

INTRINSIC HUMAN EQUALITY: A CRITICAL OVERVIEW OF RECENT AND HISTORICAL THEORY

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ABSTRACT

A common assumption in constitutional, democratic, and liberal theory is that all human beings have equal intrinsic or moral worth, a belief that underpins equal human and constitutional rights. The arguments for intrinsic or basic equality have been advanced primarily in moral and political philosophy, despite the centrality of the issue for constitutional jurisprudence. This article presents a critical overview of theories of intrinsic equality in canonical political theory, twentieth century scholarship, and post-millennial theory to advance three claims: No attempt to ground equality can defeat the moral skeptic; defenses of intrinsic equality invariably involve positing the moral value of a shared property rather than deducing our moral equality from it; and contemporary (post-millennial) theory has offered more nuanced variations on earlier, failed attempts. Intrinsic equality, whether as a moral or constitutional principle, is best understood as an axiomatic assumption.

INTRODUCTION

A common assumption in constitutional, democratic, and liberal theory is that all human beings have equal intrinsic worth. Ronald Dworkin described this as “a kind of plateau in political argument.”¹ Among our deepest moral beliefs, he argued, is that each person has equal intrinsic value or dignity and ought to be treated with equal respect and concern.² In Mortimer Adler’s formulation: “All human beings are equal as humans. Being equal as humans, they are equal in the rights that arise from needs inherent in their common human nature. A constitution is not just if it does not treat equals equally.”³ Yet on what basis are we of equal moral worth? And why do humans possess this worth over and above non-human creatures?

These questions are central to constitutional jurisprudence. The principle of equality informs how constitutional and human rights function, and equality is among the most fundamental of rights. But the grounding of equality—what has been termed “deep,” “intrinsic,” or “basic” equality—has not been explored

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1. Ronald Dworkin, *Comment on Narveson: In Defense of Equality*, 1 SOC. PHIL. & POL’Y 24, 25 (1983).

2. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 179–83 (1978).

3. MORTIMER J. ADLER, *ARISTOTLE FOR EVERYBODY* 125 (1978).

much in constitutional theory.⁴ Dworkin joined many others in focusing primarily on distributional equality, on what the assumption of moral equality implies for good government or social justice.⁵ Jeremy Waldron has offered a notable recent exception in taking up the problem of basic equality as a constitutional theorist.⁶ In the process, he has engaged with a range of canonical political theory (primarily Locke and Kant) and a sizable literature on point in moral and political philosophy from the 1940s onward.⁷

What does not emerge from Waldron's important contributions is a comprehensive overview of the scholarship in moral and political theory on basic equality—one that could provide scholars of constitutional jurisprudence a bird's-eye view of this debate, seen through a critical lens. This paper sets out to offer this critical overview, drawing into a single narrative a rich history and lively contemporary debate on whether and how we may be fundamentally equal. It begins by briefly tracing how, from ancient Greece through the early modern period, ideas about our natural equality have come to prevail over—but not completely dispel—ideas of our natural inequality. Kant would set out what has become the paradigmatic defense of equality in his notion of our shared capacity for moral autonomy. Nietzsche offers the skeptical equivalent in his ideas of our fundamental inequality rooted in the will to power. Debate from the 1940s onward has involved a host of probing and provocative defenses of equality involving reason, consciousness, having a point of view in which things matter, to being owed equal concern and respect so as to avoid the inherent wrongness of being treated as an inferior. The moral skeptic, meanwhile, has been a constant presence.

In the course of this survey, highlighting the tension between the egalitarian and the moral skeptic, I advance three claims:

a. no attempt to ground intrinsic equality has been successful in defeating the moral skeptic, with each account failing to overcome one or more of a recurring set of objections;

4. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 271–73 (1985); JOHN WILSON, *EQUALITY* 97 (1966); JEREMY WALDRON, *ONE ANOTHER'S EQUALS: THE BASIS OF HUMAN EQUALITY* 1–2 (2017).

5. WALDRON, *supra* note 4, at 9 & n.11 (citing AMARTYA SEN, *CHOICE, WELFARE AND MEASUREMENT* 353 (1982); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *ETHICS* 287 (1999); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *PHIL. STUD.* 77 (1989); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008)) (noting this disparity).

6. See generally *id.*; see also Jeremy Waldron, *The Substance of Equality*, 89 *MICH. L. REV.* 1350 (1991); JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT* (2002) [hereinafter WALDRON, *GOD, LOCKE, AND EQUALITY*]; Jeremy Waldron, *Basic Equality* (N.Y.U. Sch. L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 08-61, 2008), <http://ssrn.com/abstract=1311816> [hereinafter Waldron, *Basic Equality*].

7. I am indebted to citations found in WALDRON, *supra* note 4, at 11 n.15, for pointing me to much of the relevant the twentieth century scholarship on intrinsic equality.

b. defenses of basic equality invariably involve *positing* the moral value of a shared property rather than proving that humans have equal moral value by highlighting or uncovering that property; and

c. contemporary (post-millennial) arguments for basic or intrinsic equality have offered more creative and nuanced attempts to overcome problems faced by earlier theorists, but, without exception, end in the same stalemates.

Some defenders of basic equality, including Waldron, concede that their arguments are not immune to the moral skeptic. They see value in providing an *account* of equality—a way it might be understood—rather than purporting to uncover its unshakable foundation. Other theorists, including Dworkin, Hannah Arendt, and Anne Phillips, suggest that equality—as either a moral or constitutional principle—cannot be grounded or justified and that none should attempt to do so.⁸ Equality, on this view, is a moral or political idea we commit to rather than somehow being rooted in a fact about us as humans. The overarching aim of this paper is to show why this position is preferable. The most reasonable inference to draw from historical and contemporary debate about intrinsic equality is that it is best understood as an axiomatic assumption.

A note of caution about form and method. This paper provides a critical overview of work in moral and political philosophy that is primarily intended for constitutional theorists. Yet it is not a conventional work of jurisprudence in the sense of offering a new account of equality as a facet of constitutionalism. The value of the contribution aimed at here is to provide for law scholars a critical overview of numerous complex arguments in other disciplines over a significant span of time—to understand why the principle of equality cannot be grounded. This approach is possible here because it avoids the longer, more detailed treatment needed to fully address each argument and all its complexity. I proceed on the assumption that an overview of the contours of the long-standing debate about basic equality is both possible and of value to constitutional theory.

To lend context, I begin with a brief survey of equality in canonical figures from Plato to Kant and Nietzsche, followed by two longer parts. The first considers scholarship in moral and political philosophy from the 1940s to the turn of the century, looking first at defenses of basic equality followed by skeptical views. The second part surveys post-millennial scholarship, grouped into those seeking to ground equality (to show why we *are* morally equal), those providing an account of it as a principle (why we should be committed to treating people equally), and those skeptical of any account or defense. I conclude with comments on the future of the debate.

8. See Dworkin, *supra* note 1, at 24; HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 234 (1951); ANNE PHILLIPS, *UNCONDITIONAL EQUALS* 41 (2021).

I. INTRINSIC EQUALITY IN CANONICAL POLITICAL THOUGHT

Antecedents of moral equality or a belief in a shared humanity can be found in various early religious traditions.⁹ Yet from ancient Greece through the early modern period, a hallmark of Western moral and political thought has been the assumption of natural inequality. Equality was appropriate only among equals and the polity was properly thought to be divided by forms of status resting on ideas of natural difference.¹⁰ Nobles had greater worth than peasants or slaves; those outside one's tribe or people had lesser worth than those within.¹¹ In the West, only in the seventeenth- and eighteenth-century European Enlightenment does an idea of equality begin to prevail based on common species-membership.¹² But the roots of the idea are present at least as far back as ancient Greece.

Athenian democracy had recognized an equal right of citizens to speak in the assembly and to be treated equally before the law; but this did not include women, slaves, and foreigners.¹³ In Plato's *Gorgias*, Callicles argues against democracy on the basis of a natural inequality between humans, with the strong entitled to dominate the weak.¹⁴ In his *Nicomachean Ethics*, Aristotle conceived of justice as proportionality, entailing equal treatment for equals and unequal treatment for unequals.¹⁵ In the *Politics*, he asserted the superior status of a master over his slave, on the basis of the latter's lack of an ability to deliberate, and of men over their wives and children, on the basis of their being more capable of leadership.¹⁶

The germ of a modern conception of basic equality appears in Cicero, Seneca, and in Stoic thinking. Reason is thought to unify humans across cultural boundaries and grounds their intrinsic value. In the *Laws*, Cicero asserts:

[T]his animal—provident, perceptive, versatile, sharp, capable of memory, and filled with reasons and judgment—which we call a human being, was endowed by the supreme god with a grand status at the time of its creation. It alone of all types and varieties of

9. See generally SIEP STUURMAN, *THE INVENTION OF HUMANITY: EQUALITY AND CULTURAL DIFFERENCE IN WORLD HISTORY* 67–114 (2017) (discussing equality in the context of Abrahamic religions, Greek political philosophy, stoicism, and Confucianism).

10. See John H. Schaar, *Some Ways of Thinking About Equality*, 26 J. POL. 867, 868 (1964).

11. Richard Arneson, *Basic Equality: Neither Acceptable nor Rejectable*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON 'BASIC EQUALITY' AND EQUAL RESPECT AND CONCERN* 30, 30 (Uwe Steinhoff ed., 2014).

12. See generally STUURMAN, *supra* note 9, at 229–33; LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007).

13. STUURMAN, *supra* note 9, at 86.

14. See PLATO, *LYSIS SYMPOSIUM GORGAS* 385–87 (G.P. Goold ed., W.R.M. Lamb trans., 1925).

15. See ARISTOTLE, *NICOMACHEAN ETHICS*, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1007 (Richard McKeon ed., W.D. Ross trans., 1941) (“This, then, is what the just is—the proportional; the unjust is what violates the proportion.”).

16. ARISTOTLE, *POLITICS*, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 15, at 1143–44.

animate creatures has a share in reason and thought, which all the others lack.¹⁷

As Waldron has noted, the notion that humans possess the divine spark of reason runs through Augustine and Aquinas and later Christian thought.¹⁸ But a further important dimension of Judeo-Christian thought is the leveling captured in Genesis by our being created in the “image of God” and in Paul’s letter to the Colossians that “there is no Gentile or Jew, circumcised or uncircumcised, barbarian, Scythian, slave or free”—that is, that we are all children of God.¹⁹

Hobbes and Locke held views compatible with basic equality but were not entirely committed to the idea. Hobbes discerned a form of equality in the mortal threat that every human was capable of posing: “[T]he weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others.”²⁰ Yet, for Hobbes, humans have no intrinsic value: “The value, or worth of a man, is as of all other things, his price; that is to say, so much as would be given for the use of his power: and therefore is not absolute; but a thing dependent on the need and judgement of another.”²¹ Locke held a view of human equality based in our common possession of reason, given our common descent from Adam and Eve who were created in the image of God: “For wherein soever else the Image of God consisted, the intellectual Nature was certainly a part of it, and belong’d to the whole Species . . .”²² But as Steinhoff has argued, Locke did not hold a view of humans as possessing equal intrinsic worth.²³ “I cannot be supposed to understand all sorts of Equality,” Locke wrote in the *Second Treatise*, noting that “Age or Virtue may give Men a just Precedency: Excellency of Parts and Merit may place others above the Common Level: Birth may subject some, and Alliance or Benefits others . . .”²⁴ Locke’s idea of equality was narrow; it consisted in a natural right to be free from domination by others: “[T]he Equality I there spoke of [earlier in the work] . . . being that equal Right that every Man hath to his Natural Freedom, without being subjected to the Will or Authority of any other Man.”²⁵

17. CICERO, *De Legibus*, as reprinted in CICERO: ON THE COMMONWEALTH AND ON THE LAWS 113 (James E.G. Zetzel ed., 1999).

18. See WALDRON, *supra* note 4, at 92 (citing AUGUSTINE, ON FREE CHOICE OF THE WILL 44–46 (Thomas Williams trans., 1993); THOMAS AQUINAS, *Summa Contra Gentiles*, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 3, 6–7, 8 (Paul E. Sigmond ed., 1987)).

19. *Genesis* 1:26–27; *Colossians* 3:11 (New International Version).

20. THOMAS HOBBS, *LEVIATHAN* 82 (J.C.A. Gaskin ed., 1998).

21. *Id.* at 59 (emphasis omitted).

22. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 162 (Peter Laslett ed., 1988) (emphasis omitted).

23. See Uwe Steinhoff, *Against Equal Respect and Concern, Equal Rights, and Egalitarian Impartiality*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON ‘BASIC EQUALITY’ AND EQUAL RESPECT AND CONCERN* 142, 158–59 (Uwe Steinhoff ed., 2014).

24. LOCKE, *supra* note 22, at 304 (emphasis omitted).

25. *Id.*

Kant articulated a conception of the equal and intrinsic value of human life and its greater worth over that of other creatures, a theory that still informs much of contemporary political and constitutional thought. In *The Metaphysics of Morals*, he conceded that in the larger scheme of nature, humans were of “slight importance” and share with other animals “an ordinary value”:

But a human being regarded as a *person*, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.²⁶

As Dworkin, Waldron, and others have noted, Kant’s notion of the inherent dignity that humans possess by virtue of their capacity for moral reason serves as the normative basis of our entitlement to individual political and constitutional rights.²⁷ In ways to be seen below, every attempt to *ground* basic equality entails a variation on Kant’s argument for equality based on the possession of moral personhood.

Other important contributions to ideas about equality from the end of the eighteenth through the course of the nineteenth century can be found in Bentham’s utilitarianism, in which human equality is linked to the equal value of each person’s experience of pleasure and pain;²⁸ in Hegel’s arguments about the interdependence of human identity in the struggle for recognition between lord and bondsman;²⁹ and in Marx’s theory of alienation, as a shared capacity for dehumanization.³⁰ Arguably the most notable contribution to the debate about human equality to emerge in this period is found in the work of Friedrich Nietzsche. His ideas of morality and of the will to power serve as the clearest counterpart to Kant’s ideas of intrinsic equal dignity and worth. Nietzsche presents the most forceful version of the moral skepticism that any argument in favor of human equality must confront.

In *Beyond Good and Evil*, Nietzsche argues for the superiority—indeed the necessity—of a more powerful, vigorous, ambitious kind of human, a rare breed who would comprise a natural aristocracy. The “essential characteristic” of this aristocracy is that it “accepts with a good conscience the sacrifice of untold human beings who, for its sake, must be reduced and lowered to

26. IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, reprinted in *PRACTICAL PHILOSOPHY* 353, 557 (Mary J. Gregor ed., 1996).

27. See DWORKIN, *supra* note 2, at 184–205; WALDRON, *supra* note 4, at 52; Gregory Vlastos, *Justice and Equality*, in *EQUALITY: SELECTED READINGS* 120, 127 (Louis P. Pojman & Robert Westmoreland eds., 1997); Schaar, *supra* note 10, at 885.

28. See generally JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, as reprinted in *UTILITARIANISM AND OTHER ESSAYS* 65 (Alan Ryan ed., 1987).

29. See generally G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., 1977).

30. See generally KARL MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (Martin Milligan trans., 1988).

incomplete human beings, to slaves, to instruments.”³¹ The strong few are entitled to dominate the many weak by virtue of their greater possession of the will to power. For Nietzsche, the possession of this will serves as the only legitimate basis of value. “[L]ife itself is *essentially* appropriation, injury, overpowering of what is alien and weaker,” he writes; a human must “strive to grow, spread, seize, become predominant—not from any morality or immorality, but because it is *living*, and because life simply *is* will to power.”³²

For Nietzsche, promulgating the ideal of the “equality of all men before God” is merely an attempt on the part of the weak to contain the strong, a “favorite revenge of the spiritually limited against those less limited”³³ The notion of equal intrinsic worth could only prevail within a moral framework that disparages the idea of superior humans. At one point in Western culture, “everything that elevates an individual above the herd and intimidates the neighbor [was] called *evil*; and the fair, modest, submissive, conforming mentality, the *mediocrity* of desires [gained] moral designations and honors.”³⁴ Yet nothing grounds this egalitarian order, for Nietzsche, aside from the herd’s endorsement of it. Those in possession of a greater will to power claim a deeper truth. This truth may be grounded in nothing more than the will of the strong to assert it, which might make it a provisional truth. But it is, in Nietzsche’s sense, a moral truth no less.

II. INTRINSIC EQUALITY IN 20TH CENTURY THOUGHT

In what follows, I proceed by looking first at advocates for intrinsic equality followed by skeptics. I note, however, that not all figures I place in the first group purport to discover an ultimate grounding for equality or claim that their account overcomes the moral skeptic. Conversely, not all skeptics see no merit in the idea of basic equality. The groupings are not meant to be strict.

A. Arguments for Intrinsic Equality

In a paper given in 1942 that still garners attention, Herbert Spiegelberg sought to respond to ideas of natural inequality in fascist and Nazi discourse by inquiring into the “foundations” of human equality.³⁵ He distinguished equality as a fact from equality as an ideal, arguing that facts about humans could neither prove nor disprove the ideal of human equality, since the factual differences between people would only point to a deeper distinction between “actual and potential” equality. Those who are “actually unequal may still be potentially equal.”³⁶ But why should our potential for equality be morally significant? His

31. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE*, reprinted in *BASIC WRITINGS OF NIETZSCHE* 181, 392 (Walter Kaufmann trans., 1968) (emphasis omitted).

32. *Id.* at 393.

33. *Id.* at 337.

34. *Id.* at 304.

35. See generally Herbert Spiegelberg, *A Defense of Human Equality*, 53 *PHIL. REV.* 101 (1944).

36. *Id.* at 104.

response was to argue that the advantages we inherit at birth can in no way justify any inequality we enjoy in life:

Ethics offers no brief for any such discriminations of moral chance. It allows for no inherited desert. In its court everyone is given an equal start. And for each one the initial score is zero. This equality of our initial score is the basic ethical equality among all human beings.³⁷

We are moral equals at birth in the sense that none of us deserves whatever strengths or weaknesses we happened to inherit. In pointing out this “ethical equality” among us, Spiegelberg is careful to note that it does not “imply that our innermost selves are *completely* equal.”³⁸ The point is that the shared arbitrariness of receipt of our advantages and deficits forms the basis of treating them as “undeserved discriminations”—as either “unjust enrichment” or “unjustified deprivation”—and grounds an obligation to rectify them through “corrective justice.”³⁹

Spiegelberg offers no response to the claim that while I may not *deserve* some advantage I was born with (strength or wit), having it makes me morally superior to others. His argument is more subtle: since you did not deserve your tremendous wit and others did not deserve their lack of it, we *ought* to level the playing field. But the moral compulsion here—the need for redress—rests on an unspoken premise: that any strength you did not deserve *should not make you more worthy*. His argument thus assumes an equality of value it is meant to uncover. Put another way, in Spiegelberg’s view, the fortuitous nature of our differences needs to be justified rather than our moral equality because his argument begins by positing the moral significance of the *arbitrariness* of our differences at birth rather than the fact of those differences alone. Only by coloring this arbitrariness as unfair or undeserving does it make sense point to what he calls “moral chance” as the ground of human *equality*. If one began by assuming that moral chance (arbitrary assignment of qualities) is neither fair nor unfair, nothing would prevent one from asserting: my strengths make me superior and I owe nothing to people weaker than me.

In 1962, two thinkers, Gregory Vlastos and Bernard Williams, wrote seminal papers considering whether basic equality could be grounded in unique facets of our experience as individuals.⁴⁰ Vlastos contended that when we speak of the equal worth of persons, we refer to an aspect of them that cannot be captured by the idea of merit. Measuring merit points to a quantity of something that could be found in more than one person: “If A is valued for some meritorious quality, *m*, his individuality does not enter into the valuation. As an individual he is then dispensable; his place could be taken without loss of value by any other individual with as good an *m*-rating.”⁴¹ Measuring value by

37. *Id.* at 116.

38. *Id.* (emphasis added).

39. *Id.* at 118.

40. See generally Vlastos, *supra* note 27; BERNARD WILLIAMS, PROBLEMS OF THE SELF (1973).

41. Vlastos, *supra* note 27, at 125.

merit discounts one's worth *as an individual*. In law and politics, we avoid this; we accord rights not on the basis of merit but of equal individual worth. What gives us this worth? Vlastos points to a variation on Kant's notion that people are ends in themselves. Things other than persons can only have value *for* a person. Only humans can value things and choose among valuable things. Humans are thus unique in being "valuers" and "do not need to be valued as 'ends' by someone else in order to have value."⁴² Yet a person's inherent value consists not only in being a valuer and an end in themselves, but also in the fact that their *experience* of value and freedom is "unique and unrepeatable."⁴³ Two people might choose to experience a symphony, he suggests, but their "enjoyment" of it will be "absolutely unique."⁴⁴ Moreover, we treat each person's well-being and freedom as equally valuable because we recognize the equal importance of certain goods to each person, such as relief from "acute physical pain."⁴⁵ We do not distribute relief from pain on the basis of merit, since we assume that "[i]n all cases where human beings are capable of enjoying the same goods, we feel that the intrinsic value of their enjoyment is the same."⁴⁶ Similarly, we place equal value on each person's freedom "independently of the value of the things they happen to choose."⁴⁷ Wrongdoing, on this view, justifies punishment, but within the bounds of the "moral community" and the law. For Vlastos, a person never loses their intrinsic equal worth because they never cease to be an end in themselves, a valuer, and a chooser.

The moral skeptic might concede that people—rather than things or other creatures—can place value on things and choose among them. This might make people ends in themselves, and thus intrinsically valuable. People might also have a unique experience of freedom in their distinct consciousness of events. And their capacity to enjoy the same goods in a unique way might be a reason to treat each person's entitlement to well-being as equally valuable. Yet none of this precludes valuing *people themselves* differently. We might do this by placing value on people's varying ability to make productive choices or their varying degrees of consciousness of their experience—rather than the *fact* of their having a capacity for choice or for consciousness. Vlastos makes a strong case for uniqueness and choice as grounds for the inherent value of human life, but not necessarily the *equal* value of human life.

Bernard Williams's contribution to the problem of intrinsic equality is among the most cited in the literature.⁴⁸ It is notably modest in its claims. His inquiry is comprised of two parts. In the first, he considers our "common

42. *Id.* at 127.

43. *Id.*

44. *Id.*

45. *Id.* at 128.

46. *Id.* Richard Wasserstrom, in *Rights, Human Rights, and Racial Discrimination*, challenged Vlastos on this point, asking why we should assume equal entitlement to enjoy well-being and freedom on the basis of a shared capacity to enjoy them, since we cannot show that all are *equally* capable of their enjoyment. See Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHIL. 628, 634 (1964).

47. Wasserstrom, *supra* note 46, at 634.

48. See generally WILLIAMS, *supra* note 40.

humanity” as a basis for the claim of basic equality, suggesting that the claim may amount to no more than the tautological assertion of “the equality of men as men” but that it may still be useful and non-trivial as a moral argument.⁴⁹ To assert the equality of “men as men” is to remind ourselves of similarities we share in certain respects that are often forgotten, such as the capacity to feel pain, embarrassment, or affection—or “a desire for self-respect.”⁵⁰ This enables us to make distinctions between “political and social arrangements that systematically neglect these characteristics in the case of some groups of men, while being fully aware of them in the case of others. . . .”⁵¹ Some arrangements, for example, ignore “moral claims” that arise from possessing self-respect.⁵² Moreover, insisting that all persons are entitled to respect as persons shifts the onus onto the racist to explain why discrimination is warranted. It exposes as arbitrary the claim that black people should be treated as inferior on the basis of their skin color alone. The racist must correlate skin color to a *lack* of capacity that would justify black people being treated as less than human—a position they can only defend, Williams argues, by invoking irrational beliefs and stereotypes.⁵³ The platitude that “men are men” thus enables us to resist this reasoning by asserting that “these men are also human.”⁵⁴

Yet Williams is careful not to hold out this “tautological” argument as a *grounding* of basic equality. Pointing to a shared humanity is a way of responding to arguments for racial discrimination; it is not a solid foundation for saying “we all share equal intrinsic worth.” For this, he turns to a consideration of the Kantian notion of our equal value resting on our possession of a “moral ability” or a “capacity for virtue.”⁵⁵

Kant attempted to locate moral value, a respect owed to each person, in the mere possession of moral agency or the ability to make moral choices. Williams argues that Kant does so by making moral agency a “transcendental characteristic” or one “not dependent on any empirical capacities.”⁵⁶ But empirical capacities and differences matter and need to be addressed. People possess “different degrees of responsibility and different degrees of rational control over action.”⁵⁷ This undermines any claim to *equal* inherent worth, placing Williams in the skeptical camp. But he goes on to consider whether there might be an argument for each person being entitled to equal respect. He points to a quality analogous to Vlastos’s notion of the uniqueness of individual experience. Each person, says Williams, is owed respect as an end in themselves on the basis of their possession of a “point of view”—of their having

49. *See id.* at 232.

50. *Id.* at 233.

51. *Id.* at 232.

52. *See id.* at 233.

53. *See id.*

54. *Id.*

55. *See id.* at 234.

56. *Id.* at 235.

57. *Id.* at 235–36.

intentions and purposes and an ability to “see what they are doing in a certain light.”⁵⁸ Some ways of treating people would be inconsistent with how they see themselves (as people with intentions and purposes); some forms of treatment would be morally impermissible on the basis that they may “suppress or destroy that [person’s] consciousness.”⁵⁹ However, Williams is careful here to note that this argument would only serve to expose a hierarchical society as inconsistent with respect for and cultivation of individual consciousness. It would not ground a claim to the *equal* intrinsic worth of this consciousness, given other individual differences and the possibility of according them moral weight.

John Schaar’s contribution to the debate involves an assessment of three common forms of argument in defense of the principle of basic equality, finding fault with two and favoring a third.⁶⁰ The first argument can be traced from the Stoics to the assertion of natural equality in the Declaration of Independence (“all men are created equal”). It rests on the idea of common membership in humanity and humanity’s primary place in the “order of being.”⁶¹ The argument involved a “moral assertion based not upon a generalization of experience but upon a postulate of reason and an exercise of faith.”⁶² In Stoic thought, it entailed a belief in inherent human equality under “ultimate” or ideal conditions; in Christian thought, it was a belief that all are children of God. In early modern thought, it took the form of a belief that “each man has a *life* to live” for which they were responsible, the fostering of which grounded a claim to a “minimal equality of treatment.”⁶³ However, the idea of a common humanity lost its plausibility as a ground for equality, Schaar contends, as humanity came to be associated in the Enlightenment with the concept of nature. If, as the Declaration and other sources asserted, we are born equal, or equal by nature, some groups lacking this nature were less than human—a logic that comes to fullest fruition in Nazi Germany. A naturalist conception of equality is where Schaar situates Bernard Williams’ efforts to defend equality. As noted, Williams pointed to the “natural” capacities for pain and affection and to the desire for self-respect as relevant shared qualities. Schaar doubts that we do share these qualities to a significant degree and asserts that by “gloss[ing] over” differences in the possession of them, Williams was “making the word alike do the work of the word equal.”⁶⁴ Williams has no response to the skeptical claim that people with special qualities should receive preferential treatment, despite sharing other qualities. The common humanity argument cannot overcome this problem.

Schaar discerns a second argument emerging in recent years in favor of equal treatment, if not of basic equal worth: one that is found in the civil rights

58. *Id.* at 236–37.

59. *Id.* at 237.

60. See generally John H. Schaar, *Some Ways of Thinking About Equality*, 26 J. POL. 867 (1964).

61. *Id.* at 875.

62. *Id.* at 876–77.

63. *Id.* at 877.

64. *Id.* at 880.

cases of the 1950s and 60s to the effect that treating people as equals will advance desirable common goals.⁶⁵ At the core of this argument, invoked in *Brown v Board of Education*, is the notion that by treating black Americans unequally, they are made to feel inferior, which hinders their mental health and development and will result, in turn, in a less developed, productive society.⁶⁶ But as Schaar notes, this argument either assumes a commitment to the moral equality of all lives or it construes black lives as a mere means to a larger political or social end.

Schaar favors instead a third possible defense of equality found throughout early modern political theory: one that rests on the constitutional separation of public and private realms. The argument, implicit from Hobbes through Kant, Madison, and Bentham, is that “the most efficient way to preserve variety and difference—individuality—in the private sphere is by treating men uniformly—equally—in the public sphere. In a phrase, these theorists postulated public equality in order to preserve private inequalities.”⁶⁷ Judgement or value in this political framework is provisional. Equal citizenship assumes that in the public realm, each must be treated “*as if* he were as good—or as bad—as any other man, and it forbids a public judgment as to whether he *really* is.”⁶⁸ In Schaar’s view then, the notion of basic equality is viable not as a moral or metaphysical claim about equal intrinsic worth, but as a formal, political, or legal principle.

Despite Schaar’s incisive criticisms of naturalist defenses of equality, other thinkers throughout the 1960s and 70s would continue to be drawn to variations on shared qualities, such as moral agency, as a ground for basic equality. John Wilson derived our “intrinsic equality” in the capacity we each possess to reason, make choices, and decide on our values.⁶⁹ We may differ in our ability to reason or choose values. But it makes no sense, he says, to claim that “one person is a better valuer or a better chooser of values than another” since there is no universal criteria of value to which we could appeal to settle the matter.⁷⁰ And without this, it is “impossible to say that one man is superior or inferior to another: for ‘superior’ and ‘inferior’ only make sense in terms of some rule or criterion which is itself man-made.”⁷¹ This is a “natural and not an artificial equality,” he contends, because it “does not depend on any status which we give to particular people as creators of value, but upon the natural abilities of rational beings.”⁷²

We might agree with Wilson that the value of a person’s choices cannot be determined without appeal to a higher, “objective” set of criteria that do not exist. But his view of reason and will as conferring *equal* intrinsic value is

65. *See id.* at 882.

66. *See id.* at 883–84 (discussing the basis for the holding in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

67. *Id.* at 885.

68. *Id.* at 886.

69. *See WILSON, supra* note 4.

70. *Id.*

71. *Id.* at 98.

72. *Id.*

premised on a discounting of the moral relevance of differences in our ability to reason or make choices. As he argues, “[t]here is no difficulty about saying that one man is more purposive, or determined, or responsible than another; but it would be odd to say that one man is more able to form intentions or make choices than another.”⁷³ We may grant this, but ask: why should we place greater value on the *ability* to make choices than on the choices people happen to make? Just because we cannot agree on the value of the different things people choose to do or believe does not mean that our capacity to choose gives us equal intrinsic value. This entails an extra step—the conferring of intrinsic value on the capacity itself. Wilson implies this in remarking that when we devalue the “opium addict” or “mass murderer” on the basis of their having chosen contrary to our values, “this is simply to miss the point . . . that intrinsic equality *lies behind* each man’s values.”⁷⁴ Wilson’s unique contribution here is to suggest that since we cannot decide *ultimately* which choices are superior or inferior, possessing the mere capacity to choose renders us equal by default. Yet the skeptic would point out that moral doubt can operate here in both directions. We may not be able to say whose values are ultimately the best ones, but nothing can stop us from saying we value these things over those, membership in a certain race, high IQ, and so on. The things we value may not be absolutely good, on this view, but our inability to prove this does not mean that everyone’s *ability* to choose values confers upon them equal intrinsic worth. It means only that none of us can establish the absolute importance of what they value.

Also writing in 1967, Stanley Benn offered arguments for our entitlement to equal treatment based on a Kantian sense of our being ends in ourselves.⁷⁵ His argument is thus not strictly about intrinsic equality, but it does include an important thread that would resonate in later work on equality. The argument centered on the problem of the “imbecile,” which he notes has troubled moral philosophers from the Stoics onward, given the importance of rationality for defenses of equality and freedom. We accord humans greater importance than other species and assume each human is “worthy of special consideration” as an end in himself “possibly because each of us sees in other men the image of himself.”⁷⁶ We recognize in others “the potentialities for moral freedom, for making responsible choices among ways of life . . . for striving, no matter how mistakenly and unsuccessfully.”⁷⁷ We thus accord humans a unique status among creatures and individuals an equal intrinsic value “not *insofar* as they are rational, but because rationality is the human norm.”⁷⁸ The imbecile may fall short of the norm, but “if someone is deficient in this way, he is falling short of what, in some sense, he *ought* to have been, given the species to which by nature

73. *Id.* at 99.

74. *Id.* at 100.

75. See generally Stanley I. Benn, *Egalitarianism and the Equal Consideration of Interests*, in *EQUALITY: SELECTED READINGS* 112 (Louis P. Pojman & Robert Westmoreland eds., 1997).

76. *Id.* at 116.

77. *Id.*

78. *Id.* at 117.

he belongs. . . .”⁷⁹ Rather than devaluing the imbecile for diverging from the species norm, divergence becomes a reason for “special compensatory reconsideration, to meet a special need.”⁸⁰ Put another way, all humans are equal, including the imbecile, because they are members of a species for which reason is the norm. Benn’s account of human distinctness and equality is cogent, but it assumes—without establishing it—the central moral importance of the link between species membership and reason, and the lesser importance of variation in ability to reason.

John Rawls addresses the question of intrinsic equality in *A Theory of Justice*, introducing a concept that many egalitarians would later invoke: the range property.⁸¹ His point of departure is to inquire into the basis on which we can determine which beings are owed substantive equality in our political arrangements or the “guarantees of justice.”⁸² We owe this obligation to “[m]oral persons” who possess two features: a conception of the good or a “rational plan of life” and a “sense of justice . . . to a certain minimum degree.”⁸³ The rationale for choosing these qualities in particular rests on his larger theory of justice: “We use the characterization of the persons in the original position to single out the kind of beings to whom the principles chosen apply.”⁸⁴ Rawls concedes that people have “varying capacities for a sense of justice,” but asserts that “this fact is not a reason for depriving those with a lesser capacity of the full protection of justice”; indeed, “[o]nce a certain minimum is met, a person is entitled to equal liberty on a par with everyone else.”⁸⁵ Equality can thus be grounded on “natural capacities” which differ: “All we have to do is to select a range property (as I shall say) and to give equal justice to those meeting its conditions.”⁸⁶ Expanding on this concept, he writes:

[T]he property of being in the interior of the unit circle is a range property of points in the plane. All points inside this circle have this property although their coordinates vary within a certain range. And they equally have this property, since no point interior to a circle is more or less interior to it than any other interior point.⁸⁷

Why moral personality should be chosen as the range property that entitles humans to equal treatment (if not to be accorded equal worth) is “settled by the

79. *Id.*

80. *Id.*

81. See JOHN RAWLS, *A THEORY OF JUSTICE* 504–12 (1971).

82. *Id.* at 505.

83. *Id.*

84. *Id.*

85. *Id.* at 506. Rawls hints at argument reminiscent to Benn’s notion of equality resting on species membership and reason being a species norm where Rawls asserts that some individuals lack moral personality “from birth or accident” but “[t]here is no race or recognized group of human beings that lacks this attribute.” *Id.* He then considers the position of the severely disabled, declining to address it in detail, but asserting: “I assume that the account of equality would not be materially affected” by the problem posed by a person “permanently deprived of moral personality.” *Id.* at 510.

86. *Id.* at 508.

87. *Id.*

conception of justice.”⁸⁸ A description of persons in the “original position” in his broader theory would include moral personality because, as noted above, these are qualities every party would choose in that position, and “the principles of justice assure us that any variations in ability within the range are to be regarded as any other natural asset.”⁸⁹

Rawls considers the potential objection that equality cannot be grounded on natural qualities, such as moral personality, since they vary from person to person. But he asserts that if one recognizes the importance of variation, equality can only amount to a “purely procedural principle”⁹⁰ or the claim that no preferential treatment can be justified without compelling reasons—as Williams had argued. This approach entails “nothing more than the precept of treating similar cases similarly applied at the highest level, together with an assignment of the burden of proof.”⁹¹ It leaves one open to moral skepticism: it “puts no restrictions upon what grounds may be offered to justify inequalities,” making it possible to justify both “slave and caste systems.”⁹² This may indeed be the case; the idea of basic equality may be nothing more than a “procedural principle,” a political commitment. Yet Rawls’s account of equality based on moral personality as a range quality is viable only by relying on a broader theory of justice involving the original position (i.e., persons in that position would have these qualities and would need them only to a minimal degree to complete the experiment). He offers no *independent* argument for why the possession of moral personality as a range quality—having a minimal degree of reason and a sense of justice—should have greater moral significance (i.e., enough to render us equal) than variations in those capacities. Every attempt by later egalitarians to rely on the concept of a range quality will confront the same objection: why should that quality be morally significant, and why at one level and not another?

In an essay titled *Socialism and Equality*, Steven Lukes offered an account of basic equality that straddles the defensive and skeptical camps.⁹³ He sets out by inquiring into the bases on which all humans are entitled to be “considered or respected as equals” for political, social, or economic purposes.⁹⁴ Traditionally, he notes, thinkers have sought to ground equality in basic features such as being children of God, possessing rational wills, or sharing a common humanity—features which give humans intrinsic worth or value. But each of these theories involves “transcendental answers, whether religious or secular”; and in each case, “no *independent* reasons are given for respecting people equally—or at least none that would convince a sceptic disposed to do so unequally, according to, say, birth or merit.”⁹⁵ This is Lukes’s way of asserting

88. *Id.*

89. *Id.*

90. *Id.* at 507.

91. *Id.*

92. *Id.*

93. See generally STEVEN LUKES, *ESSAYS IN SOCIAL THEORY* 96–120 (1977).

94. *Id.* at 98.

95. *Id.* at 99.

that when a Kantian egalitarian selects the common possession of a rational will as the ground for the intrinsic equal worth of human beings, he or she is making a transcendental claim in the sense of positing the superior (“transcendent”) value of the rational will. Yet the skeptic can always doubt the superior value of this chosen property. Lukes offers no other defense of intrinsic equal worth, raising the question of whether it can be defended without resort to a “transcendental answer”—a question he does not address.

Lukes chooses instead to defend the moral imperative to *respect* people equally based on empirical features that humans share—a defense of equality that implies a claim of people’s equal worth without grounding it. Among the relevant empirical qualities that compel respect are the need to survive and maintain health and the capacity to enjoy freedom. Lukes concedes that we may have these needs and capacities to varying degrees. But he asserts a need to respect them to at least a minimal degree:

[I]t is the existence of the needs and capacities, not the degree to which the former are met and the latter realised or realisable [sic], that elicits the respect, and that respecting persons precisely consists in doing all that is necessary and possible to satisfy their basic needs and to maintain and enhance their basic capacities (and to discriminate between them in this regard is to fail to show them equal respect).⁹⁶

This is not quite a version of Rawls’s range property, since it does not turn on possession *of* a property to some minimal degree; it calls for respect *to* a minimal degree. Lukes goes on to elaborate what is necessary in order to meet every person’s entitlement to respecting their needs and capacities, including measures that would help people formulate choices and intentions, to pursue them, and to realize their “self-development.”⁹⁷ But the flaw in Lukes’s argument is that he offers no reason why the existence rather than degree of our basic needs and capacities should “elicit respect.” His argument for respect begins by assuming the value of cultivating our basic needs and capacities rather than deriving a moral imperative to cultivate them from the fact of their existence. He has no response to the skeptical query: Why should we each be equally entitled to a measure of respect if some of us have a low natural capacity to enjoy freedom?

Amy Gutmann traverses similar ground to Lukes but goes further than he does in her analysis of the relation between fact and value.⁹⁸ She notes the common criticism of egalitarianism that people are not equal “in any significant respect” and even if they were, “one cannot move from empirical claims of equality to normative conclusions concerning distributive justice.”⁹⁹ We might feel certain passions but not to the same extent; we might be capable of planning our lives, but not as effectively as others. How can we be equal? One response is to assert that “there exists no clear evidence demonstrating people to be

96. *Id.*

97. *See id.* at 99–100.

98. *See generally* AMY GUTMANN, LIBERAL EQUALITY 18–47 (1980).

99. *Id.* at 44 (endnote omitted).

unequal” in the ways noted here.¹⁰⁰ Inequalities can be explained by “less-than-ideal circumstances” of all past and present societies. But this, she contends, is a “weak defense” of equality since even if people are *potentially* equal under certain conditions, “their capacities for rationality and for happiness are very likely to differ.”¹⁰¹ She thinks a better response to skepticism of equality is to concede that we can find inequalities among people but deny their “political significance.”¹⁰² Empirical inequalities among humans do not preclude political egalitarian assumptions. Differences are not “inherently associated with any easily discernible traits, with any class, ethnic, racial, or sexual characteristics of persons.”¹⁰³ So long as a person can abide by law and make rational plans, they can partake in political processes on an equal standing.

On Gutmann’s account, people may not share an equal intrinsic worth, but the principle of political egalitarianism survives without this claim. It does so, as Gutmann notes, by acknowledging that “[t]o argue in the context of political theorizing that people are equal entails an *evaluation* that their shared characteristics are politically more significant than their differences.”¹⁰⁴ Differences in strength between men and women do not justify different voting rights because we deny the relevance of this fact to voting, not its empirical validity. Description alone, she says, cannot ground equality without a “valid (and often implicit) mediating claim” about when a fact is relevant to a value or principle.¹⁰⁵ For Gutmann, if we are equal in some basic sense, it can only be within a political or moral framework we posit or choose to commit to.

B. *Skeptical Accounts of Intrinsic Equality*

I return to the 1940s once again to cover the same period, but this time with a focus on figures who are overtly skeptical of our equal intrinsic worth or the possibility of uncovering an argument that would confirm this. Figures in this camp range from those who argue that basic equality cannot be established and operates as a moral or political commitment to those who believe that even a commitment to the ideal of equality is untenable.

A notable skeptic of intrinsic equality writing in the late 1940s was Hannah Arendt, who argued in *The Origins of Totalitarianism* that “[m]en are unequal according to their natural origin, their different organization, and fate in history. Their equality is an equality of rights only, that is, an equality of human purpose”¹⁰⁶ As both Schaar and Lukes would later do, Arendt suggested that the political ideal of equality emerged from the “Jewish-Christian tradition” and its “metaphysical concept” of humanity’s “divine origin” in “God’s creation.” Equality was central to this ideal since God’s purpose was to

100. *Id.*

101. *Id.*

102. *Id.* at 45.

103. *Id.*

104. *Id.* (endnote omitted).

105. *Id.* at 47.

106. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 234 (1951).

create a singular “mankind,” comprising a “family of nations.”¹⁰⁷ Nineteenth century positivism and racism subverted this conception by introducing the idea of the “divine origin of one people as contrasted with all others.”¹⁰⁸ But after the Second World War, the ideal of equality had begun to regain salience on the international stage. Anticipating Schaar, Arendt argued that in its renewed form, the ideal of equality rested on a “deep-rooted suspicion of [the] private sphere” extending as far back as ancient Greece.¹⁰⁹ A long tradition of political thought had relegated to private life the importance of individual differences while insisting upon the “law of equality” in public life.¹¹⁰ In an oft-cited passage, Arendt asserted that:

Equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.¹¹¹

We are, on this view, not intrinsically equal—implicitly we are naturally unequal—and are only equal within a political community committed to upholding the principle of equality in public life. This equality, for Arendt, notably rests on nothing more than a “decision.”¹¹² Arendt offers an implicit justification for this decision in her larger theory of the importance of politics to the “human condition.”¹¹³ In ways to be seen below, every later theory that conceives of equality as a commitment does the same in pointing to a larger theory of politics as an implicit justification.¹¹⁴

In an essay titled “Against Equality,” JR Lucas offered an analysis of equality consistent with Arendt’s theory.¹¹⁵ He argued that the equality in our political arrangements, the claim that people ought to be treated equally, rests on “nothing other than the principle of universalisability” or “[f]ormal

107. *See id.*

108. *Id.*

109. *Id.* at 301.

110. *Id.*

111. *Id.*

112. At roughly the same time, Margaret MacDonald in *Natural Rights* similarly argued that:

To assert that . . . ‘All men are of equal worth’ is not to state a fact but to *choose* a side. It announces *This is where I stand*.

. . . .

Do we, then, decide without reason? Are decisions determined by chance or by whim? . . . [T]here are some choices into which merit hardly enters. Those involving personal relations, for instance. It would seem absurd to try to prove that our affections were not misplaced by listing the characteristics of our friends.

Margaret MacDonald, *Natural Rights*, 47 PROC. ARISTOTELIAN SOC’Y 244, 246–47 (1947), reprinted in THEORIES OF RIGHTS 21, 35–37 (Jeremy Waldron ed., 1984).

113. *See generally* HANNAH ARENDT, THE HUMAN CONDITION (1958).

114. *See generally* PHILLIPS, *supra* note 8, at 40–62.

115. *See generally* J.R. Lucas, *Against Equality*, 40 PHIL. 296 (1965).

[e]quality”—in the sense that “if two people are being treated, or are to be treated, differently, there should be some relevant difference between them.”¹¹⁶

Yet the principle of formal equality provides us with no criteria of relevance, no basis on which to exclude varying qualities as irrelevant. Lucas describes it as a form of argument that does not lead to any conclusion.¹¹⁷ Egalitarians “profess to be less concerned with differences than with samenesses,” offering arguments to the effect that “since people are, in fact, similar, their treatment should be similar too.”¹¹⁸ But by pointing to similarities between people, egalitarians do not establish equality. As he argues, all men may be men, and all men are equally men, but not all men are equal.¹¹⁹ Put another way: there is no way to establish with certainty why similarities among humans are more fundamental or of greater moral significance than differences among humans. Yet, as Lucas notes, we do believe that human beings, as rational and sentient creatures, are entitled to be treated alike in certain basic respects, including not being killed or tortured.¹²⁰ In this case, we are not treating people as equals, he asserts; we are only according them equal treatment in certain respects. But in the basic respect we accord each person in refraining from killing or torture, he argues, it is “respect for [persons] . . . which is doing the logical work, while the word ‘[e]quality’ adds nothing to the argument and is altogether otiose.”¹²¹ He thus distinguishes formal equality and equality of respect; one pertaining to people and the other to how they should be treated. Neither ground human equality in a moral sense. But both do serve important purposes as political ideals. Formal equality grounds the principle of equality before the law, which minimizes (but does not preclude) bias in the application of law. And equality of respect grounds a set of moral obligations we commit to uphold.

In his 1979 book *Equality, Liberty, and Perfectionism*, Vinit Haksar undertook the most extensive analysis of the problem of intrinsic equality to date, canvassing seemingly every prior form of argument in defense of the idea.¹²² It remains unsurpassed in its comprehensiveness, and contains at least an implied response to every later attempt to defend basic equality. I can only touch here some of its many arguments. Haksar quickly dispenses with attempts to ground equality in rationality, autonomy, or a capacity for moral sentiments by noting the problem of variation (why shouldn’t more rational people be favored?).¹²³ He critiques the notion of a range quality, a “cut-off point” (e.g.,

116. *Id.* at 296.

117. *See id.* at 297.

118. *Id.*

119. *See id.*

120. *Id.* at 298.

121. *Id.*

122. *See generally* VINIT HAKSAR, *EQUALITY, LIBERTY, AND PERFECTIONISM* (1979). Haksar canvases the various forms of argument but does not undertake a survey of prior attempts as is done here. To be clear, I point to this work as an outstanding study of *intrinsic* equality; a larger body of literature explores equality as a political or ethical value more broadly, including such works as John Wilson’s *Equality*, *supra* note 4, or Ronald Dworkin’s *Sovereign Virtue*, *supra* note 5.

123. *See* HAKSAR, *supra* note 122, at 18–19.

possession of a certain level of rationality, autonomy, etc.), which excludes other creatures and entitles all who meet it to equal respect by asking “what is so sacred about the cut-off point?”¹²⁴ Some have argued that when we chose the cut-off point, we do not need further justification of it; instead it serves as “one of those ultimate principles that is used as a standard for justifying other principles.”¹²⁵ Maybe egalitarians need nothing more. But if so, basic equality would function as an axiomatic principle, an overtly chosen value (as Arendt had suggested).

We are inclined not to settle with intrinsic equality as an axiomatic assumption, Haksar observes, when we are pressed by some who doubt that only humans should belong to the category of those deserving the highest respect and concern, rather than some or all other animals.¹²⁶ One response has been to resort to the principle of formal equality, that like cases should be treated alike. In this case, we run into the problem of explaining which similarities among creatures are relevant. We can only solve this problem—and thus defend equality and human moral primacy—in one of two ways: by relying on an account that is metaphysical or “perfectionist” or one that is not. If we point to a metaphysical quality we share in common (our humanity, souls, reason), why should this give us rights or compel respect? The skeptic might concede our common possession of this property in distinction to animals but wonder why the property yields equality among humans. Why is possession of a natural property significant rather than what one is “capable of doing either now or in the future[?]”¹²⁷ The Kantian response is to argue that creatures without reason lack inherent value and cannot be ends in themselves. But, as Haksar notes, arguments of this form are premised on the assumption that reason (or whatever shared quality one chooses) is inherently more valuable than the possession of language or, say, great strength.¹²⁸ The Kantian assumes, without justifying it, the claim that “forms of life that exhibit rationality are superior to non-rational forms of life”¹²⁹ We do not find equality in a special shared property; we posit its value in singling it out.

A second form of argument Haksar canvasses is the “contractarian model,” a variation on the notion of a range quality.¹³⁰ We are equal in the sense of being members of a club. We need to be proficient enough to play the sport to belong, but once we are, differences in skill are not important—at least for membership. Rawls’s argument works this way: “Those who can give justice are owed justice.”¹³¹ But while the contractarian argument can explain why some should have certain rights (to vote, to be free from domination), it cannot settle questions of value, such as why an animal’s life should be sacrificed

124. *Id.* at 19.

125. *Id.*

126. *See id.* at 21–22.

127. *Id.* at 21.

128. *Id.* at 22.

129. *Id.* at 33.

130. *See id.* at 23.

131. RAWLS, *supra* note 81, at 510, *noted in* HAKSAR, *supra* note 122, at 24.

before a human's life. For this, we must rely on metaphysical assumptions or assertions of value. Yet as soon as we point to an essence that gives humans a superior status to animals, we run into the problem of whether the unequal distribution of the essence should accord higher status to some humans over others.¹³²

Two further arguments that do not appear to rely on metaphysical assumptions also fail, in Haksar's view, for concealing a dependence upon such assumptions: the family argument and the argument from sentiment. The family argument derives from Christian thought (we are children of God) but now assumes a secular form in the idea of our belonging to a common family. We may not be superior to other animals on this theory, but we have "special obligations and loyalties" to other members of the human family.¹³³ The problem here is that our ideas about what constitutes the family differ and we can only draw the line (geographical, biological) by positing the value of one criterion over another. The argument pertaining to "sympathy" and "sentiments" rests on the notion that humans possess something special and equal in value in their having a point of view—one which we can appreciate through empathy or understanding of each other that does not apply between us and non-human creatures. Yet, as Haksar points out, many people do sympathize deeply with animals, raising the question of why sympathy with strangers should assume greater moral importance than sympathy with animals one may feel closer to.¹³⁴ Every defense of equality, Haksar concludes, must rely on a moral or metaphysical value that is supplied rather than derived from some empirical quality about humans.¹³⁵

Writing the same year as Haksar, D.A. Lloyd Thomas inquired into whether humans are, in any sense, equal in fact rather than being considered equal only within a political framework.¹³⁶ He wanted to assess whether possession of a "characteristic" could ground an entitlement to rights, giving all who possess that trait the same entitlement. In order for the common possession of a characteristic to support equal rights, he contends, it would need to satisfy four criteria.¹³⁷ First, it must be open to empirical confirmation.¹³⁸ It cannot be an evaluative property, such as the "individual human worth" people acquire "simply because they are persons," as Vlastos had suggested.¹³⁹ Worth must "supervene" on a factual quality. We might find this quality in our capacity to enjoy a good life. A second requirement is that the quality must be common to

132. HAKSAR, *supra* note 122, at 25–26.

133. *Id.* at 38.

134. *See id.* at 46.

135. *See id.* at 8, 55.

136. *See generally* D.A. Lloyd Thomas, *Equality Within the Limits of Reason Alone*, 88 MIND 538 (1979).

137. *See id.* at 540–47.

138. *Id.* at 540.

139. *Id.* (quoting Vlastos, *supra* note 27, at 127). As Thomas notes, Vlastos conceded that if a Martian went looking for the special quality called "worth," he wouldn't find it. *Id.* at 541 (quoting Vlastos, *supra* note 27, at 127–28).

all people but “unique to people” rather than other creatures.¹⁴⁰ A chief contender is the “capacity to envisage ends, plans of action, and projects,”¹⁴¹ yet not all humans possess this. A third requirement is relevance. We must show that the quality at issue “bears on the forms of equal treatment”¹⁴² Here we run into a deeper problem. The quality we choose can be evaluated differently: does a capacity to make plans render us ends in ourselves or, as some might assume, fit for being an instrument for others’ purposes? Here Thomas surrenders to the moral skeptic: “Hence the relevance of this property (or for that matter, of any other) for prescriptions as to treatment perhaps can never be established as a matter of necessity: one has to bring in the particular prescriptions to which particular individuals do in fact commit themselves.”¹⁴³ If we could somehow overcome this problem, we would face another hurdle in the fourth requirement: “[T]hat the property be present in all people to an equal degree.”¹⁴⁴ If the property is held in differing degrees (and what quality isn’t?), it would be difficult to defend the claim that all who possess it “should be treated in the same way as any other who has it.”¹⁴⁵ He concludes by asserting that “the reasonable view is that we do not know whether normal people are in fact equal in a way relevant to the possession of certain equal rights.”¹⁴⁶

Writing almost a decade later, John Kekes offered one of the most incisive analyses of intrinsic equality, challenging the belief that “all human beings have equal worth independently of their moral merit.”¹⁴⁷ The belief persists given the salience of three assumptions. One is a distinction we assume between the self and the various qualities we possess. The self is permanent, on this view, and the qualities are changeable. Worth attaches to our self and moral merit only to our qualities. Rights protect and foster the development of the self, which is logically anterior to the qualities it acquires.¹⁴⁸ But the assumption is false, Kekes argues, because a self distinct from all qualities is no longer a *human* self. To make it human, we must imbue it with qualities common to humans, and once we do, we encounter the problem of variation and why differences in our possession of the quality should not matter.¹⁴⁹ A second assumption is that “human worth attaches to universal qualities of humanity,” such as “rationality, altruism, self-direction,” while “moral merit is partly due to individual qualities people have but do not deserve.”¹⁵⁰ Since moral merit (differences in character and ability) depends on luck in the “genetic lottery” or

140. *Id.* at 542.

141. *Id.* at 543.

142. *Id.* at 544.

143. *Id.* at 545.

144. *Id.* at 547.

145. *Id.*

146. *Id.* at 553.

147. John Kekes, *Human Worth and Moral Merit*, 2 PUB. AFFS. Q. 53, 53 (1988).

148. *See id.* at 56.

149. *See id.* at 57–60.

150. *Id.* at 60.

in “being raised in a hospitable setting,”¹⁵¹ we deem it unfair to distribute rights to freedom and well-being in accordance with moral merit. Yet, as Kekes maintains, if people do not “deserve” rights based on moral character, since they did nothing to acquire them, for the same reason, they cannot be said to deserve rights or to be valued based on possession of universal qualities, since they did nothing to acquire those either.¹⁵² A third assumption is that it is good for people to “develop their potentialities” and equal rights to freedom and well-being “protect the conditions in which human potentialities can be developed.”¹⁵³ Fostering everyone’s individual potential enhances both individual and collective welfare. Yet, as Kekes argues, this relies on the implicit premise that our common potentialities are fundamentally good—that people who misuse their potential still possess it, leaving room for “reform and improvement.”¹⁵⁴ Being immoral, on this view, “is merely a poor moral performance.”¹⁵⁵ A more plausible account, says Kekes, is that immoral behavior, “cruelty, aggression, greed, hostility, and malice are also human potentialities”¹⁵⁶ People who engage in a “lifelong pattern of malevolent immorality”¹⁵⁷ have not merely failed to meet their potential for good, they have realized their potential for immorality. Humans are born with a potential to be good or bad, just as they can be healthy or unhealthy. This fatally undermines the argument for attributing equal worth and rights so as to foster potential for moral merit, since equal rights can readily foster immorality. He concludes by asserting that egalitarians do not offer a good argument for “rejecting the obvious and commonsensical conviction that human worth is proportional to moral merit.”¹⁵⁸

In 1990, Peter Westen explored various meanings of the idea of equality itself, including identity, equivalence, and relation.¹⁵⁹ He argued that despite having various meanings, “equality appears to be a single concept”—but one which “lends itself to multifarious and contradictory conceptions.”¹⁶⁰ It is a relation between two or more persons or things that may differ in one or more respects but when measured or compared “by reference to a relevant standard of comparison” are “ascertained to be indistinguishable.”¹⁶¹ Conceptions of equality can thus involve the same variables but differ when they involve different ideas of a relevant standard. The relevance of a standard is a matter of both fact and value. It is a decision about which fact should matter in any

151. *Id.*

152. *See id.*

153. *Id.* at 62.

154. *Id.* at 63–64.

155. *Id.* at 64.

156. *Id.* at 65.

157. *Id.*

158. *Id.* at 66.

159. *See generally* PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE (1990).

160. *Id.* at 120.

161. *Id.*

comparison. Westen falls within the skeptical camp on intrinsic human equality in holding:

The concept of equality does not itself contain criteria for judging standards of comparison; it presupposes them. Equality is a relationship that obtains among persons or things by reference to *such standards of comparison as have been independently established as appropriate to the states of affairs one wishes to bring about*.¹⁶²

The common fallacy in defenses of intrinsic equality, Westen asserts, is the assumption that “controlling standards of comparison are descriptive when they are really prescriptive.”¹⁶³ Whether it is reason, the capacity to experience happiness, or moral personality, the choice of a descriptive standard can only result in a prescriptive standard by introducing a norm or rule: Those with x quality *ought* to be treated as equals. “Without such norms, prescriptive equality is impossible because there is no standard by which people can be compared with respect to what they owe or deserve.”¹⁶⁴ How, then, do we choose a norm or standard by which to compare humans? The answer, he contends, “must be sought not in conceptions of equality (which coincide with, rather than precede, the formulation of rules), but in external theories of justice and justification.”¹⁶⁵

Following soon after Westen, Louis Pojman ventured a brief survey of arguments for intrinsic equality, and by then, the frailty of the many common defenses seemed so obvious as to leave him “puzzled” as to the tenacity of the belief.¹⁶⁶ He began by noting that most contemporary egalitarians draw on Kant’s “doctrine of Ends” to defend intrinsic equality: that is, as rational beings, we possess a dignity that compels us to treat one another as ends not means.¹⁶⁷ Yet egalitarians “generally distance themselves from the metaphysical grounding of Kant’s doctrine.”¹⁶⁸ Pojman asserts: “[I]t may well be that without some deeper metaphysical underpinnings equal rights theories fail to persuade thoughtful persons.”¹⁶⁹ He wonders whether a belief in basic equality “is simply a left over from a religious world view now rejected by all of the philosophers examined in this paper.”¹⁷⁰ Among other common arguments he considers is the “family metaphor,” the notion (which he associates with Vlastos) that humans are equal because we are members of a “moral community” that functions as a “loving family.”¹⁷¹ The metaphor does not tell us why variant

162. *Id.* at 121.

163. *Id.* at 122.

164. *Id.* at 123.

165. *Id.* at 125.

166. Louis P. Pojman, *Are Human Rights Based on Equal Human Worth?*, 52 PHIL. & PHENOMENOLOGICAL RSCH. 605, 607 (1992).

167. *Id.* at 606.

168. *Id.*

169. *Id.* at 607.

170. *Id.*

171. *See id.* at 611.

traits among members should not entitle them to special privileges or why each person has any worth at all. A further argument is Rawls's notion of the equality of all persons based on "the capacity for moral personality," which Rawls says is comprised of two features: a conception of the good and a sense of justice.¹⁷² Pojman describes this as a version of Kant's notion of humans as ends in themselves; it "presupposes equal and positive worth" from the outset rather than justifying it.¹⁷³ Why have only one threshold (those with or without this capacity)? "Why not have five or six thresholds?"¹⁷⁴ Similarly, any capacity one might choose as a standard for equality will be one that people possess in varying degrees. Why discount the variance? He concludes that "[s]ecular egalitarian arguments for equal rights seem, at best, to be based on a posit of faith that all humans are of equal worth or that it is useful to regard them as such."¹⁷⁵

III. INTRINSIC EQUALITY IN TWENTY-FIRST CENTURY THOUGHT

Attempts to probe the question of intrinsic equality in moral and political theory have continued in earnest since the turn of the millennium. If one thread runs through almost all inquiries in this period it is the concession that one's account does not defeat the moral skeptic and that it is likely impossible to do so. But in their response to this insight, thinkers in this period fall into three groups. One attempts to provide a rationale or account, rather than an absolute defense, for the principle of basic equality in legal and political thought. A second group gives up trying to defend our equal intrinsic worth and tries instead to explain why we should treat people equally or accord them equal rights despite our differences. A third group argues that no reasonable account of intrinsic equality or the obligation to treat humans equally can be sustained. The crux of this skepticism is that any account of equality or equal treatment will rest on the value of some property or idea that must be posited or tacitly assumed.

A. *Efforts to Account for Intrinsic Equality*

In "Why We Are Moral Equals," George Sher proposes a new answer to the problem of how we all share the "same moral status."¹⁷⁶ He draws on Bernard Williams's argument that people are equally owed respect on the basis of possessing a point of view. For Sher, our equal value resides in each of us being "a conscious subject," for whom "certain things appear to matter, and certain courses of action appear to be open . . ."¹⁷⁷ Since we all possess subjectivity, "any variations in the contents of our beliefs and aims, and in the

172. *Id.* at 620.

173. *Id.*

174. *Id.*

175. *Id.* at 622.

176. George Sher, *Why We Are Moral Equals*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON 'BASIC EQUALITY' AND EQUAL RESPECT AND CONCERN* 17, 17 (Uwe Steinhoff ed., 2014).

177. *Id.* at 20–21.

capacities that gave rise to these . . . simply drop out as irrelevant.”¹⁷⁸ Waving away the skeptic, he insists that “we are moral equals because we are all equally centers of consciousness” and that this is “invulnerable to refutation through appeals to empirically discoverable differences.”¹⁷⁹ Given that we share this equal value, we have a “set of fundamental interests that count equally in determining what others have moral reason to do”¹⁸⁰ There is, however, nothing new in Sher’s argument. Subjectivity is his choice of range quality. Why is our equal possession of subjectivity morally special—more special than our beliefs, capacities, or actions? And why do degrees or quality of subjectivity not matter in this assessment? Ignoring the skeptic here does not make them go away.

A further problem with Sher’s theory is analogous to one raised by John Kekes in relation to the idea of the self.¹⁸¹ Sher asserts that “[d]espite the endless variety of people’s thoughts, ambitions, and capacities, each has a unifying consciousness with [the] same generic structure.”¹⁸² But when Sher defines this structure, he makes reference to qualities that vary, such as a person’s ability to “project[] himself into the future as the continuing subject of a certain kind of life.”¹⁸³ Once again, why shouldn’t variance here matter? Sher’s argument only works if we discount the relevance of variation in constructing bare consciousness, and if we assume the greater moral relevance of possessing consciousness over other qualities. To his credit, Sher concedes these problems implicitly in asserting at the close of his argument: “This explanation is not intended to convince the moral skeptic.”¹⁸⁴ His aim was only to explain why the facts he “singled out” are the ones to “fill a theoretical role whose contours are dictated by the normative beliefs that we already hold.”¹⁸⁵

Thomas Christiano has sought to defend intrinsic equality by lending a new twist on the oldest ground of defense: our possession of reason.¹⁸⁶ He draws on Aristotle’s notion that living creatures can be grouped into qualitative categories: those merely alive, those sentient, and those that are rational.¹⁸⁷ Each entails a greater status, with living creatures attracting a basic “dignity” and “worth” and a duty that it not be “destroyed gratuitously”; sentient creatures being owed a respect not to cause “unnecessary pain”; and rational beings possessing a distinct value since they can see “values in the world” and this

178. *Id.* at 21.

179. *Id.* at 22.

180. *Id.*

181. *See generally* Kekes, *supra* note 147.

182. Sher, *supra* note 176, at 23.

183. *Id.* (endnote omitted).

184. *Id.* at 26.

185. *Id.*

186. *See generally* Thomas Christiano, *Rationality, Equal Status, and Egalitarianism*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON ‘BASIC EQUALITY’ AND EQUAL RESPECT AND CONCERN* 53 (Uwe Steinhoff ed., 2014).

187. *See id.* at 61–62.

“adds a distinctive kind of value to the world.”¹⁸⁸ Living beings and animals are capable of self-determination, but rational beings possess this “in a deeper way than other beings”—and this, for Christiano, gives rise to “normatively relevant discontinuities” between them.¹⁸⁹ Humans may not share rationality to the same extent, and he concedes this opens the egalitarian to skepticism as to why differences should not render us morally unequal.¹⁹⁰ His creative response is to invoke the notion of a qualitative transformation: “[A] change from below the threshold to above the threshold involves some kind of substantial transformation of the nature of the being involved while changes above the threshold do not”¹⁹¹ To give a chimpanzee rationality, he asserts, is not to give them more of a capacity they already had but to turn them into a different being.¹⁹² Threshold is more important than degree, for Christiano, because one entails a qualitative difference and the other merely quantitative. This too, however, entails a thinly veiled attempt to hide a value judgement. To assert that a being capable of reason is qualitatively more valuable than one without it and qualitatively of equal worth to all those who possess it—despite how much—is simply another way of saying that having *some* reason is more important than having *a lot* of reason. It is not a justification of why this is so. Christiano may have provided an account of why having some reason makes humans qualitatively different and possibly superior to other creatures, but not why possession of reason alone makes us equal.

Jeremy Waldron has explored basic equality in a series of works, most recently and at greatest length in *One Another's Equals*.¹⁹³ In this book, Waldron is careful to make clear that in providing an account of why humans should be considered morally equal and hold greater value than other creatures, he is not providing an account meant to sway the moral skeptic.¹⁹⁴ He relies on the concept of a range quality, but rather than settle on one quality on which to build a case for equality, he considers various candidates. These include “personal autonomy, reason, the capacity for moral thought and action, and the capacity for love.”¹⁹⁵ Waldron recognizes the problem of justifying a range quality as a basis for equality and offers two arguments in defense of his assortment of qualities: the sense of “awe” Kant spoke of when encountering another person with moral agency and the sense in which a capacity for love allows us to “engage in a very deep interaction” with another being with that

188. *Id.*

189. *Id.* at 63.

190. *See id.* at 53.

191. *Id.* at 73.

192. *Id.*

193. *See generally* WALDRON, ONE ANOTHER'S EQUALS, *supra* note 4; Waldron, *Basic Equality*, *supra* note 6; WALDRON, GOD, LOCKE, AND EQUALITY, *supra* note 6.

194. WALDRON, ONE ANOTHER'S EQUALS, *supra* note 4, at 66 (“[W]e are not looking for a descriptive property to *drive us* toward equality or to *prove* that equality is valid. Rather, we are looking for a descriptive property whose conjunction with our prescriptive position will help make sense of the whole egalitarian package.”).

195. *Id.* at 196.

capacity.¹⁹⁶ Waldron concedes that both arguments involve placing value on the mere possession of a capacity over variance in possession, but suggests that he is only setting aside differences in capacity for certain purposes. He explains the unique value we place on people in light of their variant qualities by invoking the idea of “scintillation”.¹⁹⁷

Sometimes we are looking at where individuals are on the scale—how they are doing, the quality of their choices, what their life is actually like—and sometimes our attention flits back and rivets itself, for the work that human equality has to do, on the mere presence of the range property in question. We scintillate back and forth.¹⁹⁸

Yet, as Ian Carter has noted, Waldron’s idea of scintillation does not provide a justification for focusing on a range quality over differences in capacity.¹⁹⁹ The latter would seem to call the moral significance of the former into question. This is a problem that Waldron shares with all other theorists who rely on the idea of a range quality and, like them, doesn’t overcome.

Waldron’s final chapter addresses how severely disabled people might be equal and attempts to counter Peter Singer’s arguments that these humans are no better than non-human animals.²⁰⁰ Waldron describes range qualities that make us human as being dynamic rather than static, as developing, in the normal case, along a trajectory that unfolds over a lifetime.²⁰¹ We recognize and accord rights to children as human because we understand them to be humans on a trajectory that will culminate in full adulthood.²⁰² Disabled humans also had this natural potential—a potential that would have resulted in their possession of a capacity for moral agency—but it was disrupted.²⁰³ It is the possession of this potential, which rests in turn on possession of human DNA, which grounds their claim to equal worth with other humans. One response to this argument is to point out that even if disabled people can be said to share the range quality of moral capacity with other humans (since they possessed the biological teleology for it, if not the thing itself), why is the range quality special? Vinit Haksar offered another response. Saying that a “congenital idiot,” as he put it, might have been born as a normal person is no different than saying he might have been born as a dog.²⁰⁴ The possibility of being a normal human is no more essential to his essence than a dog having been born a dog rather than a human

196. *Id.* at 140.

197. *Id.* at 157.

198. *Id.*

199. Ian Carter, *Review*, 35 *ECON. & PHIL.* 167, 170 (2019) (reviewing WALDRON, *ONE ANOTHER’S EQUALS*, *supra* note 4).

200. *See* WALDRON, *ONE ANOTHER’S EQUALS*, *supra* note 4, at 221 (discussing PETER SINGER, *PRACTICAL ETHICS* 66 (3d ed., 2011)).

201. *See id.* at 233–34.

202. *See id.* at 236.

203. *See id.* at 241.

204. HAKSAR, *supra* note 122, at 73.

is essential to his.²⁰⁵ As Haksar puts it: “from the fact that the idiot would have had right to equal consideration if he had been born normal, it does not follow that he has such a right even though he is a congenital idiot.”²⁰⁶ Put another way, the disabled person did not have the potential to be normal; assuming this potential is to posit the equality one is meant to establish.

Among the most recent defenses of intrinsic equality is an effort by Nikolas Kirby that takes us back almost to the beginning of our story, by drawing on the work of Herbert Spiegelberg.²⁰⁷ Kirby seeks to make a case for equality based on what amounts to a range quality, one that he finds in Spiegelberg’s notion of “relative potential.”²⁰⁸ We have differing capacities to achieve morally laudable goals, given our differing abilities, but we all have a *potential* to achieve or not achieve our moral goals and are thus equal in our possession of that chance.²⁰⁹ As Spiegelberg put it “[a]ll that matters is: how big were our efforts in proportion to our unequal and varying momentary equipment?”²¹⁰ We are equal because everyone has some potential to realize moral goals, however big or small they may turn out to be. We can all do our best with whatever level of ability we were born with, or we can do little and achieve nothing of value. Yet here too we might ask: Why is our equal possession of this potential more morally significant than our differing abilities to realize our goals? Why is our equal potential the focus of moral value rather than our uneven accomplishments or strengths? In other words, it is not the fact of our possession of this potential that makes us equal, but rather the decision to assign moral value to this property that constitutes our equality.

B. Defenses of Equal Treatment

When Geoffrey Cupit entered the debate on equality in 2000, skeptical arguments against our intrinsic equal worth seemed, by then, too numerous and daunting to overcome.²¹¹ He sought instead to ground an argument for a moral obligation to treat each person as equal. He did so on the basis of our individuality, yet the argument is exceedingly intricate. The thrust of it is to claim that it is inherently unjust to allow interference with “individual sovereignty,” since this disrespects “each person as a separate and independent being.”²¹² Justice requires recognition of the separation. This involves positing the “incomparability” between people by virtue of the fact that comparison of their worth would entail assessing someone by taking them outside their world.²¹³ Doing so would entail failing to see them as “complete” or “whole”

205. *See id.*

206. *Id.*

207. *See generally* Nikolas Kirby, *The Problem of Basic Equality: A Constructive Critique*, 26 J. ETHICS & SOC. PHIL. 495 (2024).

208. *Id.* at 513 (emphasis omitted).

209. *See id.*

210. *Id.* at 514 (quoting Spiegelberg, *supra* note 35, at 108) (footnote omitted).

211. *See generally* Geoffrey Cupit, *The Basis of Equality*, 75 PHIL. 105 (2000).

212. *Id.* at 117 (footnote omitted).

213. *Id.* at 119.

rather than as a “part” of something larger. As to why “completeness does confer superiority” or recognition of it is morally compelled here, Cupit does not say.²¹⁴ But he believes that since this completeness as a value is not “implausible,” his account of why we should treat people as equals is viable.²¹⁵ He is correct on the assumption that we accept, without warrant, the moral importance of our individuality and separateness.

In 2011, Ian Carter offered what may be the most cited and discussed theory of intrinsic equality to emerge in recent years.²¹⁶ He begins by noting the difficulty that all earlier theorists have run into in trying to ground equality in “moral capacities” all people share—reason, consciousness, having a point of view—since people’s capabilities in each case differ, rendering us presumptively unequal.²¹⁷ He proposes an approach opposite to the one taken by Bernard Williams. Instead of assuming a person’s perspective, we should remain external to them, look not at their “varying agential capacities,” and treat them instead as “opaque.”²¹⁸ This does require looking inside to a minimal degree at the outset to confirm that a person has a “certain minimum of agential capacities” (i.e., to reflect or make plans) in order to know that it is “appropriate to treat that individual as opaque.”²¹⁹ But once we recognize this threshold, “opacity kicks in.”²²⁰ Once it does, he asserts, difference in abilities do not matter. He calls this “‘opacity respect’.”²²¹ We might see variation, but “we refuse to let such perceptions count as among the reasons motivating our treatment of those people.”²²² Thus far, Carter’s theory sounds like little more than a rhetorical repackaging of the idea of a range quality. To assert that once a minimum capacity is met, opacity kicks in is to say nothing more than: let’s focus on the range quality (minimum capacity to plan, reflect) rather than variance in degree. But why *should* we refuse to see variation?

Here is where the theory runs aground. We are owed opacity respect, says Carter, because it comports with “respect for a kind of outward dignity.”²²³ The concept of dignity here is analogous to Thomas Nagel’s notion that “concealment is . . . a basic human need.”²²⁴ Just as we need to cover up the body to maintain dignity, we need to maintain a certain distance on our agential capacities to maintain respect for them:

The basic idea is that when an agent is laid bare—when it is considered as an agent and no more than an agent—our respect for

214. *Id.* at 124.

215. *Id.*

216. *See generally* Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538 (2011).

217. *Id.* at 544.

218. *Id.* at 551–52.

219. *Id.* at 552–53.

220. *Id.* at 553.

221. *Id.*

222. *Id.* at 551.

223. *Id.* at 556.

224. *Id.* (citing THOMAS NAGEL, CONCEALMENT AND EXPOSURE, *as reprinted in* CONCEALMENT AND EXPOSURE AND OTHER ESSAYS 3 (2002)).

that agent depends on our clothing it with outward dignity as an agent—that is, on our adopting an external point of view, taking the agent as given and refraining from “looking inside”²²⁵

The need for opacity, then, the moral obligation to look past variance, derives from the need to respect dignity. To respect people’s dignity as agents, we need to give them a certain distance. It is this and not the tacit presumption of equality that grounds opacity respect, and it is only once opacity kicks in that we have equality.²²⁶ The problem with all of this is that Carter never explains why we *should* respect the dignity of every agent. By assuming this, his theory posits or assumes the moral equality it is meant to ground.²²⁷

Anne Phillips comes to the debate with a deep skepticism about the merits of grounding equality in a shared property.²²⁸ Aside from the problems thus far canvassed of not being able to find a morally relevant property that all share equally or of justifying why variation is irrelevant, Phillips objects to the idea that equality be understood as “conditional on” a shared property.²²⁹ The trouble with this is that it lends itself to discriminatory treatment; racists, sexists, and xenophobes can always argue that others are unequal because they lack a certain quality or possess it to a lesser degree. She argues instead that “equality needs no such justification; . . . it is not something we ‘recognise’ [sic] once we notice some quality in others; but something we make happen through our commitment and our claims.”²³⁰ She lauds Hannah Arendt for conceiving of equality not as something we possess but as something we bring about through our actions and beliefs.²³¹ She resists Waldron’s criticism that equality understood as a commitment reduces it to a mere decision in the sense of being arbitrary.²³² “To the contrary,” she argues, “equality is an ambition and commitment that has emerged historically, been fought over politically, and makes large claims on us.”²³³ But by pointing to this history, Phillips begs the question: why were we committed to equality in the past, and why should we be now? Her theory assumes the correctness of equality rather than trying to prove it. She insists that those who disagree “provide some plausible reason for *not* treating others as equals.”²³⁴ She thus turns the tables on the skeptic of equality and asserts that it is *inequality* that needs to be justified and cannot be. Or at least, any argument against moral equality, she implies, is equally vulnerable to skepticism as arguments in favor of it. Equality, she says, “is not

225. *Id.* at 556.

226. *See id.* at 553.

227. Carter nods to the moral skeptic in noting: “I do not attempt to parry all possible objections to the idea of opacity respect; I attempt only to describe the place of that idea in one intuitively plausible political conception of justice, thereby showing that the idea deserves to be taken seriously as a solution to the problem of the basis of equality.” *Id.* at 554.

228. *See generally* PHILLIPS, *supra* note 8, at 40–62.

229. *Id.* at 40 (emphasis omitted).

230. *Id.* at 41 (emphasis omitted).

231. *See id.* at 54–55.

232. *See id.* at 51.

233. *Id.*

234. *Id.* at 57.

a matter of proof or justification” but something “humans *make happen* by asserting it.”²³⁵ Without justification, however, Phillips’ theory is less a defense of intrinsic equality than an affirmation of it.

Andrea Sangiovanni offers of a defense of equality that begins with a similar set of observations to Phillips.²³⁶ All attempts to ground equality on a shared property are doomed to fail. The best way to proceed in defense of equality is to give up “the idea that moral equality requires appeal to moral worth, or dignity.”²³⁷ In doing so, his argument, as with Carter and Phillips, is about equal treatment rather than equal worth. Sangiovanni’s argument for this rests on the “wrongfulness of treating as inferior,” which includes slavery, sexual harassment, segregation, and political persecution.²³⁸ The wrongfulness of these forms of treatment lies in their constituting “an attack on another’s capacity to develop and maintain an integral sense of self.”²³⁹ It hinders a person’s “flourishing[,] . . . their capacity to integrate their choices, values, pursuits, and relationships into a narrative whole in which they see themselves reflected”²⁴⁰ It does so by undermining the sense that a person’s projects, choices, and pursuits matter to others. These require a measure of recognition and “some positive echo in the societies of which we are a part.”²⁴¹

But does Sangiovanni not have to assume the inherent value of human flourishing here as an implied premise? His response to this concern purports to resolve it but only raises further concerns. It involves a distinction he draws between intrinsic and relational goods.²⁴² He says something can be good for our flourishing without our flourishing being understood or assumed to be intrinsically good. Our flourishing matters relationally; that is, it matters “because we possess a perspective from which it matters what happens to us.”²⁴³ On this account, the value of flourishing is grounded in our subjectivity. But then he asserts—his most creative move—that the value of our subjectivity lies in our *experience* of flourishing.²⁴⁴ Yet if this is so, then Sangiovanni is positing our subjective experience—our capacity for it *per se*—as an inherent good. This raises the question of why a person with more or greater subjective awareness should not be accorded greater value? He offers no response. In this way, his theory amounts to a version of Vlastos’ Kantian defense of equality based on moral autonomy.²⁴⁵ Instead of equal treatment being grounded in the possession of moral autonomy and the inherent goodness of having plans, equal

235. *Id.*

236. See generally Andrea Sangiovanni, *Are We of Equal Moral Worth?*, in *RETHINKING THE VALUE OF HUMANITY* 248 (Sarah Buss & L. Nandi Theunissen eds, 2023).

237. *Id.* at 249.

238. *Id.* (emphasis omitted).

239. *Id.* at 250 (citation omitted).

240. *Id.*

241. *Id.* at 252.

242. See *id.* at 262–66.

243. *Id.* at 263.

244. See *id.* at 263–64.

245. See Vlastos, *supra* note 27, at 125.

treatment is grounded here in the possession of subjectivity and the capacity for flourishing. The whole argument is premised on the idea that differences in quality or capacity of subjectivity or flourishing are less morally relevant than the fact of possession. In this way, both accounts posit or assume the equality they purport to discover.

C. *Skeptical Accounts of Intrinsic Equality*

A final group of authors has advanced the view that no defense of intrinsic equality is tenable. They rely in part on arguments made in earlier work but add important and incisive arguments that are innovative and new.

Richard Arneson considers a series of arguments including the value of rational agency, Carter's notion of opacity respect, and arguments for equal treatment rather than value.²⁴⁶ Rational agency cannot render us equal since we cannot explain the moral irrelevance of variation. If we cannot explain the irrelevance of variation, why should we follow Carter's "duty of minimal opacity respect? This just says, ignore what should not be ignored."²⁴⁷ And with respect to equal treatment, Arneson asserts that "if one posits a moral requirement to treat people as equals, we then need to inquire into its moral justification, and then we are back to what may well be the wild-goose chase of seeking a property that all have and that justifies the stated requirement."²⁴⁸ But if we assume that equality is an axiomatic assumption—an idea we commit to—we still run into problems. We might try (as Phillips does) to turn the tables on the skeptic and argue that discrimination on the grounds of skin color or gender is irrational because these grounds are morally irrelevant. But what happens when we come to strength or reason? How do we resist the claim that differences in those qualities *are* morally relevant? To justify formal equality, we must resort to a notion of an equal moral right be treated or valued in a certain way. But we cannot refute the Nietzschean argument that rights or value should be accorded on the basis of having a superior amount of some quality rather than having a certain amount of it.

Uwe Steinhoff contends that despite being a pervasive political principle, intrinsic equality leads to counter-intuitive and irrational conclusions, including the claim that one owes a duty of equal respect and concern to the rapist of one's sister.²⁴⁹ It is, for this reason, untenable. Egalitarians cannot explain why a murderer retains moral status or why conduct rather than possession of a trait (being human) should be the basis for value—without assuming it. More plausible, he asserts, is the argument that "[j]ustice requires giving everybody his or her due, but the guilty are not due as much respect and concern as the

246. See generally Richard Arneson, *Basic Equality: Neither Acceptable nor Rejectable*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON 'BASIC EQUALITY' AND EQUAL RESPECT AND CONCERN* 30 (Uwe Steinhoff ed., 2014).

247. *Id.* at 47.

248. *Id.* at 49.

249. See generally Uwe Steinhoff, *Against Equal Respect and Concern, Equal Rights, and Egalitarian Impartiality*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON 'BASIC EQUALITY' AND EQUAL RESPECT AND CONCERN* 142 (Uwe Steinhoff ed., 2014).

innocent. The innocent have priority over the guilty.”²⁵⁰ It cannot be the case that *at all times* we all have the same moral right to be treated equally and this grounds our legal rights, because sometimes we do things to deprive ourselves of equal moral rights.²⁵¹ If A tries to kill B and B kills A in self-defense, A lacked a moral right to be treated as equal to B. B had a moral right to put their life above A’s.²⁵² Therefore, sometimes conduct results in the loss of equal moral value or moral entitlement to equal treatment. The trouble in egalitarianism for Steinhoff lies not in the claim that people should be treated equally in the sense that we should avoid arbitrary discrimination. The trouble lies in the claim that *all* people at all times retain equal moral status. Morality calls for the opposite.²⁵³ Sometimes people do things that are so deeply depraved as to compel us to treat them as unequal, and both our moral intuitions and our legal systems reflect this.

Héctor Wittwer advances an argument about equality that confounds almost all of the positions canvassed in this paper.²⁵⁴ Egalitarianism assumes that whether humans are of equal moral worth is relevant to whether humans should be treated equally or accorded equal rights. Conversely, non-egalitarians assume that because humans are not of equal intrinsic worth, they should not be accorded the same value or treatment. But Wittwer challenges both assumptions, contending there is no necessary connection between the question of intrinsic worth and moral rights and duties.²⁵⁵ In the first case, arguments about our equal intrinsic worth fail—but Wittwer presents a somewhat original analysis for how and why. A belief in our equal intrinsic worth entails a belief that we have this worth throughout life; it as an essential quality of being human; and it does not allow for “gradual differences.”²⁵⁶ Yet every conception of inherent worth, he notes, is “constituted by the possession of at least one specifically human property” (being made in God’s image, possessing moral autonomy, etc.).²⁵⁷ The problem is that it is not clear why any chosen property has an “absolute *moral* worth” since “[e]very specifically human faculty can be used to do good or abused to do evil.”²⁵⁸ And even if we did find such a property, there would “be some humans who have *not yet* acquired it, others who *no longer* possess it, and those unlucky few who can *never* have it.”²⁵⁹ The property we seek here cannot be membership in the human race since possession of DNA or basic species traits do not tell us anything specific enough to ground a claim to moral value. In order to do this, we need to seize upon some *aspect*

250. *Id.* at 148.

251. *See id.* at 152.

252. *Id.*

253. *See id.*

254. *See generally* Héctor Wittwer, *The Irrelevance of the Concept of Worth to the Debate Between Egalitarianism and Non-Egalitarianism*, in *DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON ‘BASIC EQUALITY’ AND EQUAL RESPECT AND CONCERN* 76 (Uwe Steinhoff ed., 2014).

255. *Id.*

256. *Id.* at 78.

257. *Id.* (endnote omitted) (emphasis omitted).

258. *Id.* at 79.

259. *Id.* at 80.

of our DNA or a specific trait which *is* morally valuable in some way, but then we are back to the conundrum noted earlier. Since the notion of equal intrinsic worth is untenable, the moral obligation to treat every person as an equal cannot rest on it.

Wittwer sees similar problems with the alternative argument, that we acquire moral worth through our conduct. One issue with this is that we could never settle what counts as morally valuable conduct. We would need a qualitative basis, a set of criteria, for deciding what is valuable and we could never arrive at this.²⁶⁰ A further problem is that if we could agree on such criteria, we could never be sure whether someone's conduct should confer upon them moral worth since we cannot determine why people do things. Motivation matters.²⁶¹ An action can be apparently benevolent, but if done for egoistic or malevolent reasons, it is not. Given the "epistemic opaqueness of motives" the moral worth of actions cannot be accurately measured and thus cannot form a reliable basis for distributing rights.²⁶² Héctor draws the limited conclusion that neither egalitarians nor non-egalitarians can rely on arguments about the moral worth of humans to settle their differences. I take this to be a way of saying that both the Kantian egalitarian and the Nietzschean inegalitarian bring their values to the table in the debate about equality. Neither a defense of equality nor skepticism of it can *begin* without an assumption of value, whether it be the moral value of a property, of equal treatment, or of certain forms of conduct.

CONCLUSION

Ideas about human equality and inequality have a long history. This paper aimed to lend a sense of the variety and sophistication of the many attempts to defend and critique intrinsic equality that have been endeavored. For this reader, one salient quality to emerge from an overview of the literature was how numerous were the attempts in twentieth century moral and political philosophy to address the issue, yet how many recent scholars have weighed in without seeming to be aware of many of the earlier attempts on point.²⁶³ At the time of this writing, the debate about intrinsic equality continues to unfold. Further papers are on their way.²⁶⁴ I have made the case that future contributions will likely involve versions of arguments made before, or new and creative

260. *See id.* at 89.

261. *See id.* at 90–91.

262. *Id.* at 92.

263. This can be gleaned from how common it is for many of the recent authors canvassed in this paper to cite only two or three predecessors in the literature on basic equality, if that (Phillips, Waldron, and Kirby are notable exceptions). This may simply reflect a convention common in the subdisciplines of moral philosophy and political theory of focusing on the new argument one is venturing to make rather than on how it differs from those that have come before.

264. Nikolas Kirby has kindly shared that he and Giacomo Floris have a co-edited collection of papers on equality forthcoming. Articles continue to appear, such as Kirby's 2024 paper discussed above, Kirby, *supra* note 207, and Ian Carter and Olof Page, *When Is Equality Basic?* 101 AUSTRALASIAN J. PHIL. 983 (2023).

approaches that will likely confront the same old problems. It may be that Dworkin was right in 1983 in asserting about intrinsic equality:

The principle is too fundamental, I think, to admit of any defense in the usual form. It seems unlikely that it can be derived from any more general and basic principle of political morality that is more widely accepted. Nor can it be established through one or another of the methods of argument popular in political theory, for these already presuppose some particular conception of equality. There is no point, for that reason, in asking whether there would be a two-level or rule-utilitarian argument for accepting the principle of equality as a working rule for politics, or whether people deciding under some specified conditions of uncertainty would enter into a contract to respect the principle, or anything of that sort.²⁶⁵

Dworkin may have been correct that looking for a deeper grounding for equality is a fool's errand. The larger takeaway from this overview is to affirm his insight and to show why it is best to conceive of intrinsic equality as a principle or idea we commit to in an axiomatic fashion. It is a belief we begin with and cannot justify in a non-circular manner. We might provide an account of equality or why a just constitution should include a right to equality; but the account must begin with an agreement—tacit or overt—that it should do so, because equality itself is just. And we either believe that or we don't.

265. Dworkin, *supra* note 1, at 31.