

Chapter 26

Cognitive Surrogacy, Assisted Participation, and Moral Status

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In this chapter, we examine the limitations of a recent approach to establishing moral and political equality for human beings with significant cognitive limitations: the use of representatives or surrogates to assist the cognitively limited individual to decide, remember, vote, deliberate, and participate in other social and political activities. We will not dispute the value of such assistance in enhancing autonomy and securing political rights for many or most individuals with cognitive limitations. But we will argue that the proposed forms of assistance cannot achieve these objectives for humans with the most radical cognitive limitations—those lacking self-consciousness and practical rationality. Human beings lacking those capacities, or the potential to acquire them, will not be able to participate in many important social and political activities even with the most skilful and concerted assistance. Such assistance may help to protect the interests of radically limited individuals, but it offers them only an attenuated and, in some contexts, counterfeit equality.

We will consider two roles for such “cognitive surrogacy” for humans with radical cognitive limitations. The first role is to realize or secure a moral and political equality that is already assumed or recognized—that is, to help the individual with an impairment exercise the rights she already enjoys as a moral and political equal. The second and quite distinct role for cognitive surrogacy is to contribute to the creation and maintenance of the status of the radically cognitively limited as our moral and political equals. The assumption behind this second role is that one source of equal status is participation in our human community, or our human form of life. A practice of surrogacy that would enable radically limited individuals to exercise certain rights of equal citizenship would be in part *constitutive* of their status as our moral political equals.

The two roles impose somewhat different requirements for successful surrogacy—the demands of the former role, of realizing moral and political equality, may be much more specific. But both roles face the problem of meaningful representation. We will argue that the connection between the radically limited individual and the psychological, social, and political acts done on his behalf may be too attenuated for those acts to count as his own, either for realizing moral or political equality or for enabling him to participate in a human community or human forms of life. We will conclude that political equality cannot be secured for radically limited individuals by surrogate

representation, and that their equal moral status cannot be grounded in surrogate-assisted participation.

It is certainly open to proponents of equal moral status for all human beings to avoid the force of these arguments. They could decline to infer political equality from equal moral status, or deny that political equality requires the right to vote and serve on juries. And they could attempt to ground moral status on different attributes or relationships. The authors of this paper differ in their degree of skepticism about the prospects for finding such other grounds, so we will leave this as a challenge for proponents of the equal and exclusive moral status of all human beings.

The Right to Vote and the Right of Jury Service

Martha Nussbaum has proposed the first role—the use of surrogates for cognitively limited individuals to secure the rights she regards as entailed by their being equal citizens in a modern democratic society: “I shall argue that showing equal respect for the dignity of fellow citizens with cognitive disabilities requires giving them an equal right to vote, to serve on juries, and so forth—just as it entails equal entitlement to everything else” (2009, 333). She assumes the equal status of all cognitively limited human beings within a political community, referring to them as “our fellow citizens, and fellow participants in human dignity” (343). If these fellow citizens, even the most radically limited among them, are not enabled to participate in the political process, then this “large group of citizens are simply disqualified from the most essential forms of citizenship. They do not count. Their interests are not weighed in the balance” (347). To ensure that they do count, she proposed “a surprising and controversial notion of guardianship” (333) that would enable them to participate in all aspects of the political process.

Nussbaum is very clear that her demand for assisted participation includes citizens with radical cognitive limitations, although she recognizes theirs as “the most difficult case” (347):

Here, the individual’s cognitive impairment is so severe that she cannot communicate her wishes about whom to vote for to a guardian; indeed, in many such cases, she cannot form such a view. Nor can she . . . serve on a jury in the sense of delegating a guardian to represent her interests. What does equal respect require in this case? I would argue that it requires that the person’s guardian be empowered to exercise the function on that person’s behalf and in her interests; just as guardians currently represent people with cognitive disabilities in areas such as property rights and contracts.

There are at least two objections to Nussbaum’s proposal that surrogates are necessary for the recognition and realization of the moral and political equality of radically limited human beings. The first concerns consistency, while the second concerns coherence.

To appreciate the scope of the consistency problem, note that Nussbaum cites two functions that surrogates for the cognitively limited are supposed to serve: they are to promote the interests of these individuals and also enable them to participate in practices, such as voting and jury service, that are open by right to all citizens, so that the exclusion of the radically limited from participation in these practices would constitute a violation of their human dignity. One initial problem of consistency is that animals too have interests that could be more effectively protected if they were assigned surrogates whose function would be to vote on their behalf. Wolves, for example, would benefit from surrogates to vote against Sarah Palin, who champions the practice of shooting them from helicopters for “sport.” Yet no one, to our knowledge, is calling for surrogates to vote on behalf of individual animals. Nussbaum apparently assumes that this is not an issue, since she makes her case on behalf of radically limited human beings by reference to their “human dignity,” an attribute that is apparently not found in individuals who are not human. But until someone explains precisely what human dignity is, what it is based on, and why it is morally significant, the term can serve only as a placeholder for an argument.

When we consider the second function of surrogates—to affirm the human dignity of the radically limited by enabling them to exercise the rights of equal citizenship—we confront a more acute problem of consistency. For there are other human beings, such as infants and children, who are almost universally recognized as having full moral status but are nowhere afforded surrogates for voting or jury representation. (Note also that if newborn infants have human dignity, it seems that late-term fetuses must have it as well—at least if moral status is a function of intrinsic properties rather than contingencies such as physical location. For some newborn infants arrive prematurely—in some cases by several months—and are thus indistinguishable in their intrinsic properties from fetuses of the same age, measured from conception rather than birth.) Yet an ordinary child of 12 seems to have, if anything, a stronger claim to political participation than a radically limited adult, given that the child has substantially higher psychological capacities, the potential for full moral agency, and, arguably, a wider range of interests that may be affected by political processes. The provision of surrogates for children could, moreover, achieve purposes that surrogates for the radically limited would be unlikely to achieve—for example, pedagogical in addition to prosthetic purposes.

Of course, the fact that no society provides infants and children with surrogate political representation does not mean that the denial of such representation is justified; many societies have unjustifiably denied a range of political rights to woman, minorities, and people with mild cognitive limitations. Yet there seems to be no reason to suppose that the denial of voting rights or eligibility for jury duty to infants, or even to 12-year-olds, constitutes an implicit denigration of their moral status or a failure to acknowledge their human dignity. One might, of course, argue that children do not *need* surrogates, either because their parents can be trusted to represent them at the polling station or because they are promised the ability to exercise

their rights of political participation later. But if parents can in general be assumed to function as reliable surrogates for their children, at least until the children develop the capacity for autonomous agency, it seems that formal surrogates for the radically limited are unnecessary until both their parents die or otherwise cease to be able to serve as surrogates for them. And it is implausible to suppose that a promise of later participation is ever an adequate fulfillment of rights of political participation in the present. The rights of equal citizenship of 30-year-olds are not secured by a guarantee that they will be allowed to vote when they reach the age of 50. It seems, therefore, that it is compatible with respect for the moral status and human dignity of children to deny them rights to vote and to serve on juries. The lesson we should draw from this conclusion is that these rights are not entailed, even in liberal democracies, by human dignity or full moral status.

The second, more basic objection to Nussbaum's proposal is a challenge to its coherence. It seems that the kind of assistance she proposes cannot, as a conceptual rather than empirical matter, enable citizens with radical cognitive limitations to participate in the political process. For the acts that a surrogate does on behalf of a radically limited individual will not be the latter's own, even on an expansive view of agency. Whatever the surrogate can be said to do in voting on her behalf in an election or on a jury, he is not enabling her to exercise her right to vote or serve on a jury.

In the case of jury service, a surrogate juror would be less a representative than a replacement. It is not clear what, if anything, he could represent. The radically limited individual has distinct interests, but jurors take an oath to set aside their interests. In contrast, such an individual cannot possess the epistemic attitudes and psychological attributes that are necessary in a juror and of which diversity within a jury is sought. She will not have general attitudes of credulity or skepticism, let alone attitudes towards specific kinds of evidence—for example, circumstantial versus forensic. Even if she were more trusting of some witnesses than others (assuming that she were capable of trust or distrust), she would lack a basis for her varying degrees of trust that would be appropriate for her surrogate to introduce into jury deliberations. A surrogate who, on behalf of a radically limited client, discounted the testimony of witnesses with loud voices or rapid speech would be guilty of an irrational, indefensible epistemic bias.

Finally, while an individual with radical cognitive limitations may have experience that could be relevant to the jury, it is not experience that her surrogate could present from a first-person point of view. For example, the fact that cognitively limited individuals are frequently mistreated, abused, or ridiculed may have some bearing on some legal cases, and the pervasiveness of such mistreatment may be important to convey to the jury. But a surrogate who shared this in jury deliberations would be reporting his own experience as a guardian or caregiver, not representing the first-hand experience of the individual with the radical cognitive limitation.

Nussbaum recognizes some of these limitations: “Since personal interests are supposed to be excluded from jury deliberations, there is no easy way to distinguish being a juror for oneself from being a juror representing a person with a disability” (2009, 349). She acknowledges that the surrogate would have to disclose his own background and interests during *voir dire*, as well as any interests or biases she might have personally or in her capacity as guardian for a cognitively limited individual. And once in the jury room, she “would use her own judgment.” Indeed, “there is no point in bringing [the person with the cognitive limitation] along into the jury room.”

Given the utterly nominal role the limited individual would play, Nussbaum quite reasonably asks: “What would be the point of that?” (2009, 349) Her answer is that “the all-important point is that the person with the disability has her name in the pool, has an equal chance to perform that civic function.” But this is an equivocation. Under her proposal, the limited individual would have an equal chance of being summoned for jury service, since her name was in the pool. But she would not have “an equal chance to perform that civic function,” because she was not capable of performing it. Keeping her name on the roll may be a symbolic gesture of her equal citizenship, but if she is summoned, it would seem more respectful to simply recognize that she is not qualified, and fill her slot with the next person on the roll, rather than go through the charade of surrogate representation.²

The prospects for cognitive surrogacy might look better for voting, since voters are permitted, and on some accounts encouraged, to take personal interests into account. If an individual with radical cognitive limitations has a right to have his interests effectively represented, a surrogate may be able to adequately represent them. But a surrogate cannot realize his client’s *right to vote* by voting in his interests. The casting of a vote is not, or not only, an expression of preference; it is a decision based on a judgment. An individual with mild or moderate cognitive limitations may well be able to make an assisted decision, but an individual with radical cognitive limitations, by definition, cannot, since she lacks self-consciousness and the capacity for practical reason. A surrogate can only vote as the guardian of her interests, not as the executor of a decision she herself made or participated in making.

Nussbaum rejects the denial of voting rights to radically limited individuals on the grounds that such a denial could only be based on a rationale that would restrict voting rights far more extensively (2009, 349):

Any reason that can be offered [for excluding individuals with radical cognitive limitations] would also be a reason to exclude docile and deferential people, people who vote without knowing anything about the candidates, and so forth. We have opted for an understanding of the franchise that is non-elitist and non-exclusive, rejecting Mill’s educational oligarchy.

But the reason for excluding radically limited individuals is not that they will vote badly, but that they cannot vote at all. The right to vote, as Nussbaum recognizes, can be exercised irresponsibly; it can also be waived, and often is, as shown by the low turnouts at most U.S. elections. Indeed, the very fact that the right to vote encompasses the right to vote badly poses further problems for surrogate voting. A surrogate could not responsibly exercise her client's right to vote irresponsibly, by, say, voting for a charismatic candidate who would endanger her client's interests. In doing so, he would violate his duty to act in his client's best interests. At best, he would face a conflict between his role-based duties to protect his client's interests and to exercise her liberty to ignore those interests. Nor is it obvious that he could simply decline to vote on his client's behalf in most elections, mimicking the behavior of a majority of her fully enfranchised fellow citizens.

It is instructive to compare Nussbaum's proposal for surrogate voting with one recently made by Brighthouse and Fleurbaey (2010) for ensuring that the interests of citizens with serious cognitive disabilities are adequately represented in the political process. Like Nussbaum, they maintain that those individuals should have their interests effectively represented, and that to the extent that they cannot represent themselves, they should be represented by trustees. But unlike Nussbaum, they regard such surrogate representation as denying, not realizing, their right to vote: in the case of individuals "unable to assess and advance their own interests, it appears inevitable that they should be excluded from the right to vote, even though this may involve some degree of stigmatization" (149). Thus, Brighthouse and Fleurbaey treat surrogate voting as a form of exclusion, justified because it is necessary to protect the interests of the excluded: "[T]he motivation for excluding the seriously cognitively disabled is precisely that including them will mean that their interests are not represented well" (150). Individuals incapable of assessing or advancing their interests could hardly be expected to represent those interests effectively by going through the motions of voting. Nussbaum fails to recognize this tension between avoiding stigma and protecting interests.

The Human Form of Life

Although surrogacy is presented by Nussbaum and others as a way to respect equality, it can also be seen as a way to ground it. Rather than assume that human beings with radical cognitive limitations are entitled to participate in the life of their community by virtue of their equality, it could be argued that because they can participate—with a little help from their surrogates—they must be accorded the same moral status as other human beings. In this way, the case for assisted participation may be seen as a way of reinforcing arguments that some have made to the effect that even the most radically limited humans have full moral status because they participate in "the forms of embodied common life open to distinctively human creatures."³

Thus, Eva Kittay has argued that species membership matters to human beings not because of the mere biological affinities among us, but because "it

means that we partake of a form of life, that is, we share interests, activities, hopes, dreams, fears, forms of sensual and motor experiences, and ways of knowing the world and other humans, all of which are species-specific such non-individual considerations [are] part of the rich moral tapestry in which moral considerations are set” (2005, 24–25). Similarly, Stephen Mulhall argues that we treat the severely disabled as fully human “because they are our fellow human beings, embodied creatures who will come to share, or have already shared in our common life, or whose inability to do so is a result of the shocks and ills to which all human flesh and blood is heir” (2002, 18). Defenders of participation in human forms of life as the basis for moral status might well wish to avoid or minimize Mulhall’s problematic recourse to a species-specific notion of misfortune (“shocks and ills to which all human flesh and blood is heir”) to include human beings incapable of participating in common life. Among other problems, the appeal to misfortune appears to rely on strictly biological differences—species-specific norms—in a way that the forms-of-life argument seeks to avoid. The claim that human beings with radical cognitive limitations can be assisted in participating in status-conferring forms of life may offer a more promising alternative.

Made explicit, this “constructivist” response would go something like this:

1. Participation “in the forms of embodied common life open to distinctively human creatures,” or the potential for such participation, is a source of moral status, at least vis-à-vis other human beings.
2. *Contra* McMahan (2005), radically limited human beings *can* participate in these forms of life, while animals with equal or greater cognitive and social capacities *cannot*.
3. This is because (a) radically limited human beings *can* be given assistance that will enable them to achieve such participation, and (b) animals with equal or greater capacities *cannot* be given such assistance, because their form of embodiment precludes participation, or because the required kind of assistance cannot cross species boundaries.

We will question 3(a)—the claim that the kind of assistance that humans with radical cognitive limitations can receive would enable them to participate to the extent required by point 1. There is also reason to be skeptical about (b)—the claim that intelligent animals could not be assisted to participate in “distinctively human” forms or life. If the level of participation required were minimal enough to be attained by radically limited human beings with sufficient assistance, it could presumably be attained by many domesticated animals if they received such assistance—unless distinctively human biological features were necessary for receiving that assistance. Humans with radical cognitive limitations could have a potential for assisted participation that intelligent animals lacked only if “human forms of embodiment” were necessary to receive the requisite assistance.

Proponents of the forms-of-life position have not been very forthcoming about what the minimal forms of assisted participation would be. If participation in those life-forms is possible for radically limited human beings, it cannot require that they acquire a language, culture, or specific “ways of knowing” (McMahan, 2005). Perhaps such participation need not involve structured social or political activities at all, just certain day-to-day interactions among members of human families or communities. The claim would be that radically limited human beings could, with assistance, participate in such routine interactions in ways that even the most intelligent, sensitive, and domesticated animals could not.

If actual participation, however minimal, were required for moral status, many or most human beings with radical cognitive limitations would lack that status, because few have the skilled, concerted assistance that could make even that minimal participation possible for them—if anything could. Further, even if some radically impaired human beings had moral status on this basis, they would have it only contingently—the necessary assistance could be lost or withdrawn at any time. Thus, it seems more promising to understand this argument as claiming that a certain kind of potentiality grounds the equal moral status of human beings with radical cognitive limitations; that all human beings have the potential to participate in distinctively human forms or community life and that no (or almost no) animals have that potential. Although the notion of potentiality is notoriously elastic (see McMahan, 2002), it may be reasonable to extend the potentiality for participation in distinctively human activities to those who can be enabled to participate by cognitively unimpaired human beings. This assistance could take two distinct forms: first, the kind of representation or surrogacy proposed for more structured social and political activities, in which the assistant would serve as an active intermediary between the limited individual and the community; second, a nurturing or pedagogical role, in which the assistant would enable the limited individual to participate, by herself or with further assistance, in the family or community. We begin with the latter.

Pedagogical Surrogacy

One way to flesh out the potentiality claim would be to focus on the capacity of human beings, including radically limited human beings, to respond to each other, a capacity that would give limited human beings the possibility of developing a social responsiveness that even higher animals could not acquire. On this view, the potential for developing such responsiveness is limited to human beings with the psychological capacity for some degree of mutual acknowledgement and reciprocity. But that capacity may develop only in the context of sustained human interaction. When human beings come into contact with other humans, limited or not, they expect responses quite unlike those they expect from chimpanzees, dolphins, or dogs. The mere fact that a 10-year-old boy or 40-year-old woman *looks human* evokes different actions and emotions from those evoked by non-human animals. These actions and emotions may, in turn, elicit distinctive behavior and affect the psychological

development of cognitively limited humans. Precisely because cognitively unimpaired humans respond to cognitively limited human beings in ways they don't respond to chimpanzees, dolphins, or dogs, the former may *acquire* a moral and emotional sensitivity toward others humans that does not occur in non-human animals in regular contact with human beings. This reciprocal pattern of emotional response may establish relationships of mutual caring and concern that, it could be argued, ground the moral status we accord other human beings, irrespective of cognitive ability.⁴

This is an empirical hypothesis, and one whose exclusivity would be questioned by those familiar with the kind of responsiveness that some animals have developed as the result of sustained interaction with human beings. If those fortunate animals acquired the kind of social responsiveness to human beings typically limited to other humans, then many of their biological kin have the potential to do so.⁵ And even if almost all animals lacked this potential for such human socialization, it seems that not all humans have it. Some human beings, and not merely anencephalics, seem to lack the capacity for recognition and reciprocity necessary for this kind of socialization.

A variation on this argument would deny that the issue is contingent, claiming that the very kind of interaction required for the evocation of social responsiveness was limited to beings with a more-or-less human form. Humans cannot inculcate the required sort of social responsiveness in non-human animals because they can attribute the potential for such responsiveness only to those with a human form or appearance. This claim concerns the limitation of the givers, not the recipients, of assisted participation: the inability of human beings with standard cognitive function to recognize the responsiveness of beings that lack human features. Because this claim treats a human appearance as a necessary but not sufficient condition for developing social responsiveness, it would not imply that all humans had that potential. But it would exclude other animals, unless they looked or behaved sufficiently like humans. Such a claim could be based on suggestive passages from Wittgenstein (quoted by Hanfling, 2001, 153):

Only of a living human being, and what resembles (behaves like) a living human being, can one say: it has sensations; it sees; it is blind; hears; is deaf; is conscious or unconscious (PI 282). . . . We can only say of a human being, and of what is like one, that it thinks. We can also say so of a doll (PI 359).

It is hard to know what to make of these claims. Human beings frequently and easily anthropomorphize animate beings and even inanimate objects; they attribute all sorts of thoughts and sentiments to them with varying degrees of conviction. Indeed, Wittgenstein observes that “in a fairy tale, a pot too can see and hear” (PI 282, Hanfling, 2001, 153). Perhaps in making such attributions, we implicitly endow animals and inanimate objects with human-like forms, features, and behavior, like cartoon characters. But if so, that merely suggests that their actual appearance is no barrier to psychological

attribution. Often, these attributions are not sustainable, but their failure appears to be an empirical rather than a conceptual matter. If we can imagine thinking, feeling beings embodied in chairs or snails, perhaps such beings could exist, however unlikely we are to encounter them. And although it may be much easier in general for us to attribute thinking and feeling to beings with human form¹, this seems to be a matter of degree, not a firm constraint imposed by our language or conceptual scheme.

Moreover, some highly self-conscious, sensitive, and rational human beings barely resemble typical humans in appearance or behavior—they lack limbs, or most facial features, or cannot move in standard ways, or at all. While communicating with such humans may pose a practical challenge, it hardly presents a conceptual one.

Assisted Participation

The second type of assistance that might enable a radically limited human being to participate in human social life involves the support of a representative or surrogate, who mediates between the individual with a radical limitation and her family or community.

Unlike the claim that radically limited human beings have the potential to be drawn into human social life through sustained nurturing—an empirical claim about their potential to acquire a capacity for social responsiveness they initially lack—this claim does not rest on their developmental potential. Rather, it concerns the potential for an individual who lacks self-awareness or social responsiveness to participate in a human community with the help of a representative or surrogate.

The difficulty we see with this suggestion concerns the question of agency. The agency of a surrogate acting on behalf of a cognitively limited individual cannot be attributed to that individual unless she guides or endorses it. But an individual with radical cognitive limitations—who cannot see herself as a temporally extended being or engage in simple practical reasoning—cannot guide or endorse her surrogate’s decisions or actions, so it is unclear how those decisions or actions can be regarded as hers. Moving someone’s arm in a manner that she enjoys is not helping her to move her arm unless she contributes to, directs, or authorizes the movement. Somewhat analogously, participating as someone’s surrogate in social activities is not enabling that individual to participate if she cannot contribute to, direct, or endorse those activities; if she cannot understand the nature of those activities or her roles in them. The question of whether such assisted “participation” is possible for non-human animals does not need to be addressed if it is not possible for radically limited humans.

¹ In some cases, it may be too easy. Other humans beings sometimes attribute consciousness to human beings who arguably lack it, as in the controversial case of Terry Schiavo.

The difficulty of attributing agency to the assisted individual is reinforced by a comparison with the more modest proposals that have been made for enlarging the autonomy of people with less severe cognitive limitations. Leslie Francis, for example, raises “the possibility of constructing individualized conceptions of their good by, and with, and for people with lifelong intellectual disabilities. . . . [C]onceptions of the good can be individually tailored and rooted in individual psychological states without being arrived at independently” (2009, 206). In response to the charge that such a construction would merely serve the interests of cognitively limited individuals and not develop their autonomy, Francis introduces the notion of a “mental prosthesis”:

We use assistive devices, prostheses, and partners all the time, to varying degrees and ends. Some of these are ‘internal’—mnemonic devices such as triggers for people’s names—but others are not: notebooks, visual aids and other people. (Francis, 2009, 208)

Francis and Anita Silvers (Silvers & Francis, 2009) develop this analogy:

[A]s a prosthetic arm or leg executes some of the functions of a missing fleshly limb without being confused with or supplanting the usual fleshly limb, so, we propose, a trustee’s reasoning and communicating can execute part or all of a subject’s own thinking processes without substituting the trustee’s ideas as if it were the subject’s own. (Silvers & Francis, 2009, 485)

They propose a “standard of authenticity” for the idea of the good that results from the interaction of the individual “subject” and her trustee:

Such ideas cannot emerge authentically, we contend, except where the subject is the sole inspiration for the conceptualization the trustee advances. Every component of the idea of the good should be personalized to the subject and in this regard be singular. (Silvers & Francis, 2009, 493)

But 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. If the personalization of the good requires no more participation than the tailoring of a suit, it would not be enough to establish agency. But any more active role, such as evaluating specific formulations offered by the surrogate, or suggesting (even nonverbally) how they might be amended, would be beyond the capacity of an individual with radical cognitive limitations.²

² Moreover, it is not clear why intelligent animals could not give attentive human surrogates equally detailed and idiosyncratic information about their preferences. Unless human embodiment is necessary for such communication,

It may be helpful to contrast the issue here with the controversy over facilitated communication: the use of trained individuals to assist people with autism and other conditions in expressing their thoughts through keyboard typing. That controversy concerns the authorship of the communication, the extent to which it can be attributed to the assisted individual rather than the facilitator. Despite widespread disagreement over how to test for authorship, there is general agreement about what would count against it—for example, the assisted individual could not have been the author if she could not have known the information she allegedly communicated. But the question of authorship cannot even arise for an individual who cannot form the beliefs or judgments conveyed by such communications.

This problem of agency would be much less acute if the individual with radical cognitive limitations had once enjoyed fuller cognitive function. If she left instructions, or even expressed her views about what she valued or how she desired to live, the surrogate could be seen as executing her will. Her past directives or statements might even be regarded, as James Nelson (2009) suggests, as a present part of her “extended mind.” But such grounds for agency are not available for the individual whose limitations are congenital.

Conclusion

The upshot of our skepticism about the various forms of assisted participation we have reviewed, as ways of respecting equality, or as ways of grounding it, can be summarized as follows. We certainly do not deny that radically limited human beings can benefit from, and have some claim to, sustained assistance from other human beings, not merely to protect their interests in survival and comfort, but to enrich their psychological and social lives, and their control over their environment, to the extent their limitations permit. Nor do we deny that the potential of actual human beings with cognitive limitations is often unknown and easy to underestimate, so that it may be appropriate to presume that all human beings (at least those possessing some higher brain function) have the potential to participate in human forms of life. Yet there will almost certainly be some human beings for whom that presumption cannot be sustained (McMahan, 2009). We have found no reason to believe that all human beings with radical cognitive limitations can take part in human social life through the assistance of other human beings, in ways that all or most non-human animals cannot. And if there are other grounds for concluding that human beings with radical cognitive limitations have the same moral status as their fellow human beings, that status would not give them the same array of social and political rights. For they could not exercise many of those rights, nor could those rights be meaningfully exercised by others on their behalf.

there would be no barrier to constructing a personalized conception of the good for many animals, particularly those with whom humans shared their domestic lives. And the necessity of human embodiment for this purpose has yet to be shown.

Notes

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² It is not hard to imagine contingencies that would further expose the anomalies of surrogate representation. For example, what if the surrogate and his principal were both summoned for jury duty at the same time? Would the surrogate go through the *voir dire* twice? Suppose he was selected both in his own person and as a surrogate. Might he vote for acquittal in his own name but for conviction in his role as surrogate? The anomalies in serving such a dual role would be less acute if the surrogate were merely serving as an aid or interpreter for an individual with lesser cognitive limitations, since that individual could actually take her own seat on the jury, and could be seen as making her own decisions, albeit mediated and probably influenced by the surrogate.

³ Mulhall (2002). For objections to this type of argument, see McMahan (2005).

⁴ We owe this suggestion, and the language in which it is framed, to Adrienne Asch.

⁵ Admittedly, if such animals could acquire human social responsiveness, it might prove highly maladaptive in their usual habitats. But that would hardly make their achievements less worthy of respect.

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