

# **PERSONS AS FREE AND EQUAL: EXAMINING THE FUNDAMENTAL ASSUMPTION OF LIBERAL POLITICAL PHILOSOPHY\***

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The purpose of this paper is to briefly examine one of the fundamental assumptions made in contemporary liberal political philosophy, namely that persons are free and equal. Within the contemporary liberal political thought it would be considered very uncontroversial and even trivial to claim something of the following form: “persons are free and equal” or “people think of themselves as free and equal”. The widespread nature of this assumption raises the question what justifies this assumption, are there good reasons for holding it? After establishing some methodological remarks, including a distinction between having freedom-equality and being free-equal and restricting the domain of discussion to include only a subset of all moral questions, namely the questions of political morality, the paper deals with some conceptual issues concerning this assumption of persons as free and equal, such as how do free-and-equal-making properties relate to person-making properties. It then moves on to examine three broad ways the free-and-equal-making properties could be established. First, necessary property approaches, which take some necessary feature of persons to be what makes them free and equal (e.g. possessing an immortal soul). Second, contingent property approaches, which take some contingent feature of persons to be what makes them free and equal (e.g. their practise of reasoning). Third, agreement based approaches, which take some

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agreement or contract among persons to be the basis for their being free and equal (e.g. evolutionary emergence of our treatment of others). Strengths and weaknesses of all approaches will be examined.

**Keywords:** persons, freedom, equality, necessary properties, contingent properties, agreement based properties.

O propósito deste artigo é examinar brevemente um dos pressupostos fundamentais da filosofia política liberal contemporânea, a saber, que as pessoas são livres e iguais. No seio do pensamento político liberal contemporâneo seria considerado incontroverso e até mesmo trivial afirmar algo como o seguinte: “as pessoas são livres e iguais” ou “as pessoas pensam em si mesmas como livres e iguais”. O caráter disseminado deste pressuposto levanta a questão da sua justificação: existem boas razões para defendê-lo? Depois de estabelecer algumas considerações metodológicas, entre elas a distinção entre ter liberdade-igualdade e ser livre-igual, e restringir o âmbito da discussão de modo a incluir apenas um subgrupo de questões morais, nomeadamente questões de moralidade política, este artigo trata de questões conceptuais relativas ao pressuposto das pessoas como livres e iguais, tais como em que medida as propriedades que nos fazem livres-e-iguais se relacionam com aquelas que nos fazem pessoas. De seguida, o artigo analisa três formas gerais de estabelecer as primeiras. Em primeiro lugar, as abordagens relativas a propriedades necessárias, que entendem ser um atributo necessário das pessoas aquilo que as torna livres e iguais (por exemplo, ter uma alma imortal). Em segundo lugar, as abordagens relativas a propriedades contingentes, que entendem ser um atributo contingente das pessoas aquilo que as torna livres e iguais (por exemplo, o exercício do raciocínio). Em terceiro lugar, abordagens baseadas em acordos, que identificam a base de ser livre-e-igual com acordos ou contratos entre as pessoas (por exemplo, o surgimento evolutivo do tratamento dos outros). Serão, por fim, avaliados os pontos fortes e fracos de todas estas abordagens.

**Palavras-chave:** pessoas, liberdade, igualdade, propriedades necessárias, propriedades contingentes, propriedades baseadas em acordos.

## 1. Introduction

The purpose of this paper is to briefly examine one of the fundamental assumptions made in contemporary liberal political philosophy, namely that *persons are free and equal*. Within contemporary liberal political thought it would be considered uncontroversial and even trivial to claim something of the following form: “persons are free and equal”<sup>[1]</sup> or “people

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<sup>1</sup> Following Ian Carter (2012) I will take the nouns ‘freedom’ and ‘liberty’ to mean the same thing.

think of themselves as free and equal". Just a few recent<sup>[2]</sup> examples of this idea, one from Kevin Vallier:

This is to say that each and every reasonable member of the public must have good reasons to endorse the laws (or, for Rawls, constitutional essentials) of their society if they are to be *treated as free and equal*. (Vallier, 2011: 261, emphasis added)

And another from Jonathan Quong:

We correctly *think of ourselves as free and equal* from the moral point of view. We all have the same moral status as free persons—as people who are not naturally under the authority of someone else. If person A claimed the moral right to control the life of person B without offering a suitable justification for this claim, A would be claiming a superior moral status to B. The *liberal view of people as free and equal* is incompatible with this claimed inequality of moral status. (Quong, 2010: 2, emphasis added)

The widespread nature of this assumption raises two related questions: first, what does this assumption actually mean and entail, and second, what justifies this assumption, are there good reasons for holding it? I say that these questions are related because it seems that the foundations are informative of the content, and perhaps vice versa (cf. Carter, 2011: 542–543; Sen, 1995: 12). My aim in this paper is to explore the second question,<sup>[3]</sup> more specifically I will analyse three general ways one could establish this assumption would also like to stress that what is at issue here is this very specific assumption (that persons are free and equal) which is made in a fairly specific context (contemporary liberalism) which means that my aim

<sup>2</sup> See also (Cohen 2006: 244), (Reidy 2007: 278), (Freeman 1990-1991: 348), (Grotefeld 2000: 77). But this is not limited to recent nor academic literature: (Pateman 1980: 150), (Finer 1950: 231), (Knight 1941: 141–142), (Overstreet 1913: 115), but also Article 1 of the Universal Declaration of Human Rights (adopted by the United Nations) and Article 1 of the Declaration of the Rights of Man and of the Citizen (adopted by the National Constituent Assembly).

<sup>3</sup> We can interpret this question in two ways: as a question about what *makes it true* that persons are free and equal and as a question about why we *ought to treat* persons as free and equal. The why-we-ought-question has a wider scope than the why-is-it-true-question, in the sense that if no good answer to the why-is-it-true-question can be found then we still might have reason to hold the assumption. Very much like in high school physics we have good reasons to take the speed of light to be 300 000 000 m/s and the question of what is the true speed of light in the conditions of the exercise we are currently solving is less relevant. The emphasis will be on the why-we-ought interpretation. I would like thank Tom Stoneham for bringing this distinction to my attention.

is not to say much about the relationship of those two values to each other. Nor do I intend to examine the implications of this or any similar assumption outside the context of political philosophy.

My motivation to look at this issue is the critical evaluation of the foundations of liberalism. In other words, much of contemporary liberalism is built on this assumption, thus anybody who wants to be a liberal ought to carefully examine this assumption. But also if this assumption implies certain kind of liberal institutions then if this assumption can be established independently of prior ideological commitments then this discussion could also serve as a way to justify liberalism to non-liberals.

The paper proceeds as follows: after dealing with some preliminary issues in section two, I will turn to the conceptual aspects of this assumption in section three. The next three sections give a brief overview of three broad groups of ways to answer the question about foundations of the assumption: the necessary property approach (section four), the contingent property approach (section five) and the agreement approach (section six). After having examined all the options I will conclude that while there is no knock-down argument against any of them, contingent property and agreement approached seem more plausible and they also fit with accounts found in recent literature.

## 2. Some Preliminary Issues

First of all, we should keep in mind that since the “persons as free and equal” is an assumption made in the process of arguing for particular conclusions, then for most authors it is not their primary end to demonstrate that there are reasons to hold that assumption which means that there is not much said about it explicitly in the literature. For example Rawls is thought to be famous for being “philosophical underlaborer” (Ackerman, 1994: 364) and that his political liberalism “does not seek deep foundations for these beliefs; it concerns itself neither with their justification nor with its absence” (Raz, 1990: 8). But similar sentiments are share by other authors, like Quong (2010: 8).

Secondly, a methodological remark: should the justification we are looking for be in a form of an argument or could an explanation suffice. The problem here is that if an argument for holding the assumption would be given, then that would have to rely on further assumptions which could be questioned in a similar way. Thus it might make more sense to look for

some kind of explanatory story of how we have come to hold that assumption. Such position is, for example, exemplified by Burton Dreben (2002: 329) who said during a Q&A session after one of his talks the following:

If one cannot see the benefits of living in a liberal constitutional democracy, if one does not see the virtue of that ideal, then I do not know how to convince him. To be perfectly blunt, sometimes I am asked, when I go around speaking for Rawls, What do you say to an Adolf Hitler? The answer is [nothing.] You shoot him.

The point here being that we can just note that there is such an assumption and it is at such a fundamental level that nothing really could be said for (or against) it, thus one either just accepts it or not and that would be the end of it. If this were be our position then it seems that the only thing left to do is some history and sociology to trace when, where and how this came to be the default position, since it is fairly obvious that it has not been so throughout human history. The problem with this approach is that such a story might prove to be unpersuasive to those who do not already accept the assumption: a simple explanation is not a justification. But a vindictory explanation (Wiggins, 2005: 7 n. 12; Wiggins, 1990-1991: 66–67) might to the job, that is, we look for the “best full explanation” of the belief that  $p$  which “requires as a premiss either the very fact that  $p$  or something which leaves the explainer no room to deny that  $p$ .” So according to Wiggins we might go about establishing the grounds for the assumption that persons are free and equal by (i) relying on certain characteristics about persons which establish the fact that they are free and equal or (ii) given the circumstances of our political culture and progress of moral thought there is no room to think anything else. A similar idea has been put forth by Catherine Wilson (2010) who compares moral knowledge to scientific knowledge, where some “unidirectional narrative” explains why something is now judged to have a moral property  $M$  when it was not the case before. Adopting this kind of approach would mean that a certain kind of explanation could also do some persuasion.

A slightly different approach is taken by Charles Larmore (1999: 605, 608) who thinks that no principle about how to organize their political association that reasonable people come to agree on is as important as is the deeper moral commitment of those people to start looking for such an agreement. These positions are quite similar in both cases there is room for a philosophical argument about what that deeper moral commitment is about or what those characteristics are. So it seems that probably we will

not be able to get a premise1-premise2-conclusion kind of argument, given the fundamental nature of the topic, but hopefully the explanatory story will be more than just a description of historical and sociological facts.

Finally, and most importantly, it should be noted that since the general discussions of persons as free and equal are often related to or serve as a basis to a more specific discussion which makes political proposals and claims about which liberties and rights should be available to citizens, then there is a danger of mixing up two distinct ideas of what it means for a person to be free and equal. On the one hand we can think of persons as free and equal in the sense of *having freedom and equality*, that is, the familiar set of liberties and rights in modern liberal democracies (such as freedom of thought, right to political participation, equality before the law etc.), this is what I call the *politico-legal sense*<sup>[4]</sup> of persons as free and equal. In this sense persons become free and equal only in a political association with others, because without laws and institutions setting down the proper framework talk of political and civil freedoms does not make sense. Persons can lose their freedom and equality in this sense when laws which establish them are revoked or the application of those laws is suspended.

On the other hand we can think of persons as free and equal in the sense of *being free and equal*, that is, of *having a certain moral status*, this status unlike the politico-legal sense of freedom and equality cannot be taken from people. It can be, of course, that this status is not recognized or acknowledged, but this status is not established by any law, but by certain characteristics of persons (what those characteristics actually are remains to be seen). I will refer to this as the *moral sense* of persons as free and equal. Unless stated otherwise in this paper I will talk of persons as free and equal in this sense.

To illustrate the distinction imagine an authoritarian state in which there is a minority of indigenous people. Given their odd customs and strange beliefs the dictator and the ruling majority, who enjoy all the political liberties we are used to in contemporary democracies, consider them to be second class citizens, incapable of proper civilized life and therefore worthy of less consideration. This attitude is reflected in the fact that most of the laws establishing various rights and liberties explicitly exclude this minority. In this situation the minority is not free in the politico-legal sense nor is their moral status as free and equal persons recognized. But now imagine further that one day the dictator is bored and decides to grant the

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<sup>4</sup> I am indebted to Paul McLaughlin for suggesting this label.



minority the full liberties and rights enjoyed by the ruling majority, given that he retains his attitude of them being of lesser status, he is expecting funny things to happen when the minority try to cope with their newly gained liberties and rights. In such a situation all citizens of the state are now free and equal in the politico-legal sense: they all have equal protection under the law, they have right to free expression and so on. But they are still not all treated as free and equal in the moral sense, because both the dictator and the ruling majority still regard the minority as lesser people. If they were recognized as free and equal persons in the moral sense then that fact and not the whim of the dictator would explain and justify their freedom and equality in the politico-legal sense.

Having distinguished between the politico-legal sense and the moral sense it is appropriate to ask why concentrate on the latter rather than the former. The short answer is that the moral sense of free and equal precedes the politico-legal sense both in the order of justification and also in temporal order. The politico-legal sense comes into being only after a political association has been established; it has no real meaning or normative force pre-politically. Thus the politico-legal sense of persons as free and equal can have no bearing on the structures of that political association, since it is created only with that very political association. In other words if persons would not be free and equal in the politico-legal sense in a political association then the only basis for claiming that they should be is to refer to the moral sense of free and equal persons.<sup>[5]</sup> Think of it like this: if Alf says to Betty that she cannot do X and Betty asks why, then Alf can refer to a law that prohibits it, but when she inquires further, then at one point Alf must refer to some moral principle, which underlies the laws Alf is relying on. And in this particular case the fundamental answer to why persons ought to be treated free and equal in the politico-legal sense is that they are free and equal in the moral sense. A similar point is made by Larmore (1999: 609) who says that the drive to give our political association a certain structure (where persons are treated with certain status) can only make sense as a prior moral commitment.

<sup>5</sup> It would also be possible to refer to the empirical equality of persons, as Hobbes (1992: 86–87) does “Nature hath made men so equall, in the faculties of body, and mind (...) For as to the strength of body, the weakest has strength enough to kill the strongest (...) And as to the faculties of the mind, (...) I find yet a greater equality amongst men, than that of strength.” But this would not be very helpful since as an empirical claim it is not clear that it is true; even if it were true of most people, it is still questionable concerning some (e.g. young children, people with disabilities, elderly); but most importantly any such empirical equality would need to be connected up with normative claims, which would take us to the moral sense of free and equal.

Another issue with the moral sense of persons being free and equal is: am I just saying that what it means to be free and equal in this sense is the same as to be morally relevant, that is, to have moral standing? Although I do not think this is correct, such a line does point us in the right direction. The short explanation is that a person being free and equal is a more constrained statement than saying that person has moral standing; the former refers to moral standing in a specific context.

Let me explain in more detail. If Alf would be the only morally relevant being in the world then his actions would matter morally only insofar as they affect him. Meaning that in the moral realm he would only have to ask himself is he living a good life. Such inquiry would mean he is only engaged with questions of *ethics* (cf. Forst, 2011: 64; Williams, 1985: 6; Dworkin 1990: 9). Now, if Betty, another morally relevant being, were to come into this world, then a new set of moral questions would come on to the agenda: how ought Alf and Betty deal with their interactions with each other. Such inquiry means they are engaged with questions of *personal morality*. But if Alf and Betty join with Charles and Diana into a political association where they take up collective action, especially when it is done by one person in a special position and/or in the name of others or in the name of all, a whole new host of issues would be on the table, namely *political morality* (cf. Dworkin, 2011: 327–328). And it is in this last context where the assumption of persons as free and equal is made in contemporary liberal theory. But not in the same way as moral standing in general is important in the previous contexts, since the aim is not to give directions for individual actions, but to help us set up institutions that are in line with the status of persons.

So if it turned out that there is no good reason for holding the assumption of persons being free and equal, then it would not mean that everything would be allowed, persons would still retain their moral standing in their personal affairs and in the private lives.

Furthermore, it should be stressed here that if we talk about persons as free and equal in the sense of having a certain status, then it does not mean that we are at the same time saying that trees and polar bears, for example, have no moral standing whatsoever. Also I am abstaining here from making any claims about the relationship between the three different spheres of moral thought: the fact that I introduced them in a certain order is not to be taken as indicating which I think is more fundamental or which serves as a basis for which. There very well might be connections between the three, but this is not at issue here right now.



So far I have been talking about *persons* who are free and equal, but when we look at some of the authors in the literature, particularly Quong (2010) and Rawls (1996), then we see that they are talking about *citizens* and not persons. Thus there seems to be a question of are they even making the same assumption. I think they are, for example in the case of Rawls we can actually see a transition from person-talk to citizen-talk during his transition towards political liberalism. So Rawls (1996: xliii) notes that “the idea of a person (...) is transformed into that of the citizen (...) the person is seen rather as a free and equal citizen.” But we could still ask if the use of ‘person’ is substantially different from the use of ‘citizen’, and I think that it is not. Rawls (1980: 520) writes:

Their [the conception of well-ordered society and moral person] general purpose is to single out the essential aspects of our conception of ourselves as moral persons and of our relation to society as free and equal citizens. (...) It [original position] serves this role by modelling the way in which the citizens in a well-ordered society, viewed as moral persons, would ideally select first principles of justice for their society.

Here we can see that ‘citizen’ is meant in the sense of ‘a person in the political context, in relation to other moral persons’. Thus the use of ‘citizen’ rather than ‘person’ just serves the role of restricting the scope. Since Quong takes much of his starting points over from Rawls it is safe to assume that a similar treatment applies to him. Since I have already restricted my scope to political morality then I can continue to talk about persons.

It is worth mentioning that freedom and equality are two distinct values and there is no conceptual reason why persons could not, for example, be free, but not equal. So for example if persons were free, but not equal, then whatever the implications of persons being free, there would be some persons to whom such implications would apply more than to others. And if persons were equal, but not free, then whatever the implications of persons being free, that would not be the case, but whatever the status of persons, nobody would be in a different position than anybody else. That being said, we have to keep in mind that the assumption is made such that it takes both to apply to persons, and since my aim is to examine this particular assumption I will not discuss the relation between the two values further.

### 3. Analytic Aspects of Persons Being Free and Equal

If being free and equal is a special case of moral standing then it makes sense to start by looking at what are the ways beings have moral standing. Sytsma and Machery (2012: 1) have recently argued there have traditionally been two ways the moral standing of beings has been established, first, what they call the Experience account, and, second, the Agency account. Simply put the former takes the capacity to feel pleasure and pain as the basis for assigning moral standing. All beings capable of such feelings have moral standing, Sytsma and Machery (2012: 5) cite Jeremy Bentham and Peter Singer as representatives of this view. The second view takes the capacity for sophisticated forms of cognition and life-style as the basis for assigning moral standing. All beings capable of certain cognitive tasks have moral standing, Immanuel Kant and Aquino Thomas, but also Peter Carruthers are representatives of this view (Sytsma & Machery, 2012: 3–4).

Since I have restricted the scope of my discussion to political morality but these are views about moral standing in general then neither view could be used to establish the assumption without any further revisions or restrictions. For example it is clear that the Experience account would cast too wide a net and would easily include beings to which we would want to deny membership to our political communities, namely most of the animal kingdom, or at least the mammals class. A solution to this would be to apply these accounts only to persons, such that there are distinct criteria for distinguishing which beings are persons and of them only those which have the capacity to feel pleasure and pain will be granted the status of free and equal.

Such a reply would bring into focus an issue that I have thus far assumed to be uncontroversial: the question of what are the criteria for personhood. While I hope to avoid arguing for a specific set of person-making properties something on this matter has to be said. First of all, whatever the specific criteria, they have to be such that corporations or any other fictional persons, who are considered to be persons in modern legal practise, would not fall under it. So any criteria will have to be such that they only pick out single individuals (who will, in most cases, be biological organisms from the species *Homo sapiens*).

But given the nature of the current inquiry there is a second thing to be said on the matter. And here I am following Weithman (2011: 32–33), we should bear in mind that the type of concept of a person we get is dependent on the type of ideas we use to construct it. Meaning that when we rely

on ideas of metaphysics then we get a metaphysical conception of a person and when we make use of ideas from moral philosophy we will get an ethical conception of a person and so on. This will prove useful because then we can get certain independence of political and moral philosophy from metaphysics and philosophy of mind. So that debates in the former fields (e.g. how we ought to treat persons?) could proceed without regard to the debates in the latter fields (e.g. what constitutes personal identity over time?).

Thus the picture we have here is that there are many different beings in the world and doing metaphysics can tell us which of them are persons and why. But doing moral philosophy tells us how we ought to treat those beings that our metaphysics picked out as persons. So for my purposes the more relevant question is not what are the person-making properties but what is the relation of those properties to the free-and-equal making properties, more on that below.

But even with the restriction of applying only to persons the Experience account, or some view based on it, would not be a good starting point for the establishment of our assumption. This is because it identifies characteristics which are irrelevant to the political context. The assumption that persons are free and equal is meant as a grounding for specific kind of political institutions and from there on specific kind of laws. But it is hard to imagine a law or a political institution to be the direct cause of pleasure or pain. At the same time, a person's capacity for sophisticated forms of cognition and life-style does seem to connect up with political institutions and laws in relevant ways, since they can prescribe actions which conflict with one's life-style, for example. This is why I think that the establishment of the assumption has to take its cue from the Agency account of moral standing.

Now, back to the relation of person-making properties to free-and-equal making properties. One option would be to say that the person-making properties and the free-and-equal-making properties are the same, in other words all beings who are persons are also free and equal and necessarily so, because the very properties that make them persons make them also free and equal.<sup>[6]</sup> In one sense it would make the whole problem of looking for foundations trivial: there is no need to look for any foundations to the assumption, since it is already in the conception of person that they should be treated with a certain status in the political context. But in another sense, it would not solve anything since it would just push the problem to another level: instead of asking "what makes persons free and equal" we would now

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<sup>6</sup> Although it would still be an open question whether the beings who are persons are persons necessarily.

ask “what makes some creatures persons (and thus by extension free and equal)”. Michael Tooley (1973: 54–55) seems to espouse this kind of view when he writes “I shall treat the concept of a person as a purely moral concept... in my usage the sentence ‘X is a person’ will be synonymous with the sentence ‘X has a (serious) moral right to life’” and also Robert Spaemann (2007: 16) who says that there is a special status of inviolability built into the idea of a person. Depending on what we take to be the person-making properties to be, this approach has to deal with the problem of casting a too wide net, since if we encounter non-human animals that have all the properties that make a person we must admit that they also should be treated as free and equal. This option also has the danger of conflating the two concepts.

A second option would be to say that those two sets of properties are distinct but that free-and-equal properties supervene on the person-making properties or overlap partially with them. This is the kind of view that would be consistent with Lynne Rudder Baker’s (2000: 4, 60) view, since according to her beings are persons in virtue of having first-person perspective, but our status as persons is not directly constituted by that ability, but by others, which we can have only if we have first-person perspective. This seems to be the most plausible option, firstly, because it coheres best with the most plausible ways of grounding the status of persons as free and equal. But also because it means we do not jump from certain metaphysical concept of a person to some normative conclusions without any further argument or explanation. Under this view the moral concept of a person (with its normative conclusions) will be separate from the metaphysical concept.

There is also a third option: to say that those two sets are completely independent, thus some beings who are persons could be also free and equal but that would be merely a contingent matter, and there could be beings who are free and equal but not persons. In some sense it seems that this would be the best, since the danger of casting the net too wide is lowest, at the same time there is the danger of coming up with free-and-equal-making properties which are biased against some beings. This view takes the separateness of the two concepts to the extreme and thus seems like the most implausible one since it is difficult to imagine what those completely independent sets of properties are. It is very likely that our metaphysical concept of person will have a cognitive component and will also make reference to some biological factors<sup>[7]</sup> then coming up with a separate list of

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<sup>7</sup> If a person is constituted, for example, by psychological continuity then it has to be the kind of being who has the biological features which can generate such psychological continuity (e.g. a brain).

properties to make our moral concept of a person seems very difficult, since as we saw traditionally moral status of beings has been defined in terms of agency (i.e. a cognitive aspect) or in terms of experience, which would require a certain kind of biological make-up.

Now we should have sufficient context to move onto the main topic: different ways to ground the status of persons as free and equal. Taken in abstraction there seem to be three ways one could do that. First, one could rely on some necessary and essential property of persons, such as the fact of them being part of humanity or that they have an immaterial and immortal soul. Second, one could rely on some contingent property of persons, such as the actual fact of reasoning. And, third, one could rely on the agreement of persons to treat other persons in a certain way. In what follows I will briefly examine all three options.

Of course just noting certain properties will not be enough, one cannot just jump from the claim “Persons have the property X” to “Persons ought to be treated as free and equal”. But I do not think that bridging that gap is impossible. For example, certain properties might imply certain patterns in behaviour, which would in turn imply certain ways to deal with persons. It should be noted that with the first kind of approach it seems that to be free and equal will be a binary thing: a being either has the necessary properties that make it free and equal or it does not. With the other two there is some possible room for having a scale, some beings are more clearly free and equal than others, this leads us to the area of threshold and range properties which I will take up in section 5.

#### 4. The Necessary Property Approach

According to this kind of approach all persons necessarily have some property which makes it so that we ought to treat them with a certain status. One example of this approach can be called the “God did it” view. Andrew Brennan and Yeuk-Sze Lo (2007: 48) have presented one such argument in a neat form: given that God is all-good, the necessary non-instrumental and intrinsic love God has for all humans gives them the value or dignity which implies that they should be allowed to exercise their self-mastery, i.e. to be treated with a certain status. It is worth mentioning that the difference from a Lockean account here is that although God plays a role in his explanation of why persons are free, it was not the fact *that God created persons with reason*, but the fact *that they had reason*, which was at the bottom of taking all persons as free and equal (cf. Waldron, 2002: 83).

The obvious strength of such an approach is that if some necessary property can be identified and it can be easily demonstrated that certain beings have it and others not, then it makes the foundations of the assumption of freedom and equality very firm and also very distinct. If this approach is favoured then it points us very strongly towards the view that person-making and free-and-equal-making properties are identical, although it does leave open the option that there is only partial overlap or supervenience relation between the two.

As demonstrated by the example versions of this approach will have to deal with establishing the controversial assumption that there is a God with certain purported properties.

But the main problem of this kind of approach is what I will call, the *problem of humanity*, that is, if the necessary and essential property of persons is something like “the fact of being part of humanity” or some metaphysical quality of “human nature” then all non-human persons are excluded from the set of free and equal. In other words the metaphysical or the biological conception of a person is conflated with the moral one with no good reason. It is true that this is not an actual problem at the moment, since there does not seem to be any non-human persons in our political associations. But a theory should be able to say how to deal with highly intelligent programs/robots, alien life-forms and/or (genetically enhanced) animals all of who are possible future members of our political associations. If a being exhibits all the properties we take to be necessary for being a person, except for being a member of the species *Homo sapiens* then it seems problematic to treat that being significantly differently from humans, assuming that there are no disqualifying reasons. Of course any such account could stipulate additional reasons why non-human persons should still be treated as free and equal, but then the question arises: how do we decide in which cases do we come up with the extra reasons?

The other problem one might face is to provide a clear definition of the kind of property one is claiming persons to have and what it means. If one relies on “human nature” for the explanation why persons ought to be treated as free and equal then it should be made clear whether this is just a placeholder for human psychology or whether supposed to describe something “deeper”? If the former, then I think legitimate concerns can be raised whether there is something that is substantial enough, and at the same time universal, in the psychological make-up and behaviour of persons. I am sure that there are traits that are shared widely enough, but something as simple as survival instinct or fear of death might not be sufficient to think



that persons ought to take other persons as free and equal. If it is supposed to be the latter then I am skeptical that a clear and meaningful definition can be provided, or at least whether a clear and meaningful definition which would not end up being controversial. From the history of philosophy we can find many examples of different conceptions of human nature, so any specific understanding of human nature would have to compete with alternatives like the Aristotelian, Thomistic, Cartesian, Kantian or any of the other countless examples from the history of philosophy (cf. Williams, 1973: 236).

## 5. The Contingent Property Approach

Abandoning the metaphysical picture we have to admit that we are now looking at empirical capacities, such as capacity for rational choice or the ability to reason. Thus one example of this kind of approach would go something like this: persons are beings capable of reasoning; that is, they act based on and respond to reasons. And even though some persons might be better at reasoning than others, they all meet a certain minimum requirement. If they were treated in a way that did not engage their reasoning, such as being subject to coercion without proper justification, then they would not be treated according to their nature. To treat them according to their nature is to offer them arguments for the actions which affect, influence or coerce them. In other words accord them a certain status, that of free and equal.

While this example argument just given relies on an assumption that we ought to treat persons according to their nature and it is not obvious that this is so. Then Weithman (2010: 27–28) has suggested that there is another way of stating the same point, according to him there is no need to rely on this imperative of respecting persons' nature, instead the nature of persons gives rise to a certain self-conception for the persons and if they are to live up to their view of themselves then they ought to act towards others in a certain manner.

But, as noted by Williams (1973: 230), empirical capacities we are looking at now are distributed unequally among persons. When we turn to more abstract properties, like the capacity to feel pain or feeling affection for others, then we seem to be on the right track, and we may end up with some idea of desire for self-respect or capacity for virtue. But the problem is to identify such moral capacities and they seem to depend on empirical capacities which are possessed unequally (Williams, 1973: 233–234).

The reply to this worry, which can be found in Rawls (1980: 546), is to adopt a threshold view. If we stipulate a certain threshold that each person has to meet then the empirical differences will matter much less, since as long as the threshold is met the status of free and equal should be accorded. This kind of approach can also be found in Carter (2011: 548) who makes use of the idea of range property: possessing some scalar property within a specified range, so all those who, for example, have certain level of rationality qualify as having equal dignity or humanity.

Although Carter (2011: 549–550) thinks that this line is “in the right direction”, he finds it ultimately unsatisfactory because it runs into two problems. First, explaining the moral relevance of the range property. If we move from a claim “persons who possess scalar property X in this certain range possess the range property Y” to the claim “persons who possess range property Y ought to be treated equally” we have not shown why we should not take the scalar property X to be the basis for equality. Second, even if the range property can be shown to be morally relevant and empirically equally possessed then there seem to be other properties which people possess unequally which are also morally relevant and thus should be taken into account when assessing the equality of persons.

Carter’s (2011: 550) own proposal relies on a particular understanding of respect for which the central element is evaluative abstinence. The point is that in order to take people as equals we need to “avoid looking inside people” (Carter, 2011: 551), that is all the variable empirical properties on which persons moral personality supervenes are not evaluated. It should be noted that Carter (2011: 552) leaves it open what are the exact characteristics on which a person’s moral personality supervenes. But whatever they are once we have recognized that the person under evaluation possesses them to a minimum degree, we should not look any further (Carter, 2011: 553). This kind of idea of respect, “opacity respect” as Carter (2001: 553–554) calls it, provides us with a response to the problems identified with the Rawlsian picture discussed earlier. It deals with the first problem because we can show that there are independent moral requirements for adopting opacity respect other than our commitment to equality (as I try to do in the next paragraph). It deals with the second problem because if the independent moral requirements have been presented opacity respect excludes any other considerations.

But what reason do we have to adopt this kind of idea of respect? Carter’s argument can be summarized briefly in the following way: we can rely on an empirical property as a basis of equality only if we take that property to

be a range property (otherwise people will not possess it equally). We can rely on a range property only if we adopt the opacity respect approach since otherwise we will see too much and the differences in the scalar properties that constitute the range property will reveal the inequality of persons. Assuming that human dignity is the proper object of respect, then the opacity approach will work only if we distinguish two kinds of dignity: dignity as agential capacity in the Kantian sense of having certain agential capacities, and outward dignity which is a “feature of a person’s character, behaviour, or situation” (Carter, 2011: 555). The fundamental difference is that unlike the former, we can lose the latter. Making use of outward dignity is appropriate only in certain contexts, where we view others simply as agents. One such context is the relation between the citizen and political institutions, for example, we think it improper for the state to evaluate our agential capacities, so in such situations only the outward dignity should be made use of. This is very plausible since I suspect that most people would have the intuitive reaction that there is something wrong when a philosophy professor is given a higher status than somebody with less but still adequate level of education. It should be fairly obvious how this approach clearly assumes that the person-making and free-and-equal-making properties either have some overlap or the latter supervene on former.

These kinds of approaches face what I will call the *problem of marginal persons*; that is, if the contingent property of persons that grounds their freedom and equality is some range property then one ought to explain what becomes of people who fall just under the required range, due to for example mental disability. If somebody is born mentally retarded or becomes impaired later in their life such that they are incapable of reasoning or meeting any other cognitive task that has been set, then it seems they do not qualify as free and equal persons, but this might conflict with our intuitions that as members of the same political association they still should be treated as such. It must be pointed out here that although they may lack the status of free and equal, such people still retain their moral standing, and it is probably one of the main reasons why our intuitions would tell us to treat them as free and equal.

Nicholas Wolterstorff (2012: 607) has suggested that there are three solutions to this problem: (1) rely on a theistic account, thus marginal persons retain their status irrespective of their current capabilities, (2) bite the bullet and claim that such people are not free and equal or at least not to the same measure as others, (3) or come up with some extra reason why, despite their lack of cognitive abilities, they still should be taken as free and

equal. A version of the second solution would be to deny that there even is a problem, that when we examine the issue closer we will see that in fact we do not have such intuitions and there is no problem in assigning a different status to marginal persons.

The first of the three solutions offered by Wolterstorff is basically adopting a version of the essential property approach where all persons have some connection with a deity and thus granted freedom and equality.

In a way adopting the second solution would be the intellectually most honest way: accepting the logical conclusions of the argument and not coming up with any (*ad hoc*) explanations for special cases. At the same time there might be intuitions that tell us that there would be something wrong in choosing to believe that disabled people, survivors of unfortunate accidents or the mentally ill are in some sense of a lower status than others. But when we look at our current practices concerning the mentally disabled and incapacitated then they seem to reflect the attitude that they do have a different status: it is considered normal to treat them as having less or no freedom and equality, especially in medical cases. Such attitudes are implied by Stanley Benn (1988: 116) who has noted that given the deficiencies in their personhood the requirements for justifying our actions towards the mentally ill are much more relaxed. So there are various cases of invasive medical procedures that are regularly performed on people who are deemed incapable of making decisions, including sterilization (Dimond, 2009: 56; Stauch, Wheat and Tingle, 2006: 197–220), bone marrow harvesting (Dimond, 2009: 65), and involuntary admission and detention for treatment (Jackson, 2009: 307). All such activities could constitute assault, battery and kidnapping if performed on mentally capable people. Sometimes in case of incapacitated people part of their agency is transferred to a guardian, who has, the authority to decide among other things where the patient should live (Jackson, 2009: 345), which is also something which would not be normal in case of normal adults.

The third solution seems unsatisfactory in much the same way as the possible solution to the problem of humanity, I discussed earlier. If facing the problem of marginal people we manage to come up with some extra reason why people who lack the required contingent property still qualify as free and equal then the question arises why should we not look for a similar reason for other beings who do not meet the established requirements, whatever they happen to be. There needs to be some motivation why we are looking for the extra reason in some cases and not in other cases. That motivation will either be problematic, since it will refer back to certain

biological facts and thus be speciesist, or it will be self-defeating since it will reveal that it is not the particular contingent property but rather the extra reason which is doing all the work.

Thus it seems, at first sight anyway, that if certain cognitive capacities are at the fundamental level the ground for persons being free and equal then the best response to the problem of marginal people is to bite the bullet. Or even deny that there is such a problem in the first place, given our actual practises concerning marginal people.

But when we think further we should notice that the problem of marginal persons is not really an issue at all. Referring back to the distinction made earlier about personal and political morality: what is under investigation here is not our singular acts concerning individuals, what is under investigation is how ought our institutions be organized given that people are of certain kind. In other words what is at issue here are general rules, which while based on a moral status of persons, will apply to people on a different basis, namely a legal one. That is after inquiring about what is the moral nature of persons we come up with the proper institutions, but once those institutions are in place they will apply to all of those who fall under them, and that is not decided based on moral facts, but based on legal facts, if somebody is or is not a citizen of a certain state. Given that marginal persons are a deviation from a statistical normality then we need not take them into account when considering the structure of institutions and when it comes to the application what we need to look at is if and to what extent they are citizens.

When discussing the problem of marginal people then the question of very young children might arise: since if they also do not possess the necessary cognitive capacities then it looks like they also fall under this problem. And similar attitudes apply to children: in many ways children are not free or equal; for one thing they are partly under the authority of their parents, meaning they are restricted in ways normal adults are not. But there is a crucial difference: in the case of very young children (under normal circumstances) their inability is merely temporary and not permanent, which gives us reason to treat them differently, but only in so far as they remain unable to participate fully and such that they would be able to participate fully in their own governance.

A further issue that is not necessarily a problem for the contingent property approach, but just needs special attention, is making sure that the cognitive capacities that are required of persons for them to be free and equal would not be so strict as to include only the Platonic Philosopher



Kings, the fully autonomous persons who at all times operate on stage six on the Kohlberg's (1973: 632) moral development scale. I would suspect that there is a certain tendency, given the nature of professional philosophy, to bias the requirements on the too strict side and also underestimate the abilities of the "common man". Once again it seems to me that Benn (1988: 155) is right when he stipulates a state of autarchy of agents, which is a state between the full autonomy just mentioned and always acting on impulses. The opposite worry, that the requirements will be too relaxed and too many beings will satisfy them, thus making the set of free and equal beings too large, does not seem very serious.

The strength of the approach, at least over the necessary property approach, is that there is no need to rely on any problematic ideas such as "human nature" or "souls". Instead we rely on actual empirically verifiable properties. I take Larmore (1987, 1996, 1999), Rawls (1996) and Dworkin (2011) to be examples of this kind of view.

## 6. The Agreement Approach

One possible version of the agreement approach could be built on the idea of reciprocity. This would mean assuming that persons think to themselves how they would like to be treated by others, including other persons. They come to the conclusion that they would prefer if they were not coerced and restricted arbitrarily by others, thus they would want others to treat them with a certain status. But after reaching this conclusion persons would have to recognize a further point, namely that there are no deep differences between them and other persons, meaning they would have to assume that other persons have reached similar conclusions about how they would like to be treated. Such hypothetical reasoning would lead all persons to see that if they want others to treat them with a certain status; they would have to treat others with the same status in return. While this is very similar to contractualist (as opposed to contractarian) thinking, it is nevertheless different, since the contractualist already starts with the parties taking others to have certain status (Ashford and Mulgan, 2012; Cudd, 2012), while here the establishment of that status is at issue.

In such an approach the actual properties of persons would not matter. What would be important that there is some set of beings, persons, whoever might belong to that set, and those beings have reached something that might be called an agreement or a contract, whether by explicit or implicit consent or hypothetical reasoning, to accord a certain status to all persons.



That very fact of agreement is what would ground the assumption, even the reasons for achieving the agreement or the emergence of the agreement would be irrelevant.

This kind of approaches face first of all the same problems any contract approaches face: when and where did the agreement take place? Of course one need not rely on explicit consent, but if the contract is taken to be hypothetical or rely on implicit consent then it will be much harder to show the bindingness of it. But assuming that it could be done still some explanation has to be given about how the agreement emerged. The most plausible way to answer this worry would to come up with some (evolutionary) story of how this agreement emerged out of our moral and political practices over time and is implicit in them currently. One such story might rely on that fact that, for evolutionary reasons, humans feel empathy for other beings relevantly similar to them, and this empathy makes them want to treat those beings in a certain way. Another might claim that experimenting with different kinds of political associations it turned out that the kind which guarantees a certain status to its members is the most efficient in achieving our aims. Of course any such story cannot be parochial or rely on facts that are true of only a very small set of persons, in such a case it would not just be convincing enough.

A further aspect of this approach which might prove to be problematic is explaining why the agreement should be binding for all. It might be true that an implicit agreement emerged from our practices but if it relies on distant past then that alone does not give us sufficient reason to hold that agreement binding for us now. The response to this worry is to claim, like Strawson (1962: 210), that “[o]ur practices do not merely exploit our natures, they express them”, meaning that the fact that the agreement emerged from our practises is binding since our practises are based on our natures, thus there is an innate reason to abide by such an agreement in all of us. Another worry which could be raised is whether such an agreement among persons is even sufficient to ground the actions of persons on such a fundamental level.

The strengths of the third kind of approach are mainly that it is not vulnerable to the weaknesses of the two other approaches: there are no contingencies about whether persons actually have the properties (second approach) or difficulties in identifying them (the first one). Recent authors who seem to espouse some version of this kind of approach are Benn (1988) and Gaus (2011), but also Strawson (1962).

## 7. Conclusion

In this paper I started out by surveying some conceptual aspects of providing grounding to the widespread assumption in liberal political theory that persons are to be taken as free and equal. I first drew the distinction between two different senses of this idea: the politico-legal and the moral. The former refers to the liberties and equalities we enjoy as members of specific political associations and which depend on a specific legal framework. The latter refers to a pre-political idea of a certain status on persons which is supposed to guide us in defining the politico-legal sense.

I then looked briefly at the relationship between properties that make a person and properties that make a person free and equal, and suggested that this issue cannot be solved without a more particular sense of what kind of properties could make a person free and equal. I thus moved on to looking at three different possibilities: the necessary property approach, the contingent property approach, and the agreement approach. The first of these relies on some necessary property of persons (e.g. possessing an immortal soul or being the creation of God) to make the case for the special status of persons. The main difficulty of such approach lies in the fact of being metaphysically controversial. The second relies on some contingent property of persons (e.g., rationality or other cognitive capacities) to make the case for the special status of persons. The main difficulty of such approach lies in alleviating the tension between intuitions that marginal people should still be treated as free and equal and the approach's demand that they should not. Although, if we do not aim provide guidance on individual action, but come up with general institutions, then it would not be a problem at all since the marginal people would be treated under the general rule. The third relies on the agreement among persons (e.g. one through evolutionary process or hypothetical based on abstract reasoning) to make the case for the special status of persons. The main difficulties of such an approach are the ones any contractualist approach faces. The relevant difference of this approach from the last two is that the foundation of the assumption is not grounded in the properties of persons.

As for any conclusions that might be drawn from the previous discussion; given that most modern political philosophers shy away from metaphysics, any foundation provided for the assumption of freedom and equality will either have to adopt the contingent property or the agreement approach.

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