we have seen to be inherent in assigning special moral status? The general problem here has to do with whether being an object of special care requires people, either as individual recipients of special care or as members of classes that include some members who need special care, to acquiesce to restrictions to liberty or opportunity. Do practices of care justify reduction or attenuation of rights, or impose a duty to accept care gracefully regardless of its content? Answering these difficult questions takes us beyond the conceptual boundaries I was asked to scope, but they must be faced and resolved to fully escape insidious paternalism and enable recognition of disabled people’s personhood.

\textsuperscript{11} In \textit{City of Cleburne v. Cleburne Living Center}, see the previously cited Silvers and Stein article for an analysis.