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GRIFFIN ON HUMAN RIGHTS

Edited by Roger Crisp

Griffin on Human Rights

Responses to *On Human Rights*

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William J. Talbott, *Notre Dame Philosophical Review*

This is one of the most thought-provoking works to be published on the subject in a long time.

The Commonwealth Lawyer

. . . a beautifully written and truly wise book. James Griffin delivers a tour de force of philosophical argument in conversation with human rights practice . . . *On Human Rights* is a lucid, brilliant book worth careful study. It is one of the classics on human rights, at least of this generation.

Nicole Hassoun, *Journal of Philosophy*

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Edited by Roger Crisp

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Preface

In recent decades, discussion of human rights has burgeoned in many disciplines, including law, international relations, and, of course, political philosophy. James Griffin's book *On Human Rights*, published by Oxford University Press in 2008, has been widely recognized as a major philosophical contribution to our understanding of the nature, and justification, of human rights. It is a pleasure and a privilege to present a wide-ranging selection of responses to it.

Before reading any of the papers that follow, it would of course be wise to read Griffin's book, or at least the relevant parts, though each paper can be read independently. The following brief overview of *On Human Rights* may help some readers.[1]

Griffin begins the book with the claim that we do not yet have a clear enough idea of what human rights are. For instance, we do not know their existence conditions, nor how to establish their content, nor how to resolve conflicts involving them. Griffin wants, in particular, to understand better how human rights are used in the best ethics we can develop.

He then turns to history, especially from the late Middle Ages to the Renaissance, then to the Enlightenment, and finally to the second half of the twentieth century. In the light of this account, Griffin considers the question of what the UN had in mind, or should have had in mind, in deriving human rights from the dignity of the human person. Again he stresses the indeterminacy of sense in the term 'human right'.

In his second chapter, Griffin takes his first steps towards greater determinacy of sense. What seems to Griffin the most plausible development of the idea of natural or human rights is to regard these rights as protections of our human standing, that is, our personhood. One ground for human rights, then, is personhood. A second ground is practicalities, such as the limits of human will, the limits of human understanding, and susceptibility to slippery slopes. Griffin rejects a third possible ground, equality.

[1] I am grateful to James Griffin for assistance in the writing of this summary.

After these first steps, Griffin turns to the deeply difficult question of resolving conflict involving human rights. Then, in his fourth chapter, he addresses the question of who bears human rights. Infants? Foetuses? Griffin argues for restricting the bearers of human rights to normative agents. This is a limitation many find counter-intuitive, but Griffin's case turns on certain practicalities. He is offering a stipulation that improves the language of human rights, and so his proposal must be assessed as such a stipulation.

In the following chapter, Griffin turns from rights to duties. Who are the bearers of the duties correlative to human rights? The questions to which Griffin offers answers include: Whose duties? Must duty bearers be identifiable?

Part I of the book, which concerns human rights in general, ends with a discussion of the metaphysics and epistemology of human rights, the tenor of which is contrary to the widely-accepted views of John Rawls.

Parts II and III of the book address individual human rights and expose the consequences of Part I to the test of plausibility.

In Part II, Griffin devotes a chapter to each of three 'high-level' human rights: autonomy, liberty, and welfare. Autonomy consists in assessment of options and forming a conception of a worthwhile life. He distinguishes autonomy from liberty, explains its value, and examines the content of the right to autonomy as well as the relation of autonomy to free will. Moving on to liberty itself, Griffin shows how under liberty fall several important freedoms, including freedom of expression. And with regard to welfare rights, Griffin covers the historical growth of rights; welfare as a civil or human right; the case for a human right to welfare; and human rights, legal rights, and rights in the United Nations.

In the third and final part of the book, Griffin turns to issues of the application of human rights. He begins by pointing out discrepancies between the lists of human rights provided by the best philosophical account on the one hand, and the most authoritative international declarations on the other. He also discusses civil and political rights; international law; economic, social, and cultural rights; and the future of international lists of human rights.

The next right Griffin examines is the alleged right to life. He considers John Locke's views on the scope of such a right, and the claim that personhood grounds such a right. Euthanasia and human rights are also discussed.

The following chapter concerns the right to privacy, covering among other issues legal approaches to privacy; privacy of information as well as privacy in terms of space and life; privacy of liberty; and the potential conflict between privacy and freedom of expression and the right to information.

Do human rights require democracy? Griffin argues that the two ideas serve different needs. Human rights are to protect human dignity, while democracy provides us with a decision-procedure that is appropriate to a society of equals. In general, much more is involved in the idea of democracy than can be distilled from the notion of human rights. For example, one cannot derive a requirement of fair political procedures from human rights alone.

The book ends with a sceptical discussion of group rights, covering good-based and justice-based arguments. Many supposed group rights are best not seen as rights at all, and some others can be reduced to individual rights.

This book consists primarily in interpretative and critical discussions of various central aspects of Griffin's views.

In 'Two Approaches to Human Rights', Carl Wellman contrasts his own theory of human rights, developed over several decades, with that of Griffin.

Wellman takes legal rights as his paradigms of rights in general, begins his general theory of rights with a conceptual analysis of the meaning of 'a right' in terms of Hohfeld's fundamental legal conceptions, and then identifies the grounds of human rights with the reasons that justify complexes of liberties, claims, powers, and immunities. Griffin doubts that human rights are merely one species of rights in any generic sense or that they are essentially similar to ordinary legal rights, rejects any structural analysis in Hohfeldian terms, and moves directly to a substantive theory that grounds human rights on human dignity or personhood. Although Griffin would describe Wellman's approach as top down and his own as bottom up, in fact each combines both sorts of reasoning.

In 'Taking Rights out of Human Rights', John Tasioulas focuses on Griffin's attempt to remedy the indeterminacy of sense afflicting the term 'human rights' by grounding such rights in the values of autonomy and liberty. However, he argues, a notable feature of Griffin's theory is that it does not give much attention, or attribute much significance, to the fact that human rights belong to the more general class of moral rights.

Tasioulas argues that once we appreciate the need to construe human rights as rights, the motivation to limit the values that can ground human rights to autonomy and liberty is seriously undermined. Instead, we can adopt the more natural course of construing human rights as grounded in a plurality of prudential values. The chapter then goes on to argue that taking more seriously than Griffin does the fact that human rights are rights opens the way to a more convincing account of their universality and of their role in practical conflicts.

In 'When the Good Alone isn't Good Enough', David Reidy is also concerned about Griffin's attempt to avoid indeterminacy. He outlines Griffin's account and presses criticisms from three main sources. First, Griffin fails to develop the concept of human rights as *rights* beyond affirming the idea of rights as valid moral claims. Second, Griffin fails to account for the special role or place of human rights within the deontic domain of the right more generally. While he affirms human rights as weighty moral claims, he offers in the end little more than the intuitionist's advice to 'call 'em as you see 'em' when it comes to adjudicating cases of competition or conflict between human rights and other weighty moral claims associated with, say, distributive justice, national security, perhaps even environmental stewardship. Third, Griffin conceives of the deontic domain of the right generally and so of human rights specifically in terms of the relationship between persons and their good rather than the relations between persons themselves or between persons within institutions.

In 'The Egalitarianism of Human Rights', Allen Buchanan offers his own account of the egalitarian elements of international human rights law. He evaluates the theories of Griffin and Nickel, arguing that neither theory offers a concept of dignity appropriate for a human rights theory. He attempts also to introduce the idea of equal status into the philosophical thought of human rights.

In 'Human Rights, Human Agency, and Respect: Extending Griffin's View', Rowan Cruft examines five problematic aspects of Griffin's view—encompassing questions about justified punishment, miscarriages of justice, and violations of which the subject is unaware—and argues that these problems can be overcome without abandoning Griffin's insight that human rights are grounded in normative agency. The necessary move, Cruft suggests, is to adopt a broader conception of respect that goes beyond the technical notion.

In 'Griffin on Human Rights: Form and Substance', Roger Crisp begins with an examination of Griffin's charge that theorizing of human rights has been excessively top down, as in the work of Kant and Mill. Crisp argues that Griffin's position is in fact closer to these historical positions than he suggests, and that this is something he should welcome. The second part of the paper turns to Griffin's substantive theory of rights. Crisp claims that Griffin should extend the bases of human rights beyond normative agency, but also work to prevent the extension of human-rights-talk to inappropriate domains such as that of personal relationships.

In 'Personhood versus Human Needs as Grounds for Human Rights', David Miller, having noted various similarities between Griffin's personhood account of human rights and his own human needs account, criticizes Griffin for locating human rights within *ethical reasoning* rather than *political argument*; for justifying these rights by appeal to a narrowly liberal understanding of human agency; and for failing to establish their upper limits in an appropriate way. A need account begins with the human form of life as made up of activities that are reiterated across societies, and understands human needs as conditions that must be fulfilled to be able to engage in these activities at a minimally decent level. It justifies the set of rights that best enable all agents to fulfil their needs. Miller defends this view against Griffin's charge that needs are insufficiently determinate to ground human rights, and explain how conflicts of rights can be avoided by taking this approach.

In 'Griffin on Human Rights', Brad Hooker considers Griffin's contribution as a whole to the theory of human rights, explaining why Griffin thinks that the term 'human right' suffers from an unacceptable indeterminateness of sense, and then summarizing both Griffin's objections to various prominent accounts of human rights and Griffin's own account of human rights. The final section of the essay explores Griffin's objections to rule-consequentialism's approach to human rights, and provides a response to these objections.

In 'Griffin on Human Rights to Liberty', James Nickel focuses on Griffin's treatment of human rights to liberties. While welcoming Griffin's attention to the liberty dimension of human rights, Nickel identifies some shortcomings such as his failure to take account of fecundity in thinking about freedom of movement and residence, having too narrow a basis for liberties of self-defence, and not recognizing the great

difficulties in providing a justification of the nondiscriminatory enjoyment by everyone of universal human rights without having an independent principle of fairness or equality as part of one's justificatory framework. This final shortcoming leads him to underestimate, Nickel claims, the strength of the case for rights to political participation and democratic institutions in contemporary societies.

In the final chapter, Griffin provides a response to some of the central issues raised by the contributors.

This book has its origin in a conference on Griffin on human rights held at Rutgers University in April 2009. Several of the papers in this volume were presented at this conference, including my own, and I wish warmly to thank Larry Temkin for inviting me to participate. Some articles are based on previous publications, and I am grateful for permission to reuse this material as follows:

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Roger Crisp
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Brad Hooker is Professor of Moral Philosophy at the University of Reading. His *Ideal Code, Real Word* was published by Oxford University Press in 2000. He is a co-editor with Roger Crisp of *Well-Being and Morality: Essays in Honour of James Griffin* (Oxford University Press, 2000). Currently, Hooker is working on fairness.

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1

Two Approaches to Human Rights

Carl Wellman

For many years, Professor James Griffin and I have discussed how best to explain the nature and grounds of human rights. Our discussions have always been friendly and, for me at least, highly illuminating, but we often come to different conclusions. This is primarily because we approach the theory of human rights in very different ways. It will, I hope, be useful to compare and contrast our approaches. Although the most appropriate way to honor my kind and wise friend would be to analyze his approach to human rights in detail, with occasional references to my own, I will organize my essay in the opposite fashion. This is mainly because I know more about my approach than Jim's, but also because he will have an opportunity to correct my misinterpretations before this essay is published.

Our goals were, and remain, similar in three important respects. We both wanted to find a theory that would primarily explain human rights conceived of as fundamental moral rights. Although we hoped that our accounts would be relevant to human rights in international law and national constitutions, this was a secondary matter to us. Thus, our goal was to develop the natural rights tradition broadly conceived, to develop a theory of human rights as natural rather than artificial.

Secondly, we both wanted a theory that would be useful in resolving the many philosophical problems that arise in human rights practices. How can one decide whether an alleged human right, such as the right to determine what happens in and to one's body, really exists? Granted the

existence of some human right, such as the right to life, is this merely the right not to be killed or does it include the right to be provided with the means to sustain one's life? And does the human fetus possess a human right to life or is it only after one is born that one has the capacity to possess human rights? Moreover, in the event that a woman chooses to have an abortion, does her right to determine what happens in and to her body or her right to privacy (whatever that might be) override the right to life of her unborn child? We agreed that none of the previous accounts of human rights had the theoretical resources to answer these and other urgently practical questions.

Finally, we both wanted a teleological theory, an account that would explain how human rights are grounded on human values. This is partly because we both assumed that the most basic practical reasons, including specifically moral reasons, are values and partly because to suggest that human rights are not grounded on values would imply that they have no value and thus are not worth taking seriously. We both believed that this would be some sort of utilitarian theory, although precisely what sort of utilitarianism remained to be determined.

Accordingly, I began my search for a theory of human rights by trying to resolve the traditional philosophical problems concerning the nature of whatever is good, bad or indifferent. More specifically, I began to give seminars on value theory in the hope that this would help me to arrive at a more adequate general theory of value, a theory that would identify the generic property or properties of values and thus explain what makes the various species of value, such as economic value or moral value, valuable. Alas, my students could not see the point of the philosophical questions I wanted them to answer. They complained that they could not understand how these questions were relevant to any of the choices they had to make in their everyday lives. Although I was stubborn enough to continue to teach them contemporary value theory, they taught me that it is a mistake to try to do abstract ethical theory without connecting it to concrete practical problems. Therefore, I postponed my investigation of value theory and looked for some area of ethical theory with more direct practical relevance.

At the time, the early 1960s, moral and legal debates about the civil rights of black Americans were headline news and of practical urgency. I decided to write a book, one should be enough, in which I would develop a general theory of rights and apply it to the rights of black

Americans to welfare benefits and affirmative action programs. My goal was a general theory of rights modeled on the then fashionable general theories of value. I wanted an account of the generic properties of rights that would explain what makes moral rights, legal rights, and the rights of officers and members of private organizations various species of rights. And in my first paper on human rights, "A New Conception of Human Rights," I described the step-by-step program by which I would develop my general theory of rights and then apply it to human rights.

In his first paper on human rights, "Towards a Substantive Theory of Rights," Jim described his goal very differently. What we most need and he therefore wanted to develop was a substantive theory of human rights, a theory that would identify the criteria or grounds that would give content to the concept of a human right. Then in his paper "First Steps in an Account of Human Rights," he explicitly contrasts his substantive approach to human rights with that of Joel Feinberg, and by implication with mine. "But this is an account of rights generally, not of human rights. Presumably, an account of human rights will have to add an explanation of what it is about being 'human' in virtue of which all human beings have these rights." Jim was suspicious of the assumption that human rights are essentially similar to ordinary legal rights and less fundamental moral rights and therefore chose to develop a substantive theory of human rights independently of any general theory of rights.

Since I knew almost nothing about the theory of rights, I spent several months searching the relevant literature. In those distant days, so different from today, moral philosophers had written almost nothing about rights. It was lawyers who had published the most extensive and interesting analyses of rights. Unfortunately, I lacked legal training and could not fully understand what the lawyers had published. Therefore, I went to Denmark to learn from Alf Ross and to study the legal literature more intensively. On the way I stopped off in Oxford where Herbert Hart loaned me his unpublished paper "Bentham on Legal Rights." These events in my personal biography may well explain why I originally developed a legalistic theory of human rights, a theory that interpreted moral rights and all other species of rights as essentially similar to ordinary legal rights such as the creditor's right to be repaid or the owner's right to use her book as a doorstop if she so chooses. However, were one to challenge my approach to moral rights via an account of legal rights, I would today reply that because it is much easier to identify

uncontroversial examples of legal rights than of moral rights, a theory that begins with them is on firmer ground and add that the traditional theory of natural rights grew out of earlier theories of natural law.

Jim did not approach moral human rights via an analysis of typical legal rights. It is not merely that he rejected the assumption that moral human rights share any generic defining properties with legal rights. When he examined the natural rights tradition from which our contemporary concept of human rights is derived, what he finds more revealing is not its assumption that natural rights are conferred by natural law, but the idea of human dignity. For anyone who doubts the theological presuppositions of the traditional natural law theories, the characteristics of human beings that give them a distinctive moral status or dignity and by virtue of which they possess fundamental moral rights is the logical place to seek the grounds of human rights. That Jim's approach is not legalistic is confirmed by the fact that it is not until Chapter 11 of his book *On Human Rights* that he discusses any kind of legal rights, human rights in international law.

I studied philosophy at a time when theories of meaning and linguistic analysis were fashionable in the United States. Although I never agreed with those like R. M. Hare who insisted that moral philosophy must be limited to the analysis of moral language and that normative ethics was a matter for private opinion or perhaps public preaching, I did believe that conceptual analysis was an essential preliminary to achieving the clarity and precision required for any adequate normative theory. Hence my first book, *The Language of Ethics*, was an analysis of words like "good" and "bad," "right" and "wrong." Similarly, my first step in developing a general theory of rights was to analyze the concept of a right. I believed that I could not identify the grounds of any right, the reasons sufficient to justify the assertion that some right exists, until I knew what the expression "a right" means. Surely the evidence required to establish any statement depends upon its meaning.

In "First Steps in an Account of Human Rights," Jim contrasts a substantive account of human rights with a conceptual account. Thus, it would appear that he rejects any conceptual analysis in his approach to human rights. But this appearance may be misleading, for he describes the problem he will address as follows:

> It is not that the term 'human rights' has no content: it just has far too little for it to be playing the central role that it now does in our moral and political life. There are scarcely any accepted criteria, even among philosophers, for when the term is used correctly and when incorrectly.

Thus, Jim was, and presumably still is, as much concerned with the meaning of the language of human rights as I was and am. The difference is more subtle. I believed that I must first analyze the concept of a human right in terms of a general analysis of the meaning of the expression "a right" before I could identify the grounds of human rights. Hence, I approached the grounds of human rights indirectly. Jim believed that he could identify the grounds of human rights more directly and by doing so provide the meaning that the term "a human right" needs to play its role in human rights theory and practice.

In fact, my approach to a theory of human rights was very indirect. I analyzed the concept of a legal right in terms of Hohfeld's fundamental legal conceptions. This clarifies an ambiguity in the language of legal rights. It shows that there are at least four fundamentally different kinds of legal rights—claim-rights, liberty-rights, power-rights, and immunity-rights. And most importantly, it makes the practical implications of any right, for example whether it implies a correlative duty or absence of a duty, explicit. I then argued that there are moral analogues of Hohfeld's fundamental legal conceptions and analyzed moral rights in terms of these analogues. Finally, I applied this analysis to the concept of a moral human right.

In "Towards a Substantive Theory of Rights," Jim contrasts a substantive account with "a taxonomic account—one concerned, as Hohfeld's was, with cataloging the different types of legal or moral relations that rights consist in." He does not deny the value of Hohfeld's distinctions for legal theory, but he does not think of human rights legalistically and he insists that any classification of kinds of human rights is secondary to and probably dependent upon identifying their grounds.

I agree with Jim, and have always believed, that what we need is a substantive theory of human rights, a theory that identifies the grounds of any human right and explains how they establish its existence. However, I approached this part of my theory very indirectly. My analysis of the language of rights led me to conceive of any right as a complex of Hohfeldian legal or moral positions. Because claims, liberties, powers, and immunities are very different kinds of positions, they require very

different kinds of grounds. Therefore, in order to identify and explain the grounds of moral rights, I had to distinguish between duty-imposing, liberty-conferring, power-conferring, and immunity-conferring reasons and explain how each grounds a specific kind of moral position. Finally, I had to provide an analysis of moral human rights in terms of my conception of the nature of rights and try to imagine what moral reasons would establish the various Hohfeldian moral positions that constitute them.

Jim went much more directly, although not in a single step, to his account of the grounds of moral human rights. He rightly interpreted the idea of human rights to be the concept of rights one possesses, not by virtue of any special status such as being a promisee or citizen, but simply as a human being. Presumably, then, there must be something about being human, about human nature, that grounds human rights. He found this presumption confirmed by his examination of the natural rights tradition from which our contemporary idea of human rights arose, for independently of its original theological presuppositions, it based human rights on human dignity. But precisely what is human dignity, what is it about being human that confers a special moral status upon human beings sufficient to ground their moral human rights? Jim identified this as their personhood and analyzed personhood in terms of the constituents or aspects of human agency. He then explained that human agency grounds human rights because of its essential and highly valuable contribution to human well-being. But he recognized that personhood left the content of human rights somewhat indeterminate. Hence, he added that a second but supplementary ground of human rights is practicalities, those facts about human nature and society that would make the protection of human rights effective in practice. Jim did not presuppose any philosophical analysis of the language of rights in general or any theory about the nature of moral reasons. If I understand him correctly, he simply assumed that the essential function of any moral right is to protect some presupposed value, in the case of a human right some basic human interest.

Jim distinguishes between top-down and bottom-up approaches to human rights. At first glance, my approach is very top-heavy. My original goal was to develop a general theory of rights, not a theory of human rights in particular. My first step in reaching this goal was a general analysis of the language of rights. I then generalized Hohfeld's

fundamental legal conceptions to apply to moral positions as well. In order to identify the grounds of moral human rights, I explicated a general theory of moral reasons. Only then did I attempt to reach the goal that Jim and I share, a substantive theory of moral human rights. But let us take a second look at my approach. I undertook the project of developing a general theory of rights because I became convinced that it is a mistake to do abstract ethical theory without close attention to its practical implication. I took legal rights as my paradigm examples because my examination of specific issues concerning legal and moral rights identified more uncontested instances of legal rights than moral rights. I accepted Hohfeld's thesis that the legal language of rights is ambiguous between claims, liberties, powers, and immunities because he had illustrated these ambiguities by citing particular passages in judicial decisions and the literature of jurisprudence. And in the end, I have identified the grounds of moral human rights by trying to imagine what moral reasons could establish plausible examples of human rights such as the right to life, the right to privacy or the right to equitable treatment. Indeed, I confess that I have not yet managed to generalize from these particular examples to a general theory of the grounds of human rights. Therefore, I would classify my approach to human rights as both a top-down and bottom-up approach with my goal being to meet in the middle with a unified coherent theory.

Jim reports that he prefers a bottom-up approach to a substantive theory of human rights. Accordingly, he did not presuppose any general theory of rights, any conceptual analysis of the language of rights in general or a general theory of moral reasons. On the basis of his reading of the natural rights tradition, he went directly to personhood as what it is about human nature that constitutes human dignity and thereby grounds moral human rights. He supplemented this ground with practicalities only because his examination of particular human rights showed that personhood alone leaves them too indeterminate. But his approach is not innocent of top-down reasoning. He was able to explain how personhood has sufficient value to ground moral human rights because he had previously developed a theory of human well-being, a project I postponed and will probably now never complete. Moreover, his approach presupposes both that rights are grounded on value and that the function of rights is to protect those values, both rather general theses. Perhaps Jim also has a meet-in-the-middle approach to a

substantive theory of moral human rights. The difference seems to be that Jim's approach has much less top-down reasoning and is based on a narrower bottom than mine because he approaches his substantive theory of moral human rights directly, while I reach mine by applying a general theory of rights to human rights in particular.

Which is the better approach to an adequate account of human rights? If it works, Jim's is obviously preferable because it goes directly to a very plausible substantive theory of moral human rights. And as Jim has rightly insisted, a substantive theory is precisely what we need to enable us to solve any of the most difficult and important problems that arise in human rights practice. In comparison, I have not yet completed my theory of the grounds of human rights. Worse yet, I must confess that when I reflect upon the moral reasons to which I appeal when attempting to identify the grounds of this or that moral right, I often feel that they are a *reductio ad absurdum* of my theory of rights. Still, the proof of the pudding is in the eating, and the test of any philosophical theory is how well it solves the problems to which it is applicable. Since I am not gracious enough to yield first place even to my distinguished friend, I predict that each of our theories will be helpful to some extent in resolving the philosophical problems that arise in the moral and legal practices of human rights, but that neither theory will provide complete solutions to them all. This is probably as much as any philosopher, even one as imaginative and wise as Jim, can hope to achieve.

2

Taking Rights out of Human Rights*

John Tasioulas

I. Human rights without rights?

James Griffin's new book is arguably the most significant philosophical meditation on human rights to emerge in the human rights-intoxicated era inaugurated by the *Universal Declaration of Human Rights*. His starting point is an unflattering, almost MacIntyrean, portrayal of the "debasement" of contemporary human rights discourse, according to which the term "human right" has become "nearly criterionless" (Griffin 2008: 14–15).[1] Admittedly, the familiar characterization of such rights—rights that we have simply in virtue of being human—retains its currency. But we no longer accept the theological background that conferred some extra determinacy on this notion in scholastic

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[1] The comparison with MacIntyre is only partial. To begin with, Griffin's negative assessment of human rights morality is not part of a general diagnosis of the malaise of modern moral discourse. Nor, unlike at least the MacIntyre of *After Virtue*, does he conceive of human rights discourse as so deeply flawed as to be beyond salvation.

conceptions of natural law, largely because of the successive waves of criticism launched on its metaphysical and epistemological underpinnings from the late Middle Ages to the Enlightenment. And when the theological interpretation was abandoned, "nothing was put in its place. The term was left with so few criteria for determining when it is used correctly, and when incorrectly, that we often have only a tenuous, and sometimes plainly inadequate, grasp on what is at issue" (Griffin 2008: 2). Whereas this was not such an acute *practical* problem for writers in the seventeenth and eighteenth centuries, who could at least assume a broad consensus on examples of natural or human rights, today we lack even this consolation.[2]

This unhappy situation presents us with the task of completing the "Enlightenment project on human rights" by enhancing the determinateness of the criteria governing the use of the term "human right." Success will consist in arriving at an account that is informative enough to yield determinate "existence conditions" for identifying human rights and to guide us in fixing both their normative content and their weight in practical deliberation. This endeavour should be distinguished from two other projects with which it is easily confused. First, it is distinct from the widely felt need to stem the limitless "proliferation" of human rights claims—what Griffin describes as the "strong inflationary pressures on the term" (2008: 92). Whether a particular conception of human rights validates "too many" or "too few" human rights—and how that is to be decided—is a separate question from that of giving a determinate account of their identification, specification, and normative weight. Achieving determinateness of sense may be necessary in order to curb irresponsible "proliferation," but it is not sufficient. Second, it is not primarily an exercise in lexicography or value-neutral conceptual analysis but rather in normative moral philosophy: greater determinateness is to be secured by locating the notion of human rights within the best overall understanding of ethics, showing that it earns its place there.

The alternative, which is not taken seriously by Griffin, would appear to be the authentically MacIntyrean one of jettisoning the whole discourse as beyond salvation.[3] For Griffin, this debunking proposal ignores

[2] It is not clear how he squares this assessment with the great prominence given in contemporary discourse to the Universal Declaration of Human Rights.

[3] "[T]here are no such [natural or human] rights, and belief in them is one with belief in witches and in unicorns" (MacIntyre 2007: 69).

the evident utility of retaining the term "human right," and not just the concept it designates, as well as flying in the face of its resilient presence in ordinary moral thought (Griffin 2008: 19). More fundamentally, he would probably charge MacIntyre with wrongly assuming that the morality of human rights stands or falls with the prospects for a nonteleological grounding of its norms, one that does not invoke some end "the realization of which characteristically enhances the quality of life" (Griffin 2008: 36).[4] Still, Griffin does not think that the project's success is preordained. We may not be able to vindicate a recognizably Enlightenment conception of human rights within our best understanding of ethics; and even if we can, it may be only on the condition that it enjoys a less fundamental status than partisans have tended to assign it.[5]

What remedies for the "debased" condition of human rights discourse does Griffin entertain? The first follows the top-down route of subsuming the notion of human rights under a fundamental moral principle given by a prefabricated moral theory. Although he does not necessarily disparage this approach—it has been, after all, pursued by Kant, Mill, and Rawls, among others—Griffin voices serious misgivings about its "Newtonian" systematizing ambitions (Griffin 2008: 74–75). Instead, he is acutely sensitive to the fact that it runs the risk of changing the subject by failing to engage adequately with the understanding of human rights that has emerged historically and which plays such a prominent role in contemporary political and legal life. And there is good reason *not* to change the subject if one is interested in whether the human rights discourse that is so prevalent in the world today embodies anything of real ethical significance, what that might be, and how the discourse should be modified so as to give more effective expression to it. It is puzzling, however, that Griffin believes that not "changing the subject" is a desideratum capable of exerting significant pressure given his belief that the term "human rights" is virtually criterionless, for the claim that "we often have only a tenuous, and sometimes plainly inadequate, grasp

[4] Note, however, that MacIntyre has recently recanted his previous wholesale scepticism about the prospects for human rights morality, precisely in light of a possible "Aristotelian" grounding (see MacIntyre 2008: 261–281, 271–272).

[5] For Griffin's characterization of human rights as "low- to middle-level" ethical principles, see 2008: 18, 32–39.

of what is at issue" in human rights discourse is in tension with the idea that it constitutes anything approaching a well-defined subject that should not be changed.

In any case, the only other remedy contemplated by Griffin is the specific "bottom-up" route he favours. It starts not from a prior commitment to an off-the-shelf general moral theory but from the rich and complex discourse of human rights that originates in the late medieval period. And it strives for only as much higher-level explanation as that subject-matter can plausibly sustain. In particular, it seeks to renovate the discourse of human rights by working with the building materials bequeathed to us by the Enlightenment tradition. There are at least four such elements identified by Griffin:

(a) the abstract characterization of human rights as moral rights that we have "simply in virtue of being human." They are to be distinguished from rights that derive from some accomplishment or transaction of the right-holder, a special relationship to which they belong, or their involvement in some particular social or institutional order;
(b) that the existence and content of human rights—including, specifically, what the salient understanding of "humanity" is in virtue of which we possess them—is to be determined primarily through ordinary or "natural" moral reasoning, drawing on whatever assistance it can derive from, among other sources, philosophical inquiry and legal reasoning;
(c) that the notion of "humanity," in virtue of which we possess human rights, is exclusively that of our status as normative agents, beings capable of evaluating, choosing, and pursuing a conception of our good from a range of options. Moreover, human rights are protections of that status and its exercise, being grounded in our interests in autonomy, liberty, and the minimum material provision requisite to make the maintenance and exercise of that status a reality; and
(d) a defeasible (though presumably not comprehensively so) list of paradigmatic or canonical human rights. Admittedly, it is not crystal clear which rights Griffin takes to enjoy this status, and when he informs us that some rights (e.g. many that come under the headings of distributive or retributive justice) do not belong to

> the Enlightenment tradition, whereas others do (such as rights against torture), the basis for these judgements is not always readily apparent.[6]

On the face of it, there is a striking omission from the materials assembled by Griffin: he neither draws on, nor supplies, an account of the general nature of moral rights that explains why human rights properly qualify as individual moral *rights*, as opposed to interests, values, claims, goals or moral considerations of some other kind.[7] Nor does he appear to regard it as an important desideratum for a theory of human rights that it give such an account, despite the existence of a substantial literature addressed to the nature of moral rights in general, much of it belonging to the Enlightenment tradition to which Griffin aspires to be faithful. The omission is all the more surprising in view of a persistent strain of scepticism in contemporary philosophy about whether many of the rights familiar from the key human rights documents are *rights* at all as opposed, at best, to laudable social goals. Instead, Griffin briskly characterizes the "modern" sense of a "right" as "an entitlement that a person possesses to control or claim something" (2008: 30), without any further elaboration, relying instead on a confident intuitive grasp of the term's applicability in various contexts. Sometimes he even drops all explicit reference to rights, speaking of a human right as "a claim we have on others simply in virtue of our being human." Yet, as Griffin himself observes, not all moral claims are rights-based (2008: 17). It is true that he does address the views of philosophers who have offered general theories of moral rights (2008: 20–22, 54–56). But in each case the thrust of his discussion is predominantly negative; he does not commit himself to any rival account of moral rights.

The upshot is that we are left in the dark as to why Griffin believes human rights properly qualify as moral rights. To this extent, his theory

[6] Employing a somewhat crude distinction, we may say that adherence to (a) and (b) marks out a theory as "orthodox" by contrast with the newly minted "political" conceptions of human rights that have become increasingly popular in the wake of John Rawls' gnomic pronouncements in Rawls 1999: 78–81. The additional commitment to theses (c) and (d) characterizes the class of orthodox theories that merit the adjective "Enlightenment," at least as used by Griffin, in contrast to those orthodox theories that do not exclusively accord normative agency generative power with respect to the justification of human rights.

[7] "[L]est we miss the obvious, human rights are rights" (Nickel 2007: 9). Ch. 2 expands on the significance of their status as rights.

shares a tendency exhibited to a pronounced degree by those manifestations of the human rights movement that are systematically indifferent to the distinction between rights, on the one hand, and interests or values, on the other. In the case of human rights activists, this is part and parcel of the phenomenon of human rights "proliferation," with any colourably universal human interest or value becoming a candidate for the title of "human right." Moreover, it is a tendency that threatens to make the discourse of human rights redundant, since we already have a serviceable language for speaking of interests or values.[8] Griffin is sensitive to this concern about redundancy,[9] but he does not address it by drawing a tolerably clear distinction between rights in general, on the one hand, and interests or values, on the other. His appeal to practicalities in grounding human rights will not yield this distinction, since they represent a constraint that bears on far more of the moral domain than that component concerned with either rights or human rights. Instead, his solution is to narrow the range of interests that can justify human rights, limiting them to the values of personhood. But, if we have an account of the distinctive nature of rights in general, the latter manoeuvre may turn out to be otiose or even misguided (see IV–VI below). In any case, it does not answer the question why human rights are a species of *moral rights*.

II. Political theories and moral rights

Does it really matter that Griffin provides no adequate account of why human rights are moral *rights*? Let me begin by suggesting two ways in which it does: (1) it renders his response to political theories of human rights incomplete, since many proponents of the latter take seriously the idea that human rights need to be distinguished from within the general class of moral rights, and (2) it lends an air of arbitrariness to his

[8] The thought that major contemporary human rights documents might be best interpreted as setting out *universal human interests* is aired by John Finnis (1980: 214). More recently, Joseph Raz has claimed that the tendency to overlook the distinction between something's being valuable and having a right to it is symptomatic of traditional philosophical theories of human rights, as represented by Gewirth and Griffin (see Raz 2010). He sees this feature as putting such theories at odds with the practice of human rights.

[9] "If we had rights to all that is needed for a good or happy life, then the language of rights would become redundant" (Griffin 2008: 34).

judgements about the scope of human rights morality, and its relation to justice and fairness, since they reflect undefended assumptions about moral rights in general.

The critique of "political" theories of human rights

"Political" theories of human rights take issue with either thesis (a) or (b). The former is rejected because it fails to register some crucial political function(s) that essentially characterizes human rights. The latter is rejected because the justification of human rights cannot simply consist in their being derived from a comprehensive moral or philosophical position that is correct as a matter of ordinary truth-oriented reasoning. Instead, they must be justifiable by reference to a form of *public reason* that embodies distinctively *political* standards of justification. In both cases, the rejection of the thesis is significantly motivated by a concern to characterize and ground human rights in a way that is suitably non-parochial, one that cannot be impugned as arbitrarily biased towards a Western conception of values or their comparative importance. This is most obviously so in the case of the rejection of (b). But it is also true of the hostility to thesis (a): many of its opponents contend that the ascription of a characteristic political function to human rights enables the latter to be distinguished, as a minimal set of standards, from the broader and more demanding category of "universal" or "liberal" rights. This supposedly caters to the non-parochialism concern. It also, it is said, enables such theories to exhibit greater fidelity to the post-1945 human rights culture, since many plausibly universal moral rights, such as the right not to be betrayed, do not figure in the key human rights instruments.

Let me focus on Griffin's defence of (a).[10] He considers only the version of the interventionist account of human rights advanced by Rawls. According to this, human rights are individual rights which, in the case of severe and widespread violations, generate a *pro tanto* justification for military intervention against the political community

[10] Griffin's defence of (b) proceeds by indirection: he offers an account of human rights that satisfies it, but one that he also believes allays many of the concerns that motivate some to reject (b) in favour of a distinctively political conception of justification (2008: 26–27, 137–145). This strategy strikes me as entirely appropriate. Given that any theory of human rights will have various drawbacks, a decision as to which theory to adopt ultimately turns on a comparative judgement of the kind that Griffin invites us to make.

perpetrating the violations.[11] This view entails a notoriously parsimonious list of human rights, leading Griffin to the conclusion that Rawls is effectively "changing the subject" by commandeering the notion of human rights to do specialized duty within his theory of intervention. But undue parsimony is not the inevitable upshot of weaker versions of the interventionist account. These adopt a more expansive reading of the kind of intervention that human rights violations may justify *qua* human rights, so that even rights whose violation cannot generate a defeasible case for *military* intervention count as human rights provided that some international action, which would otherwise be ruled out by a morally acceptable principle of state sovereignty, becomes *pro tanto* permissible.[12] Nor is it enough to respond that, like Rawls, they too ignore the diversity of roles—beyond triggering intervention—that human rights are invoked to perform, such as determining the legitimacy of political regimes or the level of assistance owed to poor or "burdened" societies. Rawls and his followers do not deny that human rights serve roles besides justifying intervention, indeed they insist on it. What they claim is that their role as triggers for intervention distinguishes human rights within the class of moral rights more generally, and also from the rights upheld by a liberal constitutional order.

Griffin does not respond to this line of argument, but the key point is that he is not well-positioned to do so. In order to begin to show that human rights are only a sub-set of all moral rights, he needs an account of such rights in general, one that will not only enable him to distinguish human rights as a sub-set within the overall class (alongside liberal rights or whatever other rights he countenances), but also to explain in virtue of

[11] For defences of the interpretation of Rawls as offering a "Coercive Intervention Account" of human rights, see Tasioulas 2002b: 380–390 and Tasioulas 2009. Although certainly not uncontroversial, an interpretation of Rawls along these lines has been endorsed both by Griffin (2008: 23) and Raz (2010).

[12] Examples of such "interventionist" accounts of human rights include Beitz 2003; Beitz 2004; Raz 2010; Skorupski 2010. Not all political accounts of human rights that accord significance to their role as triggers for international intervention (or, more generally, international concern) are committed to the claim that human rights are helpfully treated as a sub-set of the broader class of (universal) moral rights; see Beitz 2009. And there are other political theories of human rights that identify the distinguishing political function of such rights by invoking functions other than, or additional to, intervention: e.g. benchmarks of the legitimacy of state-like institutions (see Rawls 1999: 78–81 and Williams 2005: ch. 6) and standards bearing primarily on the conduct of officials within coercive institutional schemes (see Pogge 2002: ch. 2).

which features both human rights and other non-human rights properly count as moral *rights*. In the absence of such an account, his response to the political conception of human rights fails to address their advocates' deepest motivations—primarily, those relating to non-parochialism and fidelity to the post-1945 human rights culture—and therefore remains seriously incomplete.

Assumptions about moral rights and their relations to other values

When plotting the nature and scope of human rights morality, Griffin makes a number of assumptions about the nature of moral rights and their relations to such values as justice and fairness. For instance, his reasons for rejecting Dworkin's characterization of moral rights as "trumps" against the general welfare include the following argument: (i) justice and fairness also sometimes trump the general good, (ii) the domain of justice and that of *human rights* is only overlapping not congruent; therefore, (iii) "one cannot use trumping to characterize *rights*" (Griffin 2008: 21, emphasis added). This argument proceeds from a premise about *human rights* to a conclusion about *rights*. But in the absence of an appropriate characterization of the domain of rights in general, it cannot succeed. Even if we grant (ii), it may still be the case that the domain of moral rights, of which human rights is a proper subset, *is* not only congruent with the domain of justice but constitutive of it. After all, it is a standard characterization of justice, shared by Kant and Mill among others, that it is the domain of perfect obligations, i.e. those with corresponding right-holders to whom the duties are owed, as opposed to imperfect obligations such as those of charity, which do not have right-holders.

Griffin also sometimes argues in the other direction: from a claim that something is not a matter of rights, to the conclusion that it is not a human right. For example, he says that your free-riding on a bus does not violate my human rights because, in so doing, "you do not violate my rights, even though you act unfairly" (2008: 41). But as a paying customer, do I not have a right against other users of the bus that they abstain from free-riding, one that leads to my personally being wronged when they engage in this practice? Again, however, the absence of an explanation of moral rights renders obscure the basis for Griffin's judgements in cases such as this one, with the result that they seem incapable of bearing the weight he places on them.

Perhaps Griffin denies that human rights are only a proper sub-set of the broader category of moral rights. Instead, he may take them to exhaust all the moral rights that there are.[13] This would explain his seeming indifference to the distinction between human rights and moral rights. For example, in discussing a principle of distributional equality as a would-be (human) right, he asks rhetorically: "Where would we draw the line between the moral demands of equal respect, or justice, that are rights and those that are not, other than where the personhood account has already drawn it?" (2008: 43). But it is controversial, to put it mildly, to confine the extension of moral rights to human rights. Are there not also moral rights grounded in accomplishment (desert), or in membership of certain groups or some other special relationship? And even if we were to take this drastic step, it still hasn't been explained in virtue of which features of human rights are rights as opposed to values, interests, or goals, and so on. The identity in the extension of moral rights and human rights would not efface the difference in their respective intensions.

III. Characterizing moral rights

A sceptic who persisted in doubting that a general account of moral rights stands to make a significant contribution to Griffin's project might respond as follows: "Just as there is a danger of 'changing the subject' by tackling human rights in a top-down manner, the same danger arises if we are diverted into the circuitous byways of the general theory of moral rights. Alternatively, if we manage to avoid changing the subject, then we may well discover that a fuller characterization of the notion of a moral right—one that goes beyond Griffin's ultra-minimalist formulation—is simply unavailable. So, embarking on an inquiry into the broader notion of a moral right will either do no work, or else the wrong sort of work, in the enterprise of conferring greater determinacy of sense on the concept

[13] The thrust of the passage on page 17 seems to be that rights-based moral claims are distinguished from others by being grounded in personhood. On the other hand, on page 83 he entertains the proposal that beings who are not normative agents (e.g. infants, the severely mentally handicapped, etc.) might have "certain general moral rights simply in virtue of being human," albeit not human rights strictly speaking. This proposal is eventually rejected in the case of infants (2008: 90–91) in favour of the view that children acquire *human rights* in stages, as their capacity for normative agency develops (2008: 91–95).

of a human right. Contrary to initial appearances, Griffin's avoidance of the matter is the product of shrewd judgment."

Is there an informative explanation of the general notion of a moral right that does not mire us in philosophical controversies that are alien to the concerns of the human rights culture? What is at issue here is nothing so ambitious as a definition of moral rights nor anything so crass as an insistence that one take sides in the endless feud between the proponents of "interest" and "will" theories of rights. My conjecture is that much is to be gained by elaborating on three important features of moral rights, features that are to a significant degree neutral as regards divergent philosophical theories, but which capture the distinctive contribution that the language of rights makes to ordinary moral discourse, including the discourse of human rights.

Sources of duties. Moral rights—or one paradigmatic manifestation of them usually referred to as "claim rights"—are sources of moral duties or obligations (I use these terms interchangeably). The existence of a right to *x*, on the part of A, grounds duties on the part of others variously to protect, respect, etc. A's possession, access, etc. to *x*. Now, Griffin interprets rights as "claims," but A's claim on *x* may simply consist in a reason for A to pursue *x* or for others to help A acquire *x* or at least not obstruct him in his attempt to do so. However, duties are moral reasons of a distinctive kind. They are *categorical*, i.e. their application to the duty-bearer, and their weight or stringency, is independent of how the latter happens to be motivated. They are *exclusionary* in their normative force, i.e. they are not merely to be weighed against competing reasons but also exclude some of the latter from bearing on what all-things-considered the duty-bearer should do (see Raz 1990: 37–45, 47, 178–199). And their transgression typically justifies a distinctive range of *moral responses*, e.g. blame and resentment on the part of the victim, self-blame (guilt) and repentance on the part of the rights-violator. Some go further, arguing that it belongs to the very nature of moral rights that the duties they generate are *claimable*, in the technical sense that through moral reasoning alone it is always possible in principle to determine both *who* bears the relevant duties and precisely *what* they must do in order to discharge them (see O'Neill 1996: 128–153 and O'Neill 2000: ch. 6). But there are good reasons to resist this further step, one being its deeply revisionary implications for human rights, which include demoting so-called "welfare rights" from the ranks of *bona fide* human rights (see Tasioulas 2007).

Individualistic grounding. Individual moral rights, of which human moral rights are a sub-species, are grounded in some normatively salient characteristic of the individual right-holder. For some theorists, it is an interest of the right-holder, the fulfilment of which contributes to their life going better for them, and which generates obligations on others variously to protect, respect, etc. that interest (see Raz 1986: 166). Contrary to the accusation that rights morality presupposes a falsely "atomistic" picture of human flourishing, among these rights-generative interests are those in taking part in valuable personal and communal relationships. For other theorists, the proposal to ground moral rights in interests ignores their distinctive normative role as agent-relative reasons. The appropriate response to interests, they claim, is fully determined by agent-neutral reasons to promote or maximize those interests; rights, by contrast, constitute limitations on what anyone may do to others in the name of promoting the general welfare or even the fulfilment of rights themselves. For many impressed by this line of thought, moral rights are not grounded in the *interests* of the right-holder but in a special normative *status* they enjoy, such as that of being an equal member of the moral community (see Nagel 2002). For yet others, both considerations pertaining to interests and status may be invoked to justify claims about moral rights (see Buchanan 2010). In specifying the concept of an individual moral right, we need not decide between these contending theories.

Directed character. Individual moral rights are held by identifiable individuals; violations of the duties grounded by those rights entail the wronging of the right-holder. This contrasts with violations of imperfect duties (those with no corresponding right-holder, such as a generalized duty of charity), which do not constitute the wronging of any particular individual. The directed character of wrong-doings that are rights-violations can be seen as following from the first two features of individual moral rights: that they are sources of obligations grounded in some special feature of the individual who has the right. Some theorists of moral rights wish to elaborate on this feature by associating it with a distinctive normative power on the part of the right-holder, i.e. to enforce, in some manner or other, the performance of the duty or, where this is not possible, to exact compensation or inflict punishment (see Skorupski 2010). But these further steps are controversial, and one

need not take them in order to capture an important dimension of the special directedness of those wrongs that are rights-violations.

This threefold characterization of moral rights, although rudimentary and incomplete, begins the work of explaining why the word "rights" in "human rights" cannot be replaced by "interests," "claims," "values," etc. without a significant alteration of sense. At this point, Griffin might respond by drawing on this sketch to fill out the incomplete arguments noted in the previous section. Indeed, there are reasons to think he would find the preceding sketch congenial. Although he does not dwell on the third feature, the other two figure prominently in *On Human Rights*. Thus, Chapter 5 is partly devoted to the question of determining who bears the duties corresponding to human rights. Moreover, his personhood account offers an individualistic grounding of human rights, one that operates within an interest-based framework, but which seeks to capture the grain of truth in status-based theories by limiting the interests that can ground human rights to those that constitute our normative agency.

But the idea that Griffin might simply co-opt this explanation of moral rights without any damaging repercussions for his other commitments is, at this stage, an unduly optimistic assessment of the dialectical situation. There is not only the fact that the deficits in the arguments discussed in section II still need to be made good. There is the more troubling realization that, with an explanation in hand of what human rights must be to count as moral rights, a number of Griffin's key theses come under strain. In the next three sections, I shall focus on three such theses: (1) that human rights are exclusively grounded in the values of normative agency or personhood, and that this personhood account of human rights furnishes a compelling explanation of both (2) the universality of human rights, and (3) their role in practical conflicts.

IV. The grounds of human rights

Our reflections in section III motivate the suspicion that Griffin exaggerates the level of indeterminacy afflicting contemporary human rights discourse by overlooking the potential richness of the idea that human rights are a species of moral rights. And, as I have already suggested, elaborating on the idea of a moral right need not inevitably incur the disadvantages of top-down theory. Instead, what is at issue is, if anything, a more thoroughgoing bottom-up approach than that pursued by

Griffin, one that takes seriously the ordinary designation of human rights as rights. Once we see that there is more to human rights being rights than Griffin allows, we should be less receptive to the verdict that the term "human right" is "nearly criterionless." We are also better placed to contest some of his more controversial comparative judgements, for example that the criteria governing the application of the notions of justice and fairness are significantly more determinate than those for rights or human rights (Griffin 2008: 16–17). Not only does Griffin supply little evidence for this claim, it would be surprising if it were true, for how should we then explain the influential tradition of explicating the notion of justice by reference to that of rights?

Again, Griffin might venture the conciliatory response that all this is yet more grist to his mill. If the sense of "human right" is already more determinate than he was initially disposed to allow, then so be it. The idea still needs completion, which the personhood theory provides. Moreover, he could mobilize the content in the idea that human rights are a species of moral rights to counter a serious objection to his personhood theory. Recall that the personhood theory grounds the existence of human rights exclusively in the value of possessing and exercising the capacity for normative agency, which Griffin elaborates in terms of the values of autonomy, liberty, and the minimum material provision they require:

> Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act: that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty'). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected (2008: 32–33).[14]

[14] Although Griffin describes his theory as "trinist," appealing to the three values of personhood: autonomy, liberty, and minimum provision (2008: 51), it is probably best to regard it as dualist, since minimum provision is invoked only as a condition for realizing the other two values.

One version of the kind of objection to the personhood account I have in mind has been forcefully presented by Joseph Raz. It takes the form of a dilemma. On the one hand, the notion of personhood might consist in the bare capacity for intentional action together with some measure of its successful exercise. In that case, even a slave's life can realize it—slaves would hardly be as useful to their masters as they are were they not capable of successfully engaging in purposeful activity. But, Raz says, only an ultra-minimal set of rights would follow from protecting this capacity and its exercise. Alternatively, Griffin has a richer conception of "normative agency" in mind, one that requires the presence of a diverse array of genuinely valuable options from which to choose in shaping the direction of one's life, and enough liberty and material wherewithal to make one's choices effective. But now, Raz claims, the spectre of indeterminacy of sense, which the personhood account was introduced to exorcize, re-emerges with a vengeance. For no sufficiently determinate threshold has been specified for identifying the rights that flow from this richer conception of normative agency. So, either the personhood theory fares even more dismally than Rawls' theory in vindicating a list of recognizable human rights, or else it fails to secure the promised gain in determinacy of sense.[15]

[15] Here is how Raz puts it:

> If human rights are rights of those with the capacity for intentional agency to preserve that capacity, the distinction between capacity and its exercise is relatively clear, and a case for the privileged standing of the capacity can be made, at least so long as it is not claimed that the privilege is absolute. But Griffin quite explicitly extends the grounds of human rights beyond the capacity for intentional action. He includes conditions making its successful exercise likely, conditions such as the availability of education and information, of resources and opportunities. At every point he adds 'minimal' – minimal education and information, etc. But if minimal means some information, some resources and opportunities, however little, it is a standard easy to meet, and almost impossible to violate. Just by being alive (and noncomatose) we have some knowledge, resources and opportunities. Slaves have them. Griffin, of course, does not mean his minimal standard to be that skimpy. He suggests a generous standard. But then we lack criteria to determine what it should be. My fear is that this lacuna cannot be filled. There is no principled ground for fixing on one standard rather than another. (Raz 2010: 326)

A similar dilemma is put forward by Buchanan (2010: 694–696). Buchanan argues that Griffin illegitimately switches from one sense of personhood to another in a way that undermines his ability to satisfy the desiderata for a theory of human rights.

Whether or not Griffin equivocates in this way on the "personhood" good that is to be protected by human rights we can leave open.[16] But even supposing that he does, it is apparent on reflection that there is a prior and deeper problem facing the personhood theory than the one formulated by Raz. For even on the supposed first horn of Raz's dilemma, we must ask whether, and to what extent, the protection of the austere sense of normative agency grounds rights. We do not obviously have a right to anything that would protect our capacity for intentional action and its minimal exercise irrespective of the cost entailed. For example, it is reasonable to suppose that one does not have a right against the state that it spend astronomical sums on medical research aimed at finding a cure for an extremely rare disease that threatens to destroy one's capacity for intentional agency.[17] So, the deeper question about the threshold at which an agency interest, whether of the austere or rich variety, generates a right arises on both sides of the supposed dilemma. The problem is not only, or so much, with the character of the "input" into the process of generating human rights (austere or rich conceptions of normative agency, for example), but rather with specifying a plausible and sufficiently determinate threshold *any* such input must achieve in order to ground a human right. The moral Raz himself draws is that, in order to define the threshold in a way that is both determinate and faithful to existing human rights practice, we should adopt a "political" conception of human rights of the weak interventionist sort (see section II).

Griffin can be interpreted as having a different response to the problem. It is an appeal to "practicalities", the secondary ground ordinarily required to establish the existence of human rights. It is not usually enough that our interest in normative agency be engaged in order for a human right to arise; the claim generated by that interest must also be practicable:

> What is clear is that, on its own, the personhood consideration is often not up to fixing anything approaching a determinate enough line for practice. We have also to think about society. There are practical considerations: to be effective, the line

[16] My own view is that there is a charitable interpretation of Griffin's theory, according to which austere personhood is the condition for possessing human rights, while human rights protect both the capacity for personhood (austere) and its exercise (rich).

[17] Griffin would agree (2008: 99).

has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin. So to make the content of the right to security of person determinate enough to be an effective guide to behaviour, we need a further ground – call it 'practicalities'. We need also to consult human nature, the nature of society, and so on, in drawing the line (Griffin 2008: 37).

An initial stumbling-block, of course, is that this putatively indeterminacy-reducing factor is itself highly indeterminate. Griffin indicates the sorts of considerations that shape personhood values into human rights norms, but says nothing like enough about how they play this role. In particular, the threshold at which a personhood interest crystallizes into a right is not specified beyond the vague idea that human rights must have enough content "for them to be an effective, socially manageable claim on others" (Griffin 2008: 38). On one reading, according to which conditions must be accessible in which it is possible for (most) people to comply with the relevant norm, this is not a demanding test. But such a test would seem to validate many putative human rights norms that Griffin, along with many others, would be reluctant to endorse. More is needed, and it seems to me that a vital dimension that gets obscured is whether the personhood interest is capable of sustaining a *moral right*. This will crucially involve addressing the question whether it can generate *duties* on the part of others variously to protect, respect or promote that interest, which in turn will implicate questions about the cost to the duty-bearers and others of imposing such a duty, the appropriateness of the repertoire of *moral responses* (guilt, blame, etc.) to its violation, and whether the wrongdoing has the *directed* character that distinguishes rights violations. This is why I contend that Griffin should respond to our original objection by co-opting the account of moral rights sketched in section III in order to confer the needed substance on the "practicalities" ground for human rights.

However, following this advice comes at a price. If "practicalities" is a vague umbrella term that, in part, comprehends conditions that must be satisfied to justify claims about the existence of a *right*, then Griffin has to abandon his contention that practicalities play no role in grounding some human rights, e.g. the right not to be tortured (Griffin 2008: 37). The second, far heavier price, is that it undercuts the motivation for grounding human rights exclusively in personhood interests. Provided the threshold for generating a right is satisfied, and provided the right in

question is suitably universal (possessed by all simply in virtue of their humanity), why should it not count as a human right even if non-personhood interests are also directly implicated in determining its existence and content? This opens the way to a more pluralistic account of the grounding of human rights than Griffin's personhood theory, one that can appeal to a number of different basic components of human well-being.

There is no need to settle here and now which interests, beyond autonomy and liberty, can play this human rights-generating role, although I believe that accomplishment, knowledge, friendship, and the avoidance of pain will figure among them. However, I think there is much to be gained from at least initially confining ourselves to recognizably prudential interests, even though the distinction between the moral and the prudential is not sharp. In particular, we should be reluctant to invoke overtly moralized human interests, especially those that appear to presuppose the very existence of the rights they purport to ground, such as an interest in not being subjected to severely unfair treatment.[18] On the view I favour, then, human rights are universal moral rights, but their grounding values are not restricted to an independently specifiable sub-set of universal prudential values in the way Griffin proposes.

Moreover, the pluralistic grounding of human rights apparently enjoys a number of advantages over its personhood rival.[19] First, it provides a more natural and secure style of justification for paradigmatic human rights, one that is both less counter-intuitively circuitous and less hostage to contingencies than the personhood account. For example, in conformity with common sense, the right not to be tortured can be interpreted as resting directly, in key part, on the victim's interest in avoiding severe pain. By contrast, for the personhood theorist, the pain of torture can only bear indirectly on the justification of that right, i.e. insofar as it impacts adversely on our personhood by "render[ing] us unable to decide for ourselves or to stick to our decision" (Griffin 2008: 52). The point extends to not quite so paradigmatic human rights, such as those to education, work and leisure (resting, in key part, on our interests in knowledge, accomplishment and play, respectively). Second,

[18] It plays a key role in Nickel's theory of human rights (see Nickel 2007: 62).
[19] I previously outlined them in Tasioulas (2002a).

the pluralist account ministers more effectively to the general idea that human rights are moral norms of substantial weight. By expanding the range of interests that can ground them, one augments their potential normative strength. Third, a pluralistic grounding of human rights enhances the prospects of justifying the applicability of human rights to cultures which do not place as high a value on autonomy and liberty as Western cultures. One does not have to rely exclusively on considerations of personhood, with the result that one can reach the selfsame human right by means of different values or, more likely, different eligible orderings of values. The point here is not merely strategic, about the comparative efficacy of different theories in persuading members of other cultures to recognize and implement human rights. Instead, the idea is that it is objectively the case that there are multiple human interests, that their ordering admits of incommensurable eligible alternatives, but that human rights norms might enjoy support from all such orderings. By rejecting the idea that human rights are exclusively grounded in personhood values we are potentially better equipped to respond to the recurrent objection of "parochialism" or "ethnocentrism."[20]

To these advantages, the defender of the pluralist theory should add the *ad hominem* observation that Griffin's rich understanding of personhood values—the way in which he conceives of autonomy as the capacity to choose among *intelligible* conceptions of a worthwhile life, and of liberty as the unimpeded pursuit of such choices—already implicates judgements about human interests beyond strictly those of personhood.[21] Consider, as an illustration, his heavy reliance on the values of deep personal relations and accomplishment in vindicating a human right to same-sex marriage (Griffin 2008: 163–164). The pluralist approach therefore picks up on and develops a tendency already latent in Griffin's own approach, but one which is disguised by his official commitment to a personhood theory of human rights. This makes it easier for those attracted to the personhood theory to embrace pluralism, while

[20] Griffin offers his own response to the problem of ethnocentrism at 2008: ch. 7.

[21] Contrast Dworkin's theory, which grounds human rights in two principles of human dignity (the equal value of all lives and the special responsibility of each person to make something of their lives) and relies on a sharp contrast between matters of morality and those of the good (or ethics) (see Dworkin 2007: ch. 2).

simultaneously undermining the assumption that the former enjoys conspicuous epistemic advantages through being more parsimonious in its grounding values.

Griffin addresses the case for pluralism towards the end of his second chapter (2008: 51–56), focusing on its first claimed advantage, i.e. that of providing a more compelling justification for paradigm human rights. Contrary to the pluralist's purported grounding of the human right against torture in our interest in the avoidance of pain, Griffin points out that "[t]here are many cases of one person's gratuitously inflicting great pain on another that are not a matter of human rights" (2008: 52).[22] This is presumably true, but the pluralist need give no credence to the idea that the avoidance of pain is the *only* prudential value bearing on the justification of a human right against torture. More importantly, the pluralist should not hold that there is a right against torture simply because torture causes great pain (or, for that matter, because it impacts adversely on any number of prudential interests). If he argued in this way, he would be open to the same criticism I levelled against Griffin, i.e. mistakenly tending to identify human rights with (a certain class of) prudential values and ignoring the fact that the threat posed to those values must ground a *moral right* in the case of every human being to be protected from it. And, irrespective of whether one is a personhood or a pluralist theorist about human rights, one can only show that torture violates a human right by establishing that the interests appealed to generate, in the case of each human being, a duty not to subject them to torture.[23]

So, the challenge endures: why insist that our interests in autonomy and liberty alone, and not also our interest in the avoidance of pain, bear directly on the grounding of the human right to be free of torture? Techniques exist for achieving the characteristic goal of torture—the subversion of another's will—other than through the infliction of great physical pain (Griffin 2008: 53). Presumably, one of the reasons we judge the use of torture to achieve this end to be *ceteris paribus* a graver human rights violation—and not simply a graver moral wrong—than, say, achieving the same outcome through the painless injection of chemicals,

[22] There is a parallel argument concerning the human right to education; see Griffin 2008: 53.

[23] For an influential statement of the sort of interest-based account of rights I am invoking here, see Raz 1986: ch. 7.

is that the former involves the infliction of great pain. How can this piece of common sense be squared with denying that our interest in the avoidance of pain *per se* plays a role in the justification of the human right against torture? One response is that the subversion of the will through the infliction of severe pain is indeed a graver *human rights* violation, but not because of the independent significance of the pain. Instead, the severe pain is able to magnify the gravity of the human rights violation only because it is appropriately related to the subversion of the victim's will, being the means through which that end is achieved. But this subtle rejoinder is unlikely to carry much weight with those not already persuaded by the personhood theory. And, in any case, it does not address other imaginable, torture or torture-like cases that look like human rights violations, because they involve the severe infliction of pain, but lack any comparable connection with the agent's will. Consider, for example, the infliction of two seconds of excruciating pain on a sleeping subject immediately followed by a complete memory-wipe, such that the experience has no detrimental impact on the subject's capacity for agency. An alternative response to such problem cases is that it is worth bucking common sense in order to enhance the determinacy of the term "human right." But, as we have already seen, the determinacy achieved by the personhood theory falls well short of establishing the threshold at which personhood interests ground a human right. In any case, an adequate theory of human rights should not make a fetish of determinacy; any gains in it must be weighed against the previously enumerated advantages of the pluralist account.

Rather than take the measure of these advantages, Griffin concludes his discussion of the pluralist alternative with a critique of the broadly Razian, interest-based conception of moral rights on which I have suggested that both he and the pluralist should draw. He claims that it would be excessively permissive, conniving at human rights "proliferation" by promoting a bloated conception of human rights that threatens to "fill most of the domain of well-being" (2008: 55). If well-grounded, this would be a powerful objection to the pluralist; unfortunately, Griffin does little to substantiate his claim. After all, the interest-based account offers a framework aimed precisely at drawing a genuine distinction between human interests, on the one hand, and what they entitle us to as a matter of right, on the other. Moreover, in arguing that the personhood account is superior because it is more minimalist than the pluralist

view, Griffin comes perilously close to presupposing the thesis he is defending. This is because he has not provided an independent, and sufficiently determinate, standard for deciding when an account is unduly permissive in the human rights it endorses. For example, he claims the pluralist is committed to a human right to "a rich array of options from which to build one's life," as compared with the personhood theorist who countenances only a right to the more austere conditions needed to support life as a normative agent (2008: 55). Now, it is in general a *non sequitur* to suppose that a wider base of prudential values for deriving human rights inevitably leads to a more demanding set of such rights. But even if this specific contrast is well-taken, it is not clear why it favours Griffin's theory. Minimalism *per se* cannot be the operative desideratum, otherwise Rawls' endorsement of a human right only to subsistence (rather than the more demanding right to an adequate standard of living) would be superior to both views.

In any case, these examples should not obscure the main point. To the extent that Griffin identifies challenges confronting the interest-based account of moral rights—and there certainly are tasks that need to be more fully addressed, such as giving a more informative characterization of the nature of duties and the threshold at which individual interests generate them—they are equally challenges for his own theory. For the appeal to normative agency, even when supplemented by practicalities, is not enough to establish a moral right without the sorts of considerations about duty-generation that the interest-based account makes central. That Griffin systematically sidelines these questions does not spare his theory from requiring answers to them.[24] But once we have these answers, we should find the restriction of human rights-grounding interests to the goods of normative agency to be under-motivated.

V. Universality and the "naturalist dogma"

Consider now an objection to this last suggestion. The objection is that pluralist theories of human rights fail to distinguish human rights

[24] Sometimes Griffin shows an awareness that his theory faces these challenges, e.g. "The place where we fix the limits of these demands [of duties corresponding to human rights] is not easy either to decide or defend. But, again, this is not a problem special to human rights" (Griffin 2008: 106). Nothing prevents a pluralist from making the same response.

suitably within the broader category of moral rights. In particular, they do not provide an adequate interpretation of thesis (a), one that explains why *all and only* human beings (who are normative agents, let us assume) possess human rights. For example, the right not to be tortured possessed by normative agents will not be categorically different from any right not to be tortured possessed by animals.[25] By contrast, the personhood account can readily explain this feature since it interprets the relevant aspect of our "humanity" or "human dignity" as our normative agency.[26] Even if torturing non-human animals or members of the human species who are not normative agents is a violation of their rights, and in the latter case even if it is a violation of general moral rights they possess simply in virtue of belonging to the human species,[27] it is not a human rights violation. Thesis (c), therefore, defeats the pluralist view in virtue of being able to sustain a superior interpretation of thesis (a).

One response to this objection calls into question the personhood theorist's restriction of the subjects of human rights to normative agents. This restriction creates familiar problems regarding what intuitively look like "human rights violations" involving, for example, human infants or those suffering from severe dementia. Because the pluralist can invoke a wider range of interests in grounding human rights, including the interest in avoiding severe pain, he is better placed to underwrite the widely shared intuition that policies of torturing newborns, or "harvesting" organs from mentally defective people, would be gross human rights violations.

But let us assume, *arguendo*, that the restriction of the bearers of human rights to normative agents is in order. Even on the hypothesis that the capacity for normative agency is not shared by the higher non-human animals, the pluralist can deflect the objection by distinguishing

[25] It might be objected that it is strictly impossible to torture an animal, because torture has as its characteristic aim the breaking of the victim's will in order to extract a confession, information, etc. Even if we accepted this objection, the argument in the text would go through by substituting the human right not to be subjected to extreme and gratuitous pain.

[26] "To adopt the personhood account of human rights is to adopt normative agency as the interpretation of 'the dignity of the human person' when that phrase is used as the ground of human rights" (Griffin 2008: 36).

[27] Recall that Griffin seems to allow for the possibility of "certain general moral rights [possessed] simply in virtue of being human," which are not human rights proper (see Griffin 2008: 83).

two roles that this notion plays in Griffin's theory. The first is to specify the holders of human rights, i.e. only those beings with the capacity for normative agency. Contrary to Griffin's suggestion,[28] this is a role that the pluralist need not contest, even if, as I have indicated, there are ample grounds for doing so. There is nothing incoherent in making the capacity for normative agency a condition of possessing distinctively *human* rights, while admitting interests beyond autonomy and liberty among the considerations that ground such rights. The second role is that the goods of normative agency are the *only* interests that ground human rights. But their role in explaining the distinctive character of human rights need not be tied to the feature that the pluralist finds objectionable, i.e. the claim that they are *exhaustive* of the interests that generate human rights.[29] A pluralist who admits that personhood interests generally or even necessarily figure in the grounding of human rights can also explain their distinctive basis without excluding other interests from playing an unmediated grounding role. Moreover, there are good reasons for a pluralist to accord special significance to personhood interests in light of the profound ways that our capacity for autonomous choice deeply shapes the character and fulfilment of our other interests, such as those in knowledge, deep personal relations, and even material subsistence.[30] In short, even if the tradition of human rights treats them as grounded in or protective of "human dignity," with human dignity explicated in terms of normative agency, a pluralist is not debarred from exploiting

[28] He assumes that a pluralist would have to include infants as bearers of human rights (see Griffin 2008: 93).

[29] Indeed, Griffin himself offers different answers to the capacity and grounding questions, see fn. 27, above.

[30] The Aristotelian idea that even humans' "animal" functions and needs are transformed by the distinctively human capacity to pursue them through reason and in community with others, which is also a prominent theme in the early writings of Marx, has been helpfully emphasized by Martha Nussbaum 2000: 71ff. Indeed, Griffin himself makes particularly strong—perhaps, in some cases, *unduly* strong—claims about the involvement of autonomy in other prudential values, e.g. "[N]othing counts as an accomplishment . . . unless it is one's own choosing. One's deep personal relations are valuable only if the love or affection they involve is based on one's recognition of the other person's value. Understanding, in the relevant sense, can only be autonomous" (2008: 151). It seems to me questionable, however, that one cannot accomplish something through success in an occupation one did not choose, or that a valuable friendship is impossible with a human who does not count as a normative agent by Griffin's reckoning, or that the understanding of the world imparted to an unwilling pupil by his teacher cannot enhance the well-being of the former.

these connections, since their force is not inextricably bound up with the distinctive claim of the personhood account.

Let me now ask whether Griffin offers a compelling account of the "universality" of human rights. Insofar as he subscribes to thesis (a), he upholds an orthodox interpretation of human rights. But, as we have seen, in recent years that thesis has been challenged by advocates of "political" conceptions of human rights. One line of objection to (a) turns on reading it as committed to an ahistorical interpretation of universality: "moral rights possessed by all humans simply in virtue of their humanity" (or, on Griffin's interpretation, rights possessed "by human agents simply in virtue of their [capacity for] normative agency" (2008: 48))[31] must mean that there is an invariant set of moral rights possessed by all human beings (human agents) at all times throughout history. Whatever the relevant schedule of human rights is, therefore, it must be just as imputable to Stone Age cavemen as to denizens of advanced, twenty-first-century societies. Human rights are, on this view, "natural rights", understood as rights meaningfully attributable even to humans inhabiting a state of nature. Call this the "naturalist dogma," in line with Charles Beitz's complaint that "the tendency to identify human rights with natural rights represents a kind of unwitting philosophical dogmatism."[32] Perhaps we can intelligibly conceive of cavemen as possessing a right not to be tortured, but how can we reasonably ascribe to them rights that refer to activities that are simply not conceivable, let alone feasible, in their historical epoch, such as rights to a fair trial, to an adequate standard of living, or to political participation? The orthodox account, according to this objection, lacks fidelity to the ambitions of the human rights culture, especially in the post-Universal Declaration era: "human rights" are not to be equated with "natural

[31] I have interpolated the words in square brackets.

[32] Beitz 2003: 38; the rest of the paragraph summarizes a line of attack on contemporary philosophy of human rights that is concisely developed in that article. For a persuasive argument to the effect that Beitz over-generalizes in attributing this dogma to contemporary philosophical theorists of human rights, see Buchanan 2008: 55–56. It is also deeply questionable whether the naturalist dogma characterizes mainstream Western thought about natural rights generally; see, for example, Tierney 2007. Similarly, A. John Simmons attributes to Kant a conception of natural rights comparable to that found in the Universal Declaration, one that affirms "rights that could not possibly be possessed in a state of nature, that depend on the existence of quite contingent social arrangements, or that could only be secured in a civil (i.e., political) condition"; see Simmons (2001): 186.

rights." Defenders of the political conception of human rights, by contrast, by linking human rights to the regulation of intervention among states in broadly contemporary geo-political circumstances, reject the requirement of ahistoricity that supposedly precludes the orthodox account from encompassing many paradigmatic human rights.

Although he does not address these arguments, Griffin clearly wishes to insist on (a) and, as part and parcel of doing so, something close enough to an ahistorical gloss on universality.[33] His strategy is to claim that (i) at the highest level of generality, there are three human rights that are ahistorical in scope: human rights to autonomy, welfare ("minimum provision"), and liberty, and (ii) that all other, more specific human rights count as human rights because they are derivations from the three highest-level human rights in specific times and places (Griffin 2008: 149). Consequently, not all human rights are "universal," although some of the universal rights will include more specific rights than the three highest-level rights. Thus, Griffin distinguishes between "basic, universal human rights—for example, freedom of expression—and derived, non-universal human rights got by applying basic rights to particular circumstances—for example, freedom of the press" (2008: 38).

Now, there are various difficulties with Griffin's response. To begin with, it carries the unwelcome implication that almost all of the standard items in human rights documents are not fully authentic human rights, since they lack the requisite universality. To counter this implication, one may develop, as Griffin does, an interpretation of thesis (a) that abandons the universality of the lower-level human rights. But then ahistorical universality will cease to be an essential feature of human rights. To this the reply may be that ahistorical universality remains important, because the lower-level rights are derived from higher-level rights that possess this feature. This is the strategy that Griffin pursues regarding freedom of expression, which he takes to be an ahistorically universal human right, and freedom of the press, which is an implication of it in specific circumstances: "Applying the right in the setting of the medieval hamlet might produce different derived principles from the ones that it would produce in a large, modern, industrialized society. But there

[33] Even Griffin, however, officially eschews the naturalist dogma, insofar as he is prepared to conceive of human rights as "rights that we all have simply in virtue of being *human agents in society*" (2008: 50).

would still be a robust enough sense of the identity of the right through the various applications of it needed in different social settings" (Griffin 2008: 49).

For the strategy to succeed, however, the higher-level universal rights must genuinely be *rights* and not just universal human interests. It is hardly obvious that this condition can be met such that, in a sufficient number of cases, the lower-level rights are plausibly construed as derivations from the self-same universal basic right.

Presumably, we can agree that humans throughout history have had some kind of interest in autonomy, liberty, and minimum material provision. But rights differ from the interests on which they may be based insofar as they involve counterpart duties. And we determine the normative content of rights in key part by reference to these duties; indeed, Griffin tells us that "[t]he content of a human right is also the content of the corresponding duty" (2008: 97).[34] But is there, for example, a recognizably unitary *right* to freedom of expression that applies across the whole range of human history and, in the context of modernity, generates the specific rights Griffin believes that it does? If it existed, it would need to have broadly equivalent high-level deontic implications across human history—this is what "a robust enough sense of the identity of the right" through its various applications would essentially consist in by Griffin's own reckoning. But it is a tall order to demonstrate that the free expression rights of a medieval serf, let alone a Neolithic caveman, involve more specific determinations of the same high-level duties as the free expression rights of members of modern-day societies. Are we to believe, for example, that roughly the equivalent *level* of expressive freedom is secured in each epoch, only by different means, notwithstanding the tremendous variation over time in the conditions—such as cost and feasibility—that bear on the duties that the interest in expressive freedom can generate? The strong likelihood is that if there were a unitary high-level right to freedom of expression that applied across human history, its high-level deontic

[34] But compare the following statement: "That there are duties correlative to claim rights does not imply that whatever rights demand, there will be duties sufficient to supply it" (Griffin 2008: 109–110), which seems to allow for discrepancies between the content of the right and that of the corresponding duties.

implications would be more minimal than Griffin supposes, even in the context of modernity.

The problem again traces back to Griffin's tendency to downplay the fact that human rights are indeed *rights* and not reducible to a special class of interests. Indeed, when he characterizes the highest level of abstraction at which human rights may be expressed, he speaks not of rights or duties but of "the *values* that we attach to agency . . . autonomy, minimum provision, and liberty" (2008: 50, emphasis added). Greater sensitivity to the distinction between rights and their grounding interests should have led to an enhanced appreciation of the merits of jettisoning the ahistorical interpretation of the universality of human rights (Tasioulas 2002b: 83–88). After all, that interpretation scarcely exercised the framers of the Universal Declaration of Human Rights or the instruments that make up the International Bill of Human Rights.

On the temporally relativized interpretation of thesis (a) that I favour, when speaking about the rights possessed by all humans simply as human, it is appropriate to impose, explicitly or implicitly, constraints on the historical period to which reference is being made. The formal feature of universality is still retained, since human rights apply to all those properly designated "human" within the specified historical period. When interpreting the human rights referred to by the contemporary human rights movement, the relevant historical period should normally be taken to be that of modernity. This does not mean that slaves in the ancient world or medieval serfs lacked human rights, since on a number of eligible and illuminating specifications of the relevant historical period they clearly do not.[35] An additional benefit of my interpretation is that it provides a more concrete context for the judgements of feasibility that must be made in assessing whether an interest generates a moral right. Unfortunately, Griffin's tendency to elide the distinction between personhood interests and human rights gets in the way of his registering the

[35] Of course, it must be admitted that the definition of "modernity" is itself an endlessly contested matter. Still, what I have in mind is not especially nebulous. Conditions of modernity, in the present context, refer to a social context in which features of the following kind either obtain or are suitably accessible: significant levels of scientific and technological expertise and capacity; heavy reliance on industrialized modes of production; the existence of a market-based economy of global reach; a developed legal system that is both efficacious and broad-ranging; the pervasive influence of individualism and secularism in shaping forms of life, and so on.

strength of the case for an orthodox approach that abandons the ahistorical interpretation of universality, rendering him vulnerable to the charge of espousing the "naturalist dogma".

VI. Human rights in conflict

I save for last perhaps the most difficult issue—the personhood theory's implications for conflicts involving human rights. It is exceedingly hard to say anything both true and illuminating about such conflicts at the level of generality at which philosophers are accustomed to operate. A respectable candidate for a statement about this topic that is non-trivially true is the following maxim: "Human rights are resistant to trade-offs, but not completely so" (Griffin 2008: 76). But does Griffin's own theory respect this maxim? Let me explore two reasons for doubt, both of which again take their rise from the phenomenon that is the over-arching theme of this chapter—Griffin's tendency to downplay the fact that human rights are *rights*, treating them instead largely as the goods of normative agency (filtered as may be by "practicalities"). This draws a misleading picture of human rights-involving conflicts, exaggerating their incidence and, as a result, the potential susceptibility of human rights to trade-offs.

The first line of thought proceeds from the idea that human rights, *qua* rights, enter into conflict primarily through their corresponding duties conflicting with other normative reasons. So, in order to identify whether a human right is in conflict, let alone to make a start on the conflict's resolution, one needs first to specify the content of its corresponding duties. Consider now two cases of supposedly genuine human rights conflict described by Griffin. One is the case of the criminal whose liberty is restricted by the imposition of a punishment that he deserves given the gravity of the crime he has committed (a human right (to liberty)–. retributive justice conflict). The other is the case of the detention without trial for a few months of a small number of suspected terrorists in order to avert a serious threat of a nuclear attack on a heavily populated metropolis (a right (to liberty)–right (to life and personal security) conflict). Griffin contends that the conflict in the two cases should be resolved to the detriment of the human right of the individual being imprisoned or detained, even if, at least in the case of the innocent

detainees, he is prepared to call their detention a "violation" of their human rights (2008: 68–69).

Now, there are important differences between these two cases that go unremarked in Griffin's analysis. By contrast with the second case, there is considerable pressure to treat the first as a pseudo-conflict, i.e. one such that "[o]nce the content of each of the apparently conflicting human rights is spelt out sufficiently, one often finds that there is no conflict at all" (Griffin 2008: 58). After all, the normative content of the criminal's right to liberty is primarily that of the duties it generates. Can it be credibly interpreted as imposing a duty not to subject him to a just punishment, albeit a duty that is defeated by the duty of retributive justice to inflict that same punishment? This strikes me as a highly implausible interpretation, but it is one to which Griffin seems to be led precisely because of his proneness to reduce human rights to the personhood interests that underlie them. We can certainly agree that a deserved punishment impacts negatively on the criminal's *interest* in liberty—punishment would lose its characteristic point did it not inflict "hard treatment" that impaired some of the wrongdoer's interests.[36] But that the punishment is detrimental to his interests in normative agency does not yet show that it violates a right of his; that depends on the content of the duties generated by his interests.

The objection here is not based on the "forfeiture" theory of justified punishment, the idea that by virtue of committing a crime the wrongdoer forfeits his right to liberty. As Griffin points out in a neat demolition of that theory, the offender remains a person, who retains all his human rights, including the right to liberty, and his deserved punishment *is* the forfeit he suffers in virtue of his wrongdoing, rather than something rendered permissible by the prior forfeiture of his right to liberty (2008: 65–66). Instead, the question is whether the duties generated by the right to liberty, when fully specified, incorporate an *exception* for the case of deserved punishment, so that the reasons of retributive desert for inflicting such a punishment do not come into conflict with that right. Contrast, now, the second case. Detention without trial under emergency circumstances arguably does not form an exception to the duty corresponding to one's right to liberty. One reason is that the duties generated

[36] This is compatible with the possibility that the offender's overall interests are best served by undergoing the punishment in a spirit of repentance.

by human rights are meant to reflect standard situations of everyday life, and *ex hypothesi* this is an extraordinary case. In this sort of case, the duty generated by the right to liberty is arguably defeated by the rights to life and personal security. Moreover, this difference between the two cases is underlined by the appropriateness of sharply contrasting responses to the infliction of punishment, on the one hand, and the detention without trial of innocent terrorist suspects, on the other. In the latter case, but not the former, responses such as apology and compensation may be obligatory on the part of the state, even if the detainees' rights to liberty were justifiably overridden by the competing demands of the rights to life and liberty of the terrorists' potential victims. In addition, the innocent detainees are justified in taking some steps to avoid their detention, whereas the justly sentenced criminal is not permitted to resist his punishment.

Of course, various replies are open to Griffin. Sticking to his guns, he might argue that the human right to liberty includes a right not to be deprived of one's freedom by the infliction of a deserved punishment. Or he might propose a terminological palliative, distinguishing human rights *violations* from human rights *infringements.* The former are instances of non-compliance with duties corresponding to human rights that are not all-things-considered justified, whereas the latter are instances of non-compliance that are so justified. Withdrawing his characterization of the second case as a "human rights violation," he may contend that the parallel treatment of the two cases is easier to countenance if we think of them as both involving "infringements" of the human right to liberty (a line of thought consistent with Griffin's remarks at 2008: 165). My own feeling is that the prospects for neither response are bright. But the deeper point is that to address the objection Griffin must overcome his reductionist tendency and consider the extent to which the (personhood) interests at play in these two cases generate *rights* of any sort. This requires specifying the content of the duties associated with those putative rights. In other words, he will be back to the vital question of the threshold at which interests generate duties, a question to which I have suggested Griffin stands as much in need of an answer as his pluralist opponent. Only in this way can he hope to satisfy his own maxim; the alternative is a conception of human rights that places them in conflict, and therefore potentially liable to trade-offs, whenever the interests that underlie them are at stake in practical deliberation.

An understandable response on Griffin's part would be that the foregoing objections are minor when set against the main achievement of his chapter on human rights conflicts, which is twofold. First, he mounts a powerful attack on some familiar deontological accounts of the (non-absolute) resistance of human rights to defeat by competing considerations. Second, he offers an explanation of the resistance of human rights to trade-offs within the personhood account, one that draws on his wider reflections on the grounding of moral norms. Let us consider the second, positive achievement. For it might be supposed that the reductionist strain in Griffin's account of human rights leaves him vulnerable to the standard deontological charge that any theory that grounds human rights in interests fails to capture their distinctive moral significance. It is precisely the assumption that any account of human rights that grounds them in interests renders those rights transparent to the underlying interests, together with the further assumption that the moral logic appropriate to interests is a consequentialist one, that orients Nagel's well-known criticism that such theories cannot explain the special role of rights in our moral thinking, including their resistance to trade-offs (Nagel 2002).

Griffin begins his response to such anxieties by distinguishing consequentialist and teleological theories, on the one hand, from deontological theories, on the other. Theories of the former kind can treat the good as basic in the structure of morality and the right (taken in the broad sense, as encompassing moral requirements) as derived from it. Nevertheless, he insists that the personhood theory of human rights does not form part of a broader consequentialist agenda. He reprises his familiar rejection of consequentialism, which emphasizes the way that its demands surpass our limited cognitive and motivational capacities, thereby ignoring the need for a viable morality to fit the human frame (Griffin 1996: ch. 8). More positively, he explains that although consequentialism is a version of teleology, it "restricts the right and wrong to the production of as much good as rationality requires," e.g. by insisting on maximizing or satisficing outcomes, whereas non-consequentialist teleological theories allow for other ways of basing the right on the good (2008: 80).[37] In particular, Griffin's teleological approach to human rights recognizes

[37] Presumably, Griffin has in mind here only welfarist versions of consequentialism. There is no reason why a broader interpretation of consequentialism might not recognize non-welfarist values; see Sen (2000).

that the goods of normative agency are not only to be *promoted* but also to be *respected*.[38] It is this insight, that human rights may be derived from human interests without the reasons that justify the derivation, nor the reasons generated by the rights, being exclusively reasons to promote the underlying interests, that proponents of deontological theories of human rights are prone to overlook. Moreover, the importance of respecting human rights is the third, and perhaps central, way in which Griffin articulates the resistance of such rights to trade-offs. The other two are the great value of personhood beyond a certain level of material provision, and the existence of discontinuities of value.[39]

Griffin's account of the relative immunity of human rights to trade-offs is subtle and multi-faceted. I confine myself to offering two observations. First, it is hard to see why all three ways in which Griffin articulates this resistance could not also be endorsed by his pluralist rival. There are other important goods—such as the avoidance of pain, accomplishment, and so on—which can also acquire the kind of importance needed to play a role in grounding human rights. Indeed, it is no part of Griffin's argument that personhood values enjoy "uniquely great importance" (2008: 57). In any case, as we have seen, nothing prevents the pluralist from claiming that the goods of normative agency generally, or even necessarily, figure in the grounding of human rights. Moreover, both discontinuity and the importance of respecting, as opposed to promoting goods, obtain beyond the domain of personhood values, as Griffin himself acknowledges.

My second observation is considerably more speculative, and consists essentially in an expression of unease at Griffin's contention that the deontological notion of "(equal) respect for persons" is otiose in explaining the grounding of human rights and, consequently, the weight attaching to them in practical deliberation (2008: 40).[40] One reason for my unease stems from Griffin's own characterization of the contrast between

[38] "At times, the only moral life open to us involves *respecting* values, not *promoting* them. By 'respecting' the value of human life, for example, I mean primarily, but not solely, not oneself taking innocent life; by 'promoting' life, I mean bringing about its preservation as much as possible by any means open to one" (Griffin: 2008: 74).

[39] "Some values—an obvious case being our status as persons—are such that no amount of certain other values can ever equal or surpass them" (Griffin 2008: 80).

[40] See also Griffin's remarks questioning the "independent deontological weight of our right to autonomy" (2009: 78).

deontological and teleological interpretations of the value of personhood. According to the former, "[p]ersonhood . . . has a value independent of promoting the ends that make a human life good," while according to the latter "the exercise of personhood is an end the realization of which enhances the value of life" (2008: 57). But on these formulations it is possible to be both a deontologist and a teleologist about the value of personhood. Indeed, Griffin himself counts as such, since he believes that human rights morality is deeply shaped by the importance of *respecting* personhood and not just promoting it. It might be responded that I am unfairly exploiting a loophole in Griffin's formulation of the deontological view. For Griffin may protest that we respect personhood by respecting the *goods* of normative agency; there is no extra work to be done by the deontological notion of respecting *persons*. Or, to put it another way, respecting persons comes to nothing more than respecting their (personhood) interests, which the teleological interpretation already enjoins.

My reluctance to allow this response the last word has various sources. One is a general discomfort with the terms of the debate—in particular, the foundationalist assumption that we must accord priority either to the right or the good in giving an account of interpersonal morality. It may be that we need ultimately to appeal to both notions, so that the question of relative priority embodies a misplaced assumption about the shape an acceptable explanation should assume.[41] What would then be in prospect is not necessarily a bifurcated account of the "foundations" of interpersonal morality, including the morality of human rights, in prudential values and autonomous deontological considerations. On the contrary, properly registering the moral significance of human interests involves seeing them as the interests of persons who merit equal respect in virtue of that status. Indeed, were these interests taken to be the ultimate concern of our moral thought, with the individuals who have them treated as little more than the "locations" at which they are realized or frustrated, then there would be less intuitive resistance than there manifestly is to consequentialism. Equally, were the idea of respect for persons pressed into service without some conception of the ends of

[41] "Morality is built at many different levels of generality at the same time. It does not display the sort of priorities that allow much in the way of what we can call 'derivation' of lower-level ideas from highest-level, axiomatic ones" (Griffin 2008: 40).

human life, it would likely have insufficient content to yield convincing justifications of even rudimentary substantive moral norms, let alone anything recognizable as the morality of human rights.

The idea at which I have gestured is not alien to the broad tendency of Griffin's own thinking. On the contrary, he tells us that the principle of equal respect for all moral persons "expresses the moral point of view itself and human rights, being moral standards, must likewise be expressions of it" (2008: 39). Unfortunately, and mainly for the rather peculiar reason that it lacks the content to determine on its own which human rights exist, Griffin sets the principle of equal respect aside in favour of concentrating on the role of personhood interests in grounding human rights. One disappointing consequence of this is a failure to explore more fully the generative powers of the principle, in tandem with an account of personhood interests (and others besides), for human rights, especially those rights that are most obviously egalitarian in character.[42]

VII. Conclusion

The main thrust of this article has been critical of key features of Griffin's personhood theory of human rights. This should not obscure the fact that it remains not only the most powerful, fully elaborated contemporary philosophical contribution to the topic, but also one that has put in place many of the foundations on which any future work should build. *On Human Rights* gives a fresh impetus to an orthodox conception of human rights, understood as rights possessed by all human beings simply in virtue of their humanity, and discoverable by ordinary moral reasoning. It makes a compelling case for a teleological grounding of human rights principles. And it shows just how illuminating philosophical inquiry into human rights can be when liberated from the assumptions that define the set-piece confrontation between consequentialists and deontologists in contemporary moral philosophy. The burden of this article has been to suggest that we should take more seriously than Griffin himself does the fact that human rights are *rights* and not the underlying prudential values that ground them. A proper appreciation of this fact opens the way for us to embrace a pluralistic account of the

[42] For a sustained argument that Griffin unduly neglects the egalitarianism of human rights morality, see Buchanan (2010).

grounds of human rights, and to offer a more defensible interpretation of their universality and their role in practical conflicts. In this way, we may hope to make further progress in earning a place for human rights within our best overall understanding of ethics.

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3

When the Good Alone isn't Good Enough

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I

James Griffin's *On Human Rights* is a thoughtful, interesting, informative, often illuminating, but also often frustrating and not wholly satisfying examination of human rights. Griffin theorizes human rights not as critical (rather than merely conventional) legal or political rights but as critical moral rights (Griffin 2008: 1). As critical moral rights, he theorizes them as governing not only or mainly the legal and political treatment of citizens by the states to which they belong and the relations between states, but as governing also interpersonal conduct and social relations more generally. Critical moral rights so understood constitute a large and complex topic. Indeed, it arguably is not a single topic; or, if it is, it is not a single topic best approached by reasoning from abstract universal morality to law, politics, interpersonal relations and much else as something like instances of applied ethics, which is mostly how Griffin proceeds. In any event, to tackle it, Griffin divides his book into three parts. The first offers a general account of human rights as critical moral rights. The second examines what Griffin takes to be the three most general, basic or abstract human rights. The third considers various issues of extension and application, including the status of several

[1] Thanks to Tom Christiano, Rex Martin, and Jim Nickel for useful conversation during the preparation of this review essay, and to John Tasioulas and Huw Williams for helpful written comments.

putative derivative or second-order human rights (e.g. the right to privacy, the right to bring about one's own death) and the relationship between human rights as critical moral rights and human rights as a matter of international law and practice.

Griffin is drawn to the project by what he characterizes as the troubling indeterminacy of the idea of human rights within contemporary moral thought and practice (Griffin 2008: 14).[2] This indeterminacy has, he argues, many sources. They include skepticism about the theistic and teleological assumptions upon which rested older theories of natural law and natural rights and the contemporary tendency to invoke human rights whenever issues of justice are on the table. The problem, Griffin maintains, is not that we have a pretty clear idea of human rights but struggle to choose between rival conceptions of the concept.[3] It is, rather, that we do not have a very clear idea or concept of human rights in the first place. We presently lack sufficient shared criteria for the correct and incorrect use of the idea or concept to be able now fruitfully to move on to a more focused evaluation of rival moral conceptions or theories of human rights. That said, it is not clear that Griffin offers anything other than a candidate conception of human rights, a conception proposed as superior to familiar alternatives at tracking, clarifying, and correcting the role of human rights within moral thought and practice, across various domains, from interpersonal to international relations. Key features of the concept are left unexamined.

At the conceptual level, Griffin distinguishes between structural and substantive accounts of rights. Structural accounts fill in the concept by focusing on the formal or structural features of rights within moral reasoning—for example, that rights function as trumps or side-constraints. These Griffin finds inadequate as a basis for rendering the idea of human rights substantively more determinate (Griffin 2008: 20–21). And so he turns to substantive accounts. These fill out the concept of rights by appealing not only to the formal or structural features of rights within

[2] Griffin complained about this indeterminacy several years earlier in James Griffin (2001), "First Steps in an Account of Human Rights," *European Journal of Philosophy*, 9.3: 306–327.

[3] The distinction between a concept and various conceptions of it was introduced by Rawls in *A Theory of Justice* and later put to use by Dworkin in *Law's Empire*. See, John Rawls (1999 revised ed.), *A Theory of Justice*, Harvard: Harvard University Press: 5–9; and Ronald Dworkin (1986), *Law's Empire*, Harvard: Harvard University Press: 90–96.

moral reasoning but also to substantive values essential and peculiar to rights. Griffin distinguishes between top-down and bottom-up substantive accounts. The former, which Griffin rejects, draw on substantive first principles taken from a complete or comprehensive moral doctrine to fill out the concept of moral rights. The latter, which Griffin favors and pursues, draws on the wide range of particular substantive judgments regarding moral rights, including human rights more specifically, that appear relatively fixed and stable across generations and cultures (Griffin 2008: 29).

Griffin attempts to render the concept of human rights more determinate, then, by constructively interpreting the notion as it has been inherited from late medieval, early modern and Enlightenment thinkers and as it is revealed by contemporary criteria for correct usage, such as they are, implicit in particular substantive judgments regarding universal moral rights, or human rights more specifically. The interpretation he favors casts human rights as the pressing moral norms practically necessary to respecting and supporting our status and activity as normative agents, as persons capable of conceiving of and acting for the sake of their own good. At the highest level of abstraction, human rights secure our most general interest, they answer to and express respect for our most general good: namely, to live as normative agents. Griffin's view, then, is broadly teleological. He derives the right, and hence moral and human rights, from considerations of the good. His view is not consequentialist or utilitarian, however. Griffin does not conceive of the right, and hence moral and human rights, as that which maximizes (or otherwise rationally promotes) the good alone. On his view, the relationship between the right and the good, the derivation of the right from the good, is more complex.

Now, it is worth pausing here to notice that Griffin manages here to beg an important question with respect to the concept of rights. The question concerns the relationship between rights and some measure of social recognition. Griffin assumes that rights are simply valid moral claims, nothing more. The question we face, he thinks, is whether we can unpack the idea or concept of valid moral claims on purely structural or functional terms, or whether we need instead to appeal also to substantive values. He thinks the latter, and ventures a "bottom-up" approach to the articulation of the relevant values (Griffin: 3–4). But it's not at all obvious that rights are simply valid moral claims, or even valid moral

claims of a certain weight or force, nothing more. Indeed, there has long been a vigorous philosophical debate over the extent to which the concept of a right, and hence of a moral right or a human right, necessarily involves some appeal to social recognition or institutional embodiment. To be sure, all parties to this debate recognize that if rights are to function as normative tools of critical assessment, they must in some sense be capable of exceeding that which is given by the status quo, by existing institutions and practices and so on. But it doesn't follow that we should, or even plausibly can, think of rights as valid moral claims only, apart from any meaningful measure of social recognition or institutional embodiment. Yet this is how Griffin proceeds. Of course, there's nothing objectionable about taking a position in this debate. The trouble is that Griffin claims as his philosophical task rendering the *concept* of human rights as moral rights more determinate and simply *assuming* a position in this debate is inconsistent with fully completing that task. Indeed, there is further trouble here. For it is not at all clear that Griffin can help himself to the resources he draws on—those human rights judgments and practices that have remained relatively fixed and stable across generations and cultures—in his "bottom-up" approach to constructively interpreting the idea of human rights as valid moral claims without at least implicitly endorsing some social recognition or institutional embodiment constraint on the valid moral claims that count as moral rights or human rights and thus ought to be tracked and accounted for in the best constructive interpretation of human rights as valid moral claims or moral rights.

II

This bottom-up exercise of constructive interpretation leads Griffin to normative agency as a primary justificatory ground of human rights (Griffin: 33–37). To be sure, Griffin does not deduce human rights from normative agency. Nor does he argue that one can deduce from the history of human rights discourse and practice, up to and including present-day particular judgments, that normative agency constitutes a foundational ground of human rights. Rather, Griffin proposes to render the concept of human rights both more determinate and more attractive by foundationally linking human rights and normative agency. While the link is foundational and justificatory, the argument for it is constructive

and interpretive. The idea is that by thinking of human rights in this way we arrive at a conception that makes sense of and makes a practical contribution to an ongoing tradition or practice.

On Griffin's view, normative agency is roughly identical to Rawls's first moral power, the power to form, revise and pursue a conception of one's own good.[4] Griffin allows, of course, that social relations of all sorts may, no doubt will, constitute an important part of one's own good. But still, at the root of Griffin's account lies a not very social conception of the self—for the self is taken at its core to be constitutively independent of relations to others. To put it in Rawlsian terms: Because the first moral power, the power of rationality, presupposes no constitutive relations with others, to affirm as complete a self marked only by the first moral power is to affirm a self that is not in fact social at its core, not constitutively social. It is to affirm a self the good of which may, no doubt will, depend on relations to others, but which itself, as a self, nevertheless does not. Rawls's point in insisting on a conception of the self constituted by the conjunction of the two co-equal and co-foundational moral powers, the rational and the reasonable (where the reasonable is fundamentally dialogic or oriented toward the other and depends on or presupposes the reasonableness of others), is that the self—or at least the self that asks moral questions, and presumably human rights questions are moral questions—is at rock bottom social, it is a self necessarily in and constituted through social relationships, mutually intelligible and justifiable and so reasonable, with others. On the Rawlsian view, the right concerns reciprocal public justification within those relationships, relationships at least partially constitutive of the persons who stand in them.[5] On Griffin's view, the right concerns objective truths about the social norms properly responsive to what is good for each and all persons as constituted prior to or apart from their relations one to another. As with the question of whether the concept of rights involves some measure of social recognition or institutional embodiment, here too it would appear that Griffin has begged a question that one would expect to be addressed head-on in any effort to render the *concept* of human rights as moral rights more determinate. By assuming without argument a conception of normative agency that is exhausted by Rawls's first moral power, Griffin

[4] See John Rawls (1996), *Political Liberalism*, New York: Columbia University Press: 81.
[5] *Ibid.*: 50–54.

begs an important question about the concept of rights, and the right more generally. He takes the concept to involve fundamentally the relationship between persons and the good rather than the relationship between persons. By so doing he no doubt renders the concept more determinate, but he does not do so through argument or analysis or constructive interpretation. And so, again, I'm driven toward the view that what Griffin does is start with an already fairly determinate, if not openly confessed, concept of rights—rights are the social norms expressing valid moral claims that relate persons, conceived of in terms of Rawls's first moral power only, to the good—and then go on to offer, and highlight the merits of, his favored substantive conception of this concept.

Given his stated ambition, what one might have expected Griffin to have done instead is to have devoted some critical attention to the long-standing philosophical debates over the concept of rights, or of moral rights. After all, human rights are presumably a special class of moral rights. And moral rights are a special class of moral claim. So part of what one must do to render the concept of human rights more determinate is to get clear on their nature as rights. But this Griffin does not do. Linking human rights with the good of, or our universal human interest in, normative agency does nothing to illuminate human rights *qua* rights. There are many goods or interests, even important and universal goods or interests, from which rights in the relevant sense, that is, moral claims held by particular individuals that impose determinate duties on other particular individuals the nonfulfillment of which constitutes a *pro tanto* wrong against the right-holder in particular, do not arise. However, having ignored the fact that the concept of human rights is a concept of a certain class of *rights*, Griffin is more or less blind to all that he would have to show in order to render the idea of human *rights* more determinate by linking them with normative agency. The link to normative agency arguably helps to explain or fill in the universality, the *human*, of human rights, but it doesn't explain or fill in the *rights* side of human rights.

III

Normative agency is morally significant, on Griffin's view, at least when it comes to the justification of human rights, not because of some

Kantian dignity (beyond price) intrinsic to it, a justificatory ground that would support a conception of human rights as more immune to trade-off against other values than Griffin is prepared to accept. Instead, what is morally significant about normative agency is that its exercise or realization constitutes the most general and basic good available to those who conceive of and experience themselves as normative agents, namely, all normally competent adult humans. Other things equal, a human life goes better to the extent that the person living it realizes and exercises her capacities for normative agency. Human rights serve and protect, then, this end or good, one basic or fundamental to the life of every normative agent.

Now, it's not clear how appealing to the relatively diffuse or indeterminate or abstract good of or interest in normative agency is to serve the goal of rendering the idea of human rights more determinate. After all, this good or interest is one that would seem to be implicated in virtually all our voluntary conduct. If the appeal to it is to render the idea of human rights more determinate, what is meant by it will have to be specified more carefully, in a more limited fashion. The notion must be given content sufficiently determinate and limited for it to serve constructively as a basis for and constraint on contemporary human rights discourse and practice (within which human rights are typically many and specific, e.g. the right to marriage, the right to a fair trial, the right not to be tortured, etc.).

Griffin further specifies normative agency as a fundamental end or good in terms of three essential ingredients: autonomy (choosing for oneself), liberty (acting on one's choices), and welfare (the material and social conditions necessary to autonomy and liberty). As normative agents, we have a general interest in each, and each underwrites, accordingly, a general or abstract human right. These interests reflect more than mere subjective tastes; they reflect appropriate responses to what is in fact universally and objectively valuable for us as persons, the essential conditions of our own active or realized normative agency. Griffin allows that we cannot set out in a value-neutral way how it is that we correctly perceive what is valuable for us as persons—whether at the level of our own normative agency, its three essential ingredients, or more concrete and particular goods. But this, he thinks, in no way compromises the factual truth or objectivity of his claims about our general interests (Griffin 2008: 123).

It is worth noting here that Griffin's three most basic human rights—the rights to autonomy, liberty, and minimal material welfare—are universal in the sense or way that traditional natural rights are universal; they are rights persons have across time, space and institutional context. They are, in that sense, like Locke's natural rights. And they are also, then, in that sense, unlike contemporary human rights, many if not all of which presuppose the historical conditions of modernity. Griffin thinks of the latter as derivative or as applications or implications of genuine basic human rights to or in particular contexts. But the cost of so regarding most if not all contemporary human rights probably exceeds whatever theoretical benefits are thought to follow from talk of three basic or fundamental human rights, to autonomy, liberty, and minimal material welfare. A more plausible approach here would be to hold that contemporary human rights may be organized into three families or groups, each associated with one of the elements ingredient in the good of or interest in normative agency. But taking that approach would highlight the necessity of closing the gap within the very concept of a human right between a valid claim about what is good for or an interest of all human persons and what all persons today have a human right to (in the sense of imposing determinate duties on particular others the nonfulfillment of which is *pro tanto* a special wrong against the right holder). If we start with the many and specific contemporary human rights—socially recognized, correlated with duties, etc.—we might find that they answer in various ways to the good of normative agency. But if we start with the good of normative agency, we may find ourselves defending a list of human "rights" strikingly removed from even the deeper but not yet fully realized tendencies of contemporary human rights discourse and practice.

Griffin's grounding of three general or abstract human rights (to autonomy, liberty, and material welfare) in the self-understanding of persons as normative agents may lead one to associate his view with Gewirth's.[6] But the two views are quite different. Two differences merit notice. First, Griffin does not rely on logical principles of consistency and universalizability in order to move from first-person claims about one's own good to third-person claims about human rights. Instead, in an

[6] See Alan Gewirth (1983), *Human Rights*, Chicago: University of Chicago Press.

extended discussion of the metaphysics of human rights (Chapter 6, which is, in the end, a discussion of the metaphysics of the general moral "ought" rather than the more particular "ought" ingredient in rights or human rights), Griffin relies on the ways in which, first, fact and value are both entangled and objective for social linguistic beings like us, and, second, self-interested persons, responsive to objective facts and values, socially converge on general policies to govern their interactions. These general policies, Griffin maintains, embody and express human rights commitments. A second difference between Griffin's and Gewirth's views is that Griffin does not share Gewirth's deontological orientation toward human rights. On Griffin's view, the general policies that embody and express human rights are broadly teleological (though not consequentialist). They socially embed a shared general commitment to giving a certain good or value great weight in our moral deliberations (Griffin 2008: 127). They do not commit us to maximizing (or otherwise rationally promoting) the relevant good or value at all times and at all costs. But they do commit us to respecting it (which will often involve rationally promoting, if not maximizing, it). In its broadly teleological orientation, Griffin's view is closer to Finnis's than it is to Gewirth's.[7] But Griffin's view is distinct from Finnis's as well. For one thing, Griffin is keen in ways that Finnis is not to mark off the domain of human rights as just a small corner of the larger domain of morality, a corner that only partially overlaps with the moral domain of justice.

Each of Griffin's most general or abstract human rights—to autonomy, to liberty, and to material welfare—is a claim to more than mere non-interference. Here Griffin follows the general thrust of current thinking and casts aside the distinction between negative and positive rights as a distinction ill-suited for any load-bearing work in a general theory of human rights. Yet, while even the most fundamental human rights require the affirmative performance of certain acts or the positive provision of certain goods, no human right demands more than what is minimally required to respect and support the good of normative agency. Human rights are part, and only one part at that, of the morality of the floor. So, while Griffin affirms positive human rights to material

[7] See John Finnis (1980), *Natural Law and Natural Rights*, Oxford: Oxford University Press.

welfare, he rejects positive human rights to material welfare above and beyond what is needed to express respect for and to support the good of normative agency.

That said, it remains somewhat unclear what the relationship is, on Griffin's view, between human rights and the general good of life as a normative agent. At times Griffin writes as if human rights specify conditions necessary to realizing this general good. But that cannot be right, for persons often remain and act as normative agents, even when their human rights are violated. It is tempting to suppose, then, that particular human rights secure for persons conditions favorable or conducive, but not strictly necessary, to their status and activity as normative agents. But this reading raises its own difficulties, for Griffin emphasizes throughout his book that he wants to render the idea of human rights determinate in a way that does not lend itself to inflationary human rights talk. But this is just what the rather open-ended idea of each human right securing conditions favorable or conducive, but not strictly necessary, to normative agency would seem to do. A guaranteed pension at three times the national poverty level would be a condition favorable or conducive to my normative agency. But probably I have no human right (as a universal moral right) to it. Further, if each particular human right secures conditions favorable or conducive, but not strictly necessary, to normative agency, then it's simply false that taken altogether human rights specify the conditions necessary to normative agency (the total set of conditions favorable or conducive to X is not logically the same as the total set of conditions necessary to X), a result that Griffin seems unlikely to welcome. Unhappily, Griffin never really makes clear the nature of the justificatory relationship between human rights and the good of or interest in normative agency. No doubt part of the reason for this is that having failed to attend to the nature of human rights as *rights*, he has not put before his mind's eye the various elements or components of human rights as *rights* that must be accounted for by or linked to the good of or our interest in normative agency. Add this, then, to the debits charged against the mistake of thinking that universal valid moral claims registering in the deontic domain of the right are not merely necessary to rights but are also sufficient.

IV

Normative agency or personhood is not the only justificatory ground for human rights, on Griffin's view. So too are "practicalities" (Griffin 2008: 44). These are general facts, neither historically nor geographically relative, about the human condition and human societies. Their role, as a second justificatory ground for human rights, is to make possible, without appeal to positive acts of legislation or adjudication, a finer-grained specification or determination of universal human rights as general moral rights than could be supported by the bare idea of personhood alone. Unhappily, Griffin does not devote much effort to discussing these practicalities. One supposes he has in mind something like the sorts of considerations that inform H.L.A. Hart's view of the minimum natural law content necessary to any organized society able to endure more than a generation or so.[8] He cannot mean, of course, facts about the human condition or human societies within modernity—for "practicalities" in this sense cannot yield human rights that are universal and timeless in the sense of natural rights. Indeed, Griffin is careful to distinguish between the universal and timeless practicalities that bear on the determination of human rights at the most basic or fundamental level and those geographically and temporally bounded facts, which one might also call "practicalities," that bear on the derivation of less basic or fundamental rights. The latter play an important role in the justification of rights such as the human right to a free press. There is no human right to a free press before or where there are no presses. But where there are presses, there is. Here the practicalities that matter are neither universal nor timeless. They are particular, local, and institutional. And they play no role in the justification of the most basic human rights, those timeless, universal, abstract, general valid moral claims each person has just by virtue of being a normative agent, in this case the right to freedom of communication and expression. Rather, their role is to move us from such claims or rights to more localized and temporalized instantiations, in this case the right to a free press. As already noted, one oddity of this approach is that many, if not all, of the human rights familiar from contemporary human rights discourse and practice turn out not in fact

[8] See H.L.A. Hart (1997), *The Concept of Law*, Revised 2nd Ed., Oxford: Oxford University Press: 193–200.

to be human rights at all, but mere local instantiations or applications of human rights. One cannot help but think here of the natural law idea of variable positive human law as the "concretization" of timeless universal natural law.

Griffin's treatment of "practicalities" is noteworthy for other reasons as well. Let me just note two. The first concerns the conceptual claim, already mentioned, according to which one cannot make sense of the idea or concept of a right without reference to some meaningful measure of its social recognition or institutional embodiment. This thesis can be traced back at least to Bentham and T.H. Green and has been pressed in more recent times by Wayne Sumner (drawing from Bentham) and Rex Martin and Gerry Gaus (drawing from Green), among others.[9] Given that Griffin commits himself explicitly to setting out the "existence conditions" for human rights (p. 81), one might reasonably have expected him to address this thesis. But, as noted, he does not. One might have expected that in attending to "practicalities" as a second justificatory ground of human rights, Griffin would have found himself forced to think in a more sustained way about the relationship between "valid moral claims" and their social recognition or institutional embodiment as rights in a determinate and realistic context. But the opportunity is lost.

The second reason Griffin's treatment of "practicalities" is noteworthy is that he attends to social or institutional relationships (whether the timeless and universal sort of "practicalities" in its proper sense, or the historically and geographically specific sort of "practicalities" as relevant to the derivation or instantiation of human rights in determinate and variable contexts) as never more than the medium through which the valid moral claims, that is, the rights, of individuals are expressed and honored. Social or institutional relationships are never contemplated as foundational to rights, on Griffin's view, even if certain "practicalities" must be invoked to close the gap between a normative conception of

[9] See Wayne Sumner (1987), *The Moral Foundation of Rights*, Oxford: Oxford University Press; Rex Martin (1993), *A System of Rights*, Oxford: Oxford University Press: ch. 4; Rex Martin (2005), "Human Rights: Constitutional and International," in David Reidy and M.N.S. Sellers, eds, *Universal Human Rights*, Lanham, MD: Rowman and Littlefield: 37–58; and Gerald Gaus (2006), "The Rights Recognition Thesis: Defending and Extending Green," in Maria Dimova-Cookson and W.J. Mander, eds., *T. H. Green: Ethics, Metaphysics, and Political Philosophy*, Oxford: Oxford University Press: 209–235.

personhood as normative agency and a determinate list of universal, objective, valid moral claims, or rights, possessed by all persons. This is consistent with the observation made above that on Griffin's view what human rights are about, most basically, is the relationship between each person and his or her own good. They are about relations between persons or about social institutions only derivatively, as a matter of application or extension.

These two noteworthy aspects of Griffin's discussion of "practicalities" converge when Griffin claims (discussed further below) that it makes perfect sense to speak of human rights even where there is no existing agent capable (or likely to be capable in the relatively near term) of fulfilling the duties the rights ostensibly generate. Here human rights as valid moral claims do not and cannot possibly regulate any existing relationships between persons. Indeed, insofar as they embody and express valid moral claims, the claims are against the world as such (and so seem indistinguishable for more general deontic claims about what is right, rather than about my or your rights). Griffin recognizes the apparent peculiarity of his claim here. But he fails to diagnose the source of the apparent peculiarity in his having adopted a conception of rights generally, and human rights in particular, that treats rights as valid moral claims arising out of the relationship between a person and her good framed or constrained by only the background conditions lumped under the category of practicalities—universal and timeless truths about the human condition and human societies. He never considers the fact that the peculiarity would not arise had he adopted a conception of human rights as valid moral claims constituting and regulating the mutually intelligible and justifiable determinate relationships between persons one to another in concrete historical, social, and institutional contexts; he never considers the possibility that the local and contingent "practicalities" he thinks relevant only to the variable instantiation of human rights are in fact ingredient in human rights from the start.

Griffin's proposal for rendering the idea of human rights more determinate draws only on the good of normative agency and practicalities. Neither justice nor equality play a role in the basic justification of human rights, on Griffin's view. There are human rights to aspects of procedural justice, but only because they bear on normative agency. Distributive and corrective justice concerns, and thus fairness, generally do not bear on the justification of human rights. And while human rights must be

specified in a manner consistent with their belonging to each person, and must be justified from a moral point of view that attributes to all persons the same basic moral status, richer substantive egalitarian commitments generally play no role in the justification of human rights. For better or worse, then, Griffin resists the temptation to the sort of pluralist approach to the justification of human rights that proceeds from multiple values—justice, fairness, equality, minimally adequate well-being, and so on.

V

Because human rights serve and protect the exercise of normative agency, they properly belong only to those with the capacity for normative agency. Infants, fetuses, and the severely mentally impaired are excluded, then, from the class of humans protected by human rights, properly speaking. The members of these excluded classes lack the capacity for normative agency. Griffin emphasizes that, of course, we still have any number of obligations to these humans. These obligations are rooted, however, in considerations of justice or vulnerability or the intrinsic value of biological humanity, not in human rights or the value of normative agency.

Fetuses and infants and perhaps even some of those who are severely mentally impaired may acquire at some later date the capacity for normative agency. But, Griffin argues, if the mere potential for a capacity for normative agency were sufficient to support human rights, the class protected by human rights would be absurdly large. It would include a fertilized ovum, and perhaps even a single sperm or egg. Similar problems of over- (or under-) inclusion beset other eligibility criteria for the possession of human rights. Whether the capacity for (rather than exercise of) normative agency gives rise to moral obligations nearly as stringent as, even if still distinct from, human rights claims, Griffin does not say.

Children present a difficult case. Griffin recognizes that the capacity for normative agency, the condition necessary and sufficient to have human rights, is acquired in stages. In principle, then, so too are human rights, at least as moral rights. Nevertheless, Griffin acknowledges that as a matter of law, perhaps even conventional moral practice,

it is surely best to set a very early and safe age at which children acquire human rights.

But Griffin faces, or better, fails to face, a problem here. Once it is acknowledged that normative agency is something acquired in stages, it seems implausible to deny that it can be continuously developed and exercised to varying degrees. That is, ordinary adults differ in the extent to which they develop and exercise their capacity for normative agency. But if that is true, and if human rights are grounded in the good of or our interest in normative agency alone (conjoined with "practicalities"), then why distribute human rights equally to all persons? That is, why adopt a "threshold" conception such that all persons above the threshold get one and the same set of human rights rather than a scaled or proportional conception such that the more a person develops and exercises her capacity for normative agency, the more human rights she gets? Griffin's answer here seems to be that the moral point of view is constituted by a commitment to something like equal concern and respect for persons. But insofar as this is taken to mean that the moral point of view simply excludes scaled or proportional conceptions of rights, this seems both controversial and, from within Griffin's own teleological framework, in need of justification. Of course, a more pluralist approach to the justification of human rights would permit appeal to the values of equality or fairness or reciprocity to justify a threshold conception of eligibility and with it equal human rights for all above the threshold. But Griffin rejects pluralist approaches.

VI

Though he rejects pluralist approaches to the justification of human rights, Griffin does recognize that the exercise of normative agency is not the only, or even the only important, end or good for humans. There are others: for example, the realization of justice, or the promotion of the general welfare, even avoiding pain. And the norms deriving from these goods may compete or conflict with human rights. Further, human rights may compete or conflict with one another. This is because the good of normative agency has its three separate ingredients—autonomy, liberty, and (material) welfare. Each of these underwrites its own general abstract human right that is then given further specification (in light of practicalities) as a family of more determinate rights—autonomy rights,

liberty rights, and material welfare rights. There is no *a priori* reason to suppose that these rights cannot, and plenty of historical experience to suggest that they in fact sometimes do, compete or conflict with one another. So, human rights can compete or conflict both with one another, as well as with other important norms. There is no general rule one may specify in advance for resolving such cases. On Griffin's view, human rights do not function in moral reasoning as trumps, side-constraints or absolutes. Rather, they specify only very weighty norms, and they may in certain cases justifiably be overridden. Everything depends on the weights of the relevant values and our ability to know them along with relevant empirical facts.

Griffin makes three points relevant to our reasoning about competition or conflict between human rights, or between human rights and other important norms or goods. The first is that we must keep in mind that not all human rights, or human rights violations, are equally important. Some human rights are more essential, their violation posing a greater threat, to the exercise of normative agency than others. The second is that when reasoning about cases of competition or conflict we ought not assume that we must maximize or promote the relevant values individually or in the aggregate (an aim, as Griffin has long emphasized, that lies often beyond the reach of our epistemic or motivational capacities); sometimes, perhaps often, we need only respect the relevant values by giving each its due in our moral deliberations (p. 135). The third point is that while we ought not to make trade-offs against human rights too easily, we also ought not to misunderstand what is needed to justify a trade-off. In particular, we ought not to suppose that to justifiably trade off against a human right, we need to appeal to some other value or good that substantially or greatly, rather than just barely, outweighs it. It is enough, Griffin maintains, that we appeal to a value or good that just barely outweighs the value or good secured by the human right. The requirement that we not make trade-offs against human rights too easily is not a requirement permitting trade-offs only when human rights are substantially or greatly outweighed by other moral considerations. It is rather a requirement regarding the epistemic status of the overall argument in favor of a trade-off. Because human rights specify weighty normative considerations, we should not set them aside without an epistemically compelling argument. An epistemically compelling argument showing that a human right is just barely outweighed by some

other moral consideration is sufficient. The more important the human right, the more epistemically compelling the argument for setting it aside must be. However, the competing or conflicting value need only just barely outweigh the value protected by the human right. All we need is something like a clear and distinct view of the fact that it does outweigh, even if only barely, in order to override the human right.

This, Griffin suggests, is the problem with arguments in favor of setting aside the right to life, or to be free from torture, for the sake of general security interests. They are rarely, if ever, epistemically compelling. The problem is not that the value of general security cannot outweigh the right to life or to be free from torture in some particular case. We can at least imagine cases in which the good or value of the former would clearly outweigh the good or value of the latter, or so Griffin claims. The problem is that we rarely, if ever, know with a high degree of certainty whether the case we face is such a case. And this is often because we rarely, if ever, know with a high degree of certainty any number of relevant empirical facts. Given the importance of the right to life, or against torture, we should demand an especially strong case, epistemically speaking, for making any trade-off for the sake of other values. If such a case can be made, we should be prepared to make the trade-off, even if the other values in whose name we make it only slightly outweigh in the moral balance the human rights at stake.

The trouble with this position is that it tells us almost nothing about the special status of human rights, for the same thing might be said, and presumably would be said by Griffin, about other important norms. For example, we ought not lightly or easily make trade-offs against the demands of justice (say, for the sake of efficiency, or for the sake of some corporate good like national defense, or perhaps, for that matter, for the sake of human rights). Presumably, on Griffin's view, we should understand the special status of justice claims in epistemic terms. That is, if we're to trade off justice against some other value, we should demand that the case for the trade-off can be made with a high degree of certainty, that it is epistemically compelling. It's enough that the other value only slightly outweighs justice, so long as it can be seen clearly and without any real doubt that it does so. But notice now that the same thing holds for human rights. And for other important social values—perhaps the value of stability, or efficiency, or national pride or cultural achievement. And that means that Griffin has failed to account for the distinctive

priority of human rights relative to these other values. Human rights are not trumps. They are just weighty moral claims. But they compete with other weighty moral claims. In cases of conflict, the best we can do is to balance the claims and demand a clear view of the direction in which the balance tips. But without even a burden of proof rule in terms of which we might bring to the balancing an antecedent order of values, it's not clear how we are to proceed here. If we've no antecedent reason to assign human rights priority over justice, or national defense, or the relief of human suffering, or any number of other weighty values, then it hardly counts as helpful advice to be told to be sure we have a clear view of how the values balance against one another before acting when these values conflict or compete with human rights. In the end, having rejected Dworkinian (rights as trumps), Nozickian (rights as side-constraints), and Rawlsian (on Griffin's view of Rawls: human rights as regulative of coercive intervention within international relations) structural or functional accounts of the distinctive nature of human rights as *rights* (Griffin 2008: 20–27), and having failed to offer his own structural or functional account of human rights as *rights*, Griffin fails in his own substantive account of human rights—one that aims to account for human rights as *rights* solely in terms of the good of normative agency and timeless practicalities—to specify what is special or distinctive about human rights *as rights* and hence relative to other weighty moral claims or values. This problem is exacerbated by Griffin's generally teleological orientation toward the deontic domain of the right generally.

And this means, as already suggested, that Griffin offers little useful moral guidance for thinking about conflicts between, say, human rights and justice, conflicts that he takes to be real and inevitable. What he ultimately says is that no weighty good—human rights, distributive justice, national security, etc.—is to be sacrificed to another unless we have nearly certain knowledge that in the case at hand the other outweighs it. Whether this is theoretically illuminating or not, it is not practically useful advice. Moreover, like intuitionist views generally, it leaves us without any shared public criteria for distinguishing competent from incompetent judgments in hard cases: one must simply call 'em as she sees 'em.

Now to be fair, perhaps Griffin means to embrace a hierarchy of epistemic constraints on trade-offs: don't trade off human rights unless you're absolutely certain that some other value outweighs the rights

values in question; don't trade off justice unless you're pretty certain that some other value outweighs the rights values in question; don't trade off efficiency or corporate goods like national defense unless you've got a good reason for thinking some other value outweighs the values in question, and so on. He might have in mind (though there's no real textual suggestion of this) a kind of scaled system of burdens of proof attached to various levels of weightiness a value might have. That would provide a kind of rank ordering of the relevant values. But it would just reintroduce the question as to the basis of the rank ordering. By virtue of what do human rights enjoy this privileged position? Griffin's answer is that human rights secure the three most basic interests shared by normative agents. But normative agents have interests in justice, in corporate goods, in avoiding cruelty, in mutual recognition and respect with others, and much else. Why are these interests subordinated to their interests in autonomy, liberty, and material well-being?

VII

No account of human rights is complete without an account of the duties they impose and the persons or agents upon whom they are imposed. Because Griffin is concerned to theorize human rights as moral rights that persons possess in the first instance not against the states to which they belong, but against the world, or against all other persons as a kind of abstract totality, he does not take the view that the very nature of human rights makes it the case that the state to which one belongs is the natural primary addressee of or bears the primary duties correlate with one's human rights. He allows that many human rights will in fact be addressed primarily to the state to which a citizen belongs, but for instrumental reasons that don't arise out of practicalities in the proper sense of timeless universal aspects of the human condition (since modern states are relatively recent phenomena). Where states are the primary addressee it is because they are best placed to secure the right in question and not because of any morally significant feature of political membership or citizen–state relations as such. Where corporations or wealthy individuals or "coalitions of the willing" are better able to secure human rights, they are the primary addressees, and they bear the primary correlate duties, even if states are also on the scene.

There are limits, of course, to the duties that human rights impose. One limit is given by the principle that "ought" implies "can." Another is given by the very nature of human rights as serving the conditions of normative agency rather than of well-being or a more substantively robust conception of self-realization. Yet another is given by the moral permissibility of some measure of a partialist preference for one's own projects. One has no duty to do that which would require a complete abdication of one's own projects, and thus one cannot have a right that would require this of others. Whether fairness figures, on Griffin's view, as another independent limit to the duties that human rights impose is unclear. In particular it is unclear whether there can be a human right the correlate duties of which cannot be fairly distributed to all persons (but which might be unfairly assigned to a particular addressee able to meet them without abdicating completely personal projects). No doubt the issue fails to arise because Griffin is prepared to countenance the possibility of really existing rights with respect to which there are presently no agents capable of fulfilling the requisite duties. "Ought" implies "can," but "can" does not imply any really existing agents possessed of the relevant capacity or power.

Griffin maintains that in order for a human right to exist there need be only a (naturally) possible agent capable of fulfilling the relevant duties without a complete abdication of its own projects. Such an agent need not in fact exist. Indeed, such an agent need never exist. This generates an odd result. On Griffin's view, there may be genuine human rights the correlate duties of which fall on no existing agents because the duties lie beyond the reach of, or would entail an unacceptable abdication of personal projects by, all existing (but not all naturally possible) agents. It follows that a person may have her human rights violated though no existing agent fails to meet her duties (Griffin 2008: 109–110). Griffin argues that this will strike readers as odd only if they assume that unity and system are necessary features of any acceptable ethics. I would add that it will also or alternatively so strike readers if they assume, not implausibly on my view, either that the basic subject of ethics, or at least of that part of ethics concerned with human rights, is the actual relationships in which existing persons stand to one another, especially within state institutions, and not the relationship between all individual persons and their good, or that some measure of social recognition or institutional embodiment, plausibly including at least the actual

existence of persons able to bear and fulfill correlate duties, figures among the existence conditions of any right that functions so as to give meaningful normative direction to and coordinate normative expectations between really existing persons and so exists as more than a merely nominal right.

VIII

Griffin devotes a chapter to each of the three highest-level human rights, the right to autonomy, to liberty, and to material welfare. By autonomy Griffin does not mean Kantian autonomy. He means simply choosing for oneself. The right to autonomy is violated or threatened by indoctrination, manipulation, domination, false consciousness, and so on. Unfortunately, Griffin does not do much to specify the content of the right to autonomy. And his discussion risks confusing the justificatory basis of the right—the good of choosing for oneself—with the content of the right. False consciousness may threaten the good of choosing for oneself. But can there be a human right to be free of false consciousness? What would it look like? A large part of the problem here is that having failed to explain the link between the good or our interest in normative agency and human rights *as rights*, that is, as weighty claims that impose determinate duties on particular individuals such that their non-fulfillment constitutes, at least *pro tanto*, a wrong done to the right-holder, Griffin tends to treat the specification of the content of a right as requiring little more than providing a gloss on the right's justificatory basis, the interest or good it serves. When discussing the content of the general right to liberty and to material welfare he does no better than he does with the right to autonomy. We learn that the good of liberty involves being able to act on one's own choices and that this presupposes options from which one might choose. We're invited, then, to conclude that there is a human right to a meaningful range of life options from which one might choose. But what would this "right" look like? What determinate duties does it impose? On which particular individuals? And why those duties and individuals? We are not told. To be sure, it is good that persons face a meaningful range of life options from which they might choose. But that this is so does not establish that anyone has a right to such a range of options.

Griffin seems to recognize and comes close to discussing some of the difficulties here, and he shows some awareness of the need to distinguish between the justificatory ground of a right and its content. For example, he acknowledges that in educating their children parents inevitably, even if unintentionally, reduce the meaningful range of options available to their children. The same is true for other forms and agents of acculturation. But Griffin recognizes that it does not follow that parents (or other agents of acculturation) violate the liberty rights of children (or others). And in so recognizing, he implicitly acknowledges the distinction between the justificatory basis and the content of a right. That a person acts in ways inconsistent with or for the sake of goods other than the former is not enough to show that the latter is violated. Showing that the latter is violated requires a reference to the non-fulfillment of a determinate duty imposed on a particular agent by the right in question. Griffin is correct, then, to hold that we ought not conclude that liberty rights are violated by parents (or other agents of acculturation), even if they act in ways inconsistent with or for the sake of goods other than the good of liberty (or the good of access to options) itself. But having arrived at this view, he owes readers an account of the specific content of the right to liberty and its derivation. Otherwise, his judgment that liberty rights are violated by parents who move their children to a small town in order to shelter them from worldly options and aggressively pursue Bible-based home schooling looks like no more than a subjective preference as to where the line ought to be drawn between permissible and impermissible acts inconsistent with or for the sake of goods other than liberty (Griffin 2008: 165–166). Griffin clearly thinks that parents who so move their children do more than (permissibly) act in a manner inconsistent with or for the sake of goods other than liberty. They violate the content of their children's right to liberty. Unfortunately, the objective basis for the judgment here is not made clear, though Griffin is surely calling 'em as he sees 'em.

Interestingly, Griffin argues that the general right to liberty supports or includes a right to same-sex marriage. He does not do so on the Millian ground that same-sex marriage causes no harm to others from which they have a right to be immune. Indeed, he is careful to distinguish his human right to liberty, a right grounded in the good of normative agency, from the Millian right to liberty, grounded as it is in the harm principle. The Millian right to liberty ranges over a range of self-regarding decisions

and actions too trivial, too unrelated to the good of normative agency, to ground a liberty right on Griffin's view. Instead, to justify a liberty right to same-sex marriage, Griffin claims that marital union and familial intimacy are so central to a worthwhile life that marriage and family ought to be options available to all persons, regardless of sexual orientation. To deny this option to some is to limit their liberty in a way that violates the content of their general right to liberty. But why does the absence of a legal option for same-sex marriage violate the right to liberty and not the absence of a legal option for group or polygamous marriage? Surely it cannot be the mere fact that there are more persons interested in the former than the latter. Perhaps it is because the monogamous marriage, whether heterosexual or homosexual, is substantively better, a fuller realization of the human good. But if that is so, then why leave persons at liberty to choose monogamous marriage or not? Why not compel them to enter monogamous marriage, eliminating the legal option of remaining unmarried? The obvious reply is that not only would this threaten or undermine autonomy, but it would force some persons, those for whom the unmarried life would be best, into a suboptimal life. But Griffin cannot offer this reply. First, it suggests that his distinction between autonomy and liberty does not run very deep—the values of freely choosing and of freely acting may be too often inextricably bound up with one another to support separate or independent basic human rights or well-defined families of human rights. Second, it suggests that the good of marriage is not as universal (persons have a right not to marry because marriage isn't good for everyone) or not as weighty (persons have a right not to marry, even though marriage would be good for them, because the good of marriage is sometimes outweighed by the good of autonomy or voluntariness within intimate relations) as his argument supposes. To be sure, my point here is not that there ought to be no civil or constitutional right to same-sex marriage. As a matter of justice, there ought to be. Perhaps there ought to be even as a matter of human rights. My point is that Griffin's case for a human right to same-sex marriage is neither clear nor compelling. And this, again, I think is symptomatic of his tendency to suppose that in order to specify the content of a right or a human right one need only or mainly to reflect carefully on its justificatory basis.

Because economic security and independence are essential to the exercise of normative agency, Griffin affirms a third general and abstract

human right, the right to material welfare. The right here is not, of course, a right to distributive justice. It is a right only to a certain minimal level of economic security and independence—more than mere subsistence, but less than the social minimum secured by many developed liberal democracies. Griffin does not address whether this right includes a right to private ownership of at least some means of production (even if only tools and so forth). It does not include, on his view, a right to work, notwithstanding the fact that such a right figures in many international human rights agreements (Griffin 2008: 207). It does include a right to a level of material provision sufficient to support the exercise of normative agency even if one is unable, by virtue of disability, to participate in the productive economy, provided one is capable of normative agency. However, since there is, on Griffin's view, no human right to work, this right to a level of material provision sufficient to support the exercise of normative agency, even for the disabled who remain capable of normative agency, does not include a right to reasonable accommodation by employers. The Americans with Disabilities Act and comparable legislation in other states constitutes, then, a permissible approach to the implementation of the general human right to right to material welfare in specific social contexts. Such legislation is not required as a matter of human rights.

Griffin's claim that the right to material welfare does not include a right to work is odd, not only because as a practical matter work is the usual way in which persons provide economic security and independence for themselves, but also because access to decent and meaningful work is arguably as central to one's good as a normative agent as is access to marital union and familial intimacy. If the latter justifies including a right to same-sex marriage within the content of the general right to liberty, it's hard to see how or why the former does not justify including a right to work within the content of a general right to minimal material provision, or perhaps even within the content of a general right to liberty. In the end, one is left with the sense of having either to take or to leave Griffin's decent and generally liberal recommendations as to the content of human rights depending on whether they match one's own preferences or hunches. It's not that Griffin fails to offer any arguments here. It's rather that the arguments he offers seem structurally inadequate (in that they focus almost exclusively on clarifying the justificatory basis for the human right in question rather than establishing the determinate

duties falling on particular agents that constitute its content) and all too bound up with his own subjective preferences, no doubt clearly and distinctly perceived.

The difficulty here should not surprise. If one aims at rendering the idea of human rights more determinate, so that it is possible to specify a fixed list of human rights with bounded content, one probably ought to draw on more than the relatively indeterminate notions of the good of normative agency and timeless and universal practicalities. By committing himself to drawing on these considerations only, and by turning a blind eye to the structural features of human rights *as rights* and thus the specific kinds of considerations one must appeal to in order to reason from a great good or general interest to a determinate human right with bounded content, Griffin makes it more or less inevitable that his listing and account of the content of specific human rights will fail to satisfy. His reasoning from the general good of normative agency and timeless and universal practicalities to determinate human rights needs to be set out much more carefully and fully.

IX

Drawing from his accounts of the three most general or abstract human rights, Griffin argues that several rights found within international human rights documents, or routinely invoked in human rights practice, are, like the right to work, not in fact genuine human rights in the sense of universal moral rights. So, for example, he argues that there is no human right to paid holidays, to peace, to upward mobility in employment, to the highest attainable level of physical and mental health, to compensation for unjust punishment, and so on. Justice may favor, even require, some of these things. And they may be established human rights within positive international law. But they are not genuine human rights in the moral sense. Many of the items on Griffin's list here are unobjectionable. That there could be, morally speaking, a human right to paid holidays seems doubtful. (Though one hastens to add that it's less clear, especially from Griffin's teleological starting points, that there is no human right to some measure of leisure: Is some measure of leisure not necessary or highly conducive to the development and exercise of normative agency?) But other items on Griffin's list raise problems. Consider the right to freedom of residence. Griffin claims that there is,

morally speaking, no such human right. Now, if there is, contrary to Griffin's view, a human right to work, then there likely must be a human right to freedom of residence, for one must often be free to move one's residence in order to have and make use of meaningful opportunities to work. But even if there is no human right to work, as Griffin claims, there still likely must be a human right to freedom of residence, for one must often be free to move one's residence in order to have and make use of meaningful opportunities to engage in any number of valuable activities ingredient in many if not all conceptions of a worthwhile life—for example to marry and pursue family life.

Griffin also identifies several human rights positively established by international agreements the status of which as moral rights is, he thinks, unclear. Here he points to several due process or rule of law rights—for example the right to counsel in legal proceedings. Rights of this sort are perhaps plausibly linked through intelligible argument to normative agency and thus are not obviously ineligible as universal moral rights. While the link may be less clear and compelling than it is in cases of paradigmatic universal moral rights, it may be clear and strong enough to support accepting these rights positively established by international agreements as genuine human rights in the full moral sense (Griffin 2008: 210). Within international law, then, these rights, like other paradigmatic universal moral rights, ought to be recognized as having force apart from and prior to their having been positively and voluntarily incorporated into international agreements.

Griffin devotes chapters to several other alleged human rights the moral and legal status of which is unclear. With respect to the right to life, as a universal moral right, he holds that the right does not severely restrict the permissibility of contraception, abortion, suicide or euthanasia. Further, he holds that there is a right to death, a corollary of the general rights to autonomy and liberty (Griffin 2008: 221–222). This right to death imposes duties on others. Those wanting but unable to bring about their own death have a claim to assistance from others who are duty-bound to help them die. Presumably, then, states that both fail to provide such assistance through state institutions and prohibit individuals from delivering it through individual actions or non-state institutions are in violation of basic human rights understood as universal moral rights, if not international legal rights.

With respect to the right to privacy, Griffin holds that there is a genuine human right, as a moral matter, to what he calls "informational privacy." There is a right to prevent publication and public scrutiny of certain acts, thoughts, utterances, and the like. This right is violated, Griffin maintains, when "closeted" gay political or religious officials are publicly "outed." That such officials are often themselves hypocrites who support homophobic policies provides no reason to think they have no right to privacy with respect to information about their sexual inclinations, or that their right to privacy is outweighed by other weighty norms or goods (Griffin 2008: 240). The former is clearly correct. It's less clear why their right to privacy is not at least sometimes outweighed by other weighty norms or goods—for example, the vindication of the right, on Griffin's view, to same-sex marriage, or the great good of public integrity.

Though there is a right to privacy that covers personal information about one's sexual inclinations, and so on, there is no right to privacy that covers sexual conduct simply because it is in the privacy of one's home. There are human rights to autonomy and liberty, rooted in normative agency, that protect one's sexual choices and conduct to some significant degree. But like all human rights, they may compete or conflict with other weighty norms and goods. (Thus, in general there is no human right to sexual intercourse in public.) And in any case, the fact that a sexual act is performed at home, blinds drawn, is irrelevant. There is no general privacy right to be free from coercive state action within the confines of one's home. The conduct is either protected by liberty and autonomy rights, rooted in normative agency, or it is not. Griffin's view on this matter looks, then, a lot like Justice Blackmun's in his dissent to *Bowers v. Hardwick*, and, like Blackmun's view, has a lot to recommend it.[10]

With respect to the right to democracy, Griffin argues that there is no fundamental human right to democracy—no path from a commitment to normative agency subject to timeless and universal practicalities to a human right to democratic institutions. On the other hand, he argues also that morality as a whole—which includes considerations of justice that lie outside the scope of human rights—probably requires democratic

[10] *Bowers v. Hardwick* (1986), 478 U.S. 186.

institutions (Griffin 2008: 247–249). This much seems correct. Griffin argues, further, however, that under modern institutional conditions there is a contingent, derived human right to democratic institutions (Griffin 2008: 254). As modern institutional conditions spread across the globe, so too will this contingent, derived human right to democratic institutions. The problem here is that Griffin does not say enough about the various empirical considerations of modernity that make democratic institutions necessary if the good of normative agency is to be given its due. Bearing in mind that Griffin thinks of giving the good of normative agency its due in terms of meeting various minimum thresholds—a morality of the floor not the ceiling—it's not clear why, for example, something like a Rawlsian "decent consultation hierarchy" might not give the good of normative agency its due under modern conditions.

X

On Griffin's view, human rights constitute a necessary, but not a sufficient, condition to the legitimacy of a polity. A state that fails to secure for its citizens human rights—and here Griffin means human rights as he sets them out; his list, including the right to same-sex marriage and to bringing about one's own death—is to that extent in principle vulnerable to coercive reform efforts from within or without. But so too is a state that fails to deliver to its citizens an acceptable level of distributive and corrective justice (Griffin 2008: 143) or fails to fulfill its international human rights obligations (Griffin 2008: 184). Each of these failures constitutes a possible ground for coercive reform from within or without. Of course, whether coercive reform is justified all things considered is a further question. Still, Griffin is in principle open to forcing states to secure human rights as well as at least some demands of distributive and corrective justice within their borders and to fulfill their human rights obligations within international relations. Griffin's position with respect to the use of force to democratize states not yet democratic is not clear. On the one hand, he denies that there is a human right, in the sense of universal moral right, to democracy. On the other, he holds that democracy is probably required as a general matter of morality or justice and that in any case under modern conditions there is a contingent, derived right to democratic institutions. When discussing the conditions necessary and sufficient to a polity's legitimacy—and hence right to be

free of coercion as a means of reform—Griffin requires fidelity to an ideal of popular sovereignty, such that a state acts on and is responsive to the wishes or desires of its citizens (Griffin 2008: 275). This or something like it is a plausible requirement for a polity to be accorded status recognition and respect as a full and equal member of the international order. Absent some measure of popular sovereignty, or some reciprocity between ruler and ruled, it is hard to see the grounds for according status recognition and respect to a polity as itself a moral agent in the international order. But it doesn't follow that force may in principle be used to effect reform wherever the conditions of popular sovereignty or reciprocity between ruler and ruled are absent. Griffin does not explain why, for example, force is a permissible means of reforming a benevolent absolutism. Within a benevolent absolutism the most basic interests of persons as normative agents are secure, but the polity is itself a system of coordination and the conditions of popular sovereignty or reciprocity between ruler and ruled are absent. Surely there are reasons within the international order to refuse status recognition and respect to a benevolent absolutism. But what reasons are there to permit force as a means of reform?

In principle, then, Griffin cuts a wide path for the morally acceptable use of force in political life. In principle, force may be permissibly used to coerce a society into legalizing gay marriage or securing any other human right, into delivering distributive or corrective justice to some acceptable degree, into honoring its international human rights commitments, or into adopting a political system faithful to the ideal of popular sovereignty. To be sure, like others who see few principled moral limits to the use of force in political life, Griffin emphasizes that there will very often be compelling pragmatic or prudential or even "all things considered" moral reasons to resist turning to force, especially military force, for the sake of bringing about progressive reform. For example, force, even non-military force, often backfires. It often just doesn't work. Or if it works, the moral and material costs are simply unacceptable.

Griffin reconciles the principled liberal commitments to human rights and to toleration, then, by dramatically curtailing the latter in favor of a substantively robust and doctrinally controversial conception of the former. Those inclined toward a muscular and unapologetic, even if also pragmatic, liberal foreign policy will find much to applaud. Griffin dismisses the Rawlsian reconciliation between principled commitments

to human rights and toleration, one that offers principled liberal reasons for both a less robust and distinctively political conception of human rights and a wider and more demanding commitment to toleration, as "unworkably obscure" (Griffin 2008: 144), "under-motivated" (Griffin 2008: 24), and rooted in "quite doubtful" assumptions about international public reason (Griffin 2008: 25). He has little patience for a merely political Rawlsian conception of human rights that might be the object of an overlapping consensus between diverse, well-ordered peoples. While many readers will no doubt nod in agreement, Griffin evidences little by way of sympathetic understanding of Rawls's position and offers few genuinely telling arguments against it. In the end, the two views simply pass like ships in the night—set on very different courses by very different first questions and methodological assumptions. In short, as with many critics of Rawls's view, Griffin never really seems to understand Rawls's view or to put his finger on what is really at stake between his view and Rawls's—not least of which are the meta-philosophical conception of the relationship between moral and political philosophy, the concept of rights, the nature of the liberal commitment to toleration, and the moral conception of the person.[11] But addressing Griffin's failure to engage Rawls's view of or approach to human rights in a serious way would require another essay. Here I have tried to address Griffin's view and approach on its own terms.

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[11] For a range of sympathetic reconstructions and defenses of Rawls's views on human rights, see David Reidy (2005), "An Internationalist Conception of Human Rights," *Philosophical Forum*, 36: 367–397; and David Reidy (2008), "Human Rights: Institutions and Agendas," *Public Affairs Quarterly*, 22: 409–433. See also Jon Mandle (2006), *Global Justice*, Cambridge: Polity Press, chs. 4–6; and Joshua Cohen (2004), "Minimalism about Human Rights: The Most We Can Hope For?" *Journal of Political Philosophy*, 12: 190–213.

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4

The Egalitarianism of Human Rights

Allen Buchanan

I. The current state of human rights theory

A. Growing philosophical interest in human rights

Since the publication of Rawls's deeply revisionist and controversial though fragmentary discussion of human rights in *The Law of Peoples* (1999), there has been a dramatic increase in philosophical interest in human rights.[1] There are two chief reasons for this change, apart from

[1] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999). In addition to a spate of articles and anthologies trying to piece together (or tear apart) Rawls's view, a significantly revised edition of James Nickel's classic 1987 book, *Making Sense of Human Rights*, appeared in 2007 (Oxford: Blackwell); William Talbott's consequentialist defense of human rights *Which Rights Should Be Universal?* appeared in 2005 (New York: Oxford University Press); James Griffin's eagerly awaited *On Human Rights* was published in 2008 (Oxford: Oxford University Press); Charles Beitz's *The Idea of Human Rights* was published in 2009 (Oxford: Oxford University Press); preliminary work for another book on the topic by John Tasioulas is already circulating in draft form; and Amartya Sen and Martha Nussbaum have continued to develop "the capabilities approach" to human rights. Further, the burgeoning literature on global justice has recently begun to engage the topic of human rights, if sometimes only rather indirectly and unsystematically. For example, Thomas Pogge has advanced a strongly "institutionalist" claim about human rights, namely, that the concept of human rights applies only where there are political officials who can either fulfill or fail to fulfill institutional role-based duties that are the correlates of human rights, and "liberal nationalist" theorists of global justice, such as Thomas Nagel, Michael Blake, and David Miller, have argued, contra "liberal cosmopolitans," such as Pogge, Darrel Moellendorf, and Simon Caney, that human rights do not include egalitarian "positive" rights but at most something like a right to subsistence. See Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs* 30

the fact that Rawls's attention to a topic tends to legitimize it. The first is the justification deficit, the disturbing fact that, while the global culture and institutionalization of human rights are gaining considerable traction, the nature of the justification for claims about the existence of human rights remains obscure. The second is the burgeoning philosophical literature on global justice. A theory of global justice must take a stand on what human rights are, whether they exist, and if so what role they play in global justice.[2] Worries about the lack of a justification are exacerbated by the widely held perception of human rights inflation. To take two notorious examples, many doubt that the right to periodic holidays with pay and the right to health care sufficient for achieving the "highest attainable standard of physical and mental well-being" are human rights.[3]

B. What is a philosophical theory of human rights?

There is disagreement about what a philosophical theory of human rights should do—and, indeed, what it should be about. Some theorists, including perhaps most explicitly Charles Beitz, but James Nickel as well, believe that the philosopher's task is to provide a critical reconstruction of human rights as they are in the international legal doctrine and practice of human rights.[4] On this view, a philosophical theory of

(2001): 257–96; Simon Caney, *Justice beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview, 2002); Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33 (2005): 113–47; and Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity, 2002).

[2] How serious the justification deficit is depends upon what would count as an adequate justification. In what follows I am not assuming that an adequate justification would require anything as ambitious as a metaethical foundation for the existence of human rights or an answer to the general moral skeptic. An adequate justification would include, however, an articulation and defense of the existence conditions for human rights that would be responsive to the main challenges to claims about the existence of human rights, including the parochialism objection, which I consider below.

[3] Article 12, sec. 1, of the International Covenant on Economic, Social, and Cultural Rights declares that "Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Articles 2.2 and 2.3 in part 2 of the European Social Charter reads as follows: "With a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake . . . to provide for a minimum of two weeks annual holiday with pay" and "to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed."

[4] Beitz, *Idea of Human Rights*; Nickel, *Making Sense of Human Rights*, rev. ed.

human rights must be a theory of the existing global legal-institutional phenomenon of human rights, not a theory of the history of the idea of human rights, nor a theory of individual rights that can be characterized without reference to their role as constraining sovereignty in a state system. Others, including James Griffin and John Tasioulas, believe that it is a legitimate and important philosophical task to theorize a concept of human rights that can be understood without reference to the global legal-institutional phenomenon of human rights but hold nonetheless that the successful completion of this task is necessary for an adequate critical evaluation or rational reconstruction of that phenomenon. (For brevity, I will henceforth use IHR [international human rights] as shorthand for the more cumbersome "the existing global legal-institutional phenomenon of human rights" and HR as shorthand for human rights as general moral rights [or a kind of general moral rights] that can be characterized without reference to any use to which they might be put in constraining sovereignty in a state system.)

The difference between these two views of the philosophical task can be put in terms of different subject matters: for Beitz and Nickel, it is essential to the concept of human rights which they are theorizing that these rights are a global concern. Thus Nickel emphasizes that human rights, unlike natural rights as traditionally conceived, are "international." Beitz is more explicit: he says it is essential to the concept of human rights that they are a global concern in the sense that their violation provides a *pro tanto* reason for external actors to take action (not necessarily military intervention) when a state violates them. On this view, the very concept of human rights presupposes a system of states. In contrast, for Griffin and Tasioulas, there is a concept of human rights that is a worthy subject for philosophical theorizing but that includes no reference to the state system. Tasioulas supports this view by noting that the concept of human rights—roughly understood as general moral rights that all normal human individuals possess, at least under conditions of "modernity"—would have application if there were no state system but instead a world government.[5] Criticizing a world government for violating human rights is perfectly intelligible; so it is not the case that the concept of human rights presupposes a state system or

[5] John Tasioulas, "Human Rights, Moral Not Political" (unpublished paper, Faculty of Philosophy, Oxford University, 2010).

includes the idea that appeals to human rights serve to constrain the sovereignty of individual components of such a system.

Tasioulas is right. There is a concept of human rights, one which emerged in the West, as Griffin notes, in the eighteenth century that makes no reference to the state system. This concept of human rights, which found expression in the U.S. Bill of Rights and the French Declaration of the Rights of Man and Citizen and was also invoked by abolitionists, appeared prior to the idea that such rights should be implemented globally, in such a way as to constrain state sovereignty. Thus, the reasonable conclusion to draw seems to be that Beitz and Nickel, on the one hand, and Griffin and Tasioulas, on the other, are theorizing different subjects: the former offer an account of *international human rights* (IHR), the latter an account of *human rights* (HR). Griffin and Tasioulas still have room to distinguish their conception of human rights from traditional conceptions of natural rights if they emphasize that human rights are not rights grounded in a fixed human nature or essence but instead reflect human interests and features of human life as they are now.

Despite these differences, there is agreement. Griffin and Tasioulas agree with Beitz and Nickel that there is a need for a critical reconstruction of IHR. The difference is that Beitz and Nickel think one can begin that task directly, by focusing on IHR, while Griffin and Tasioulas think that the first step toward critical reconstruction of IHR is to develop a theory of human rights (HR) and that once that is accomplished one can then turn to two further questions: (1) Does it make sense to try to implement such a theory at the global level, where this includes legal doctrines and practices that limit sovereignty? (2) And, if so, is the subject of Beitz's theorizing, IHR, the existing global legal-institutional phenomenon, credible as an attempt to do so?

Although theorists like Griffin and Tasioulas think that the concept of human rights they are theorizing makes no reference to the subject matter on which Beitz and Nickel focus, they presumably believe that the theories they are trying to develop will illuminate it. For surely at least part of what makes the concept of HR of philosophical interest is that it seems to be the normative core of the IHR phenomenon. Griffin and Tasioulas both assume that the concept of HR is crucial for IHR—that if the IHR enterprise is to be defensible, the concept of HR must be coherent and defensible. If this is so, then a theory of HR should provide

resources for critical reconstruction of IHR. So, regardless of whether one's primary subject matter is HRs (as with Griffin and Tasioulas) or IHRs (as with Beitz and Nickel), one's theory should in the end either make sense of at least the central features of IHR or explain where the latter has gone wrong.

My aim here is not to resolve the dispute as to whether the proper starting point for philosophical theorizing is a concept of general moral rights that does not presuppose a state system. Instead, I want to focus on what both parties to the dispute can agree on: the contribution that philosophical reasoning can make to the effort to provide a critical reconstruction of IHR. This approach will allow me to consider what I take to be the two most thoroughly developed theories, those of James Griffin and James Nickel, in spite of the fact that these two thinkers focus on two different subject matters under the ambiguous heading of "human rights."[6] Nickel proceeds directly with the task of critical reconstruction of IHR, while Griffin offers an account of HR which he believes one must have in hand before proceeding to the task of critical reconstruction. Regardless of this key methodological difference, both theorists presumably either must make sense of the central features of IHR or, in cases in which they cannot do so, must provide compelling reasons for modifying IHR accordingly.

Before proceeding, I wish to make one more methodological point. Griffin and Tasioulas both appear to assume that the argumentative relationship between a theory of HR and a critical reconstruction of IHR is one-way: one first develops a theory of human rights as a kind of general moral right that can be characterized without reference to IHR and then uses it to appraise and, where possible, rationally reconstruct IHR. On this view, if there are elements of IHR that cannot be supported by one's theory of HR, then it is IHR that must change. Another possibility is worth considering: where there is a discrepancy between

[6] Beitz believes that IHR relies on the ideas of "urgent" human interests and on the idea of the dignity of the individual, but he does not provide an analysis of either idea (nor an explanation of how they are related to one another) and seems to believe, without warrant in my judgment, that adequate normative and conceptual resources for a credible justification of IHR can be found within IHR itself (considered as what Beitz calls a "discursive practice"), without the aid of serious philosophical analysis. In my judgment, Beitz's characterization of the "discursive practice" of IHR reinforces, rather than dissipates, the conviction that the practice itself contains inadequate normative resources for its own defense and that philosophical analysis is needed.

one's theory of HR and IHR, the relevant features of IHR might be so morally compelling that the reasonable response would be to reconsider one's theory of HR. Later, I will suggest that this may be the case with respect to what I shall call the status-egalitarian element of IHR.

II. The centrality of the idea of equal status in international human rights

Assuming that at some point the goal of philosophical theorizing must include the task of critically reconstructing IHR, one striking fact about IHR that philosophical theorizing must take into account is that they are egalitarian in at least five respects:

1. *Inclusive ascription*: IHRs are explicitly ascribed not just to men, or whites, or "civilized peoples," but to all persons.
2. *Robust equality before the law*: governments are required to ensure that domestic legal systems give legal recognition to human rights for all citizens, and all citizens are to have the right to legal remedies for violations of their human rights; in addition, equal rights of due process are prominent in several major human rights conventions.[7]
3. *"Positive" rights*: IHRs encompass social and economic rights that can reduce material inequalities and indirectly constrain political inequalities, to the extent that the latter are a function of material inequalities.[8]
4. *Political participation rights for all*: all individuals have the right to participate in their own government, and increasingly this is understood as a right to equal participation and hence to democratic government.[9]

[7] Cf. article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the European Convention on Human Rights); and articles 2, 9, and 14 of the International Covenant on Civil and Political Rights (hereafter the ICCPR).

[8] Cf. articles 7, 9, 11 of the International Covenant on Economic, Social, and Cultural Rights (hereafter ICESCR); articles 7 and 10–14 of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW); articles 4, 24, and 26–9 of the Convention on the Rights of the Child; and articles 25, 27, 28, and 30 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[9] Thomas Franck, "The Emerging Right to Democratic Government," *American Journal of International Law* 86 (1992): 46–91.

5. *Strong rights against discrimination on grounds of gender and race*: some human rights conventions contain rights against all forms of discrimination on the basis of gender or race, including both formal (legal) discrimination and informal practices of discrimination in the public and private sectors.[10]

The preceding five items are salient egalitarian features of IHRs. Two additional egalitarian features are perhaps less obvious but are important nonetheless. The first, added as item 6 to the list, is the fact that the right to an adequate standard of living, which figures prominently in several major human rights documents, is understood in a social-comparative way. That is to say, this right requires more than biologically adequate food, clothing, and shelter; it also requires that these material needs be met in a way that is consistent with societal standards of decency. Understanding the right to an adequate standard of living in this social-comparative way constrains material inequalities. A social-comparative understanding of the right to an adequate standard of living can best be understood as grounded in an egalitarian principle—not a principle of equal distribution of resources or of well-being but rather one of equal status.[11]

An item 7, the right to work, which is found in several human rights documents, can also be seen as grounded in equal status.[12] Individuals who are judged to be able to work but who cannot find employment are also at risk of being relegated to an inferior status—the status of dependent beings who are not contributors to social cooperation. Of course, all human beings experience periods of extreme dependency, typically in infancy and in old age, but at least in the modern era in which citizenship and participation in "the economy" are closely linked because the well-being of society or "the nation" is increasingly identified with the strength of the

[10] Cf. articles 24 and 26 of the ICCPR, articles 2–5 of the ICESCR, and parts 1–3 of CEDAW. See also the "Convention on the Elimination of All Forms of Racial Discrimination," December 21, 1965, http://www2.ohchr.org/english/law/cerd.htm (accessed December 8, 2008); and the "Convention on the Rights of Persons with Disabilities," December 13, 2006, http://www2.ohchr.org/english/law/disabilities-convention.htm (accessed December 8, 2008).

[11] This social-comparative aspect of the right to an adequate standard of living will have more or less radical implications, depending upon whether the comparison is intrasocietal or global. If global comparisons are relevant, then a theory of human rights that includes a social-comparative dimension may have more robust implications for the reduction of material inequalities than would otherwise be the case.

[12] See article 23.1 of the UNDHR and article 6 of the ICESCR.

economy, the standard expectation is that, during the prime of life, at least, individuals are contributors to social production. To the extent that the notions of independence and social contribution are in this way "moralized" in modern societies, being perceived as a dependent non-contributor, while lacking the excuse of having a disability, can be a threat to one's being regarded as being an equal.[13]

It is important to distinguish here between equality as a distributive notion and equality as a status notion. "Equality of status" here means what Waldron calls equality of "basic status," which is compatible with a wide range of differences and with their social recognition in the form of material inequalities.[14] For example, properly acknowledging equal basic status for all is consistent with there being various nonfundamental distinctions regarding social status (e.g. distinctions between professionals and blue-collar workers).

I have already indicated how the last two egalitarian elements of IHR can be seen as reflecting a notion of equal status. I now want to sketch connections between the preceding five egalitarian elements and the idea of equal status. Item 1, inclusive ascription, is the most obvious manifestation of the centrality of equal status in IHR. To ascribe a set of rights to all persons, regardless of their membership in this or that group and independently of whether any legal system or set of cultural practices acknowledges those rights, is in itself a recognition of equal status. It is true that item 2, robust equality before the law, can be supported on instrumental grounds as protecting the individual against what Henry Shue calls a "standard threat" to well-being under modern conditions: when these rights are realized for all, everyone has significant protections against the abuse of the power of the law, whether by the state itself or by private parties who are able to use that power to their advantage and the

[13] Disabilities rights activists have rightly been critical of common assumptions about what counts as being a "contributor." But there is a deeper point: a theory of human rights, or for that matter a more general moral theory, ought to take into account that the basic moral status of an individual does not depend upon his capacity to be a net contributor to social cooperation, even if social cooperation is defined quite broadly. For a criticism of Gauthier's contractarian view of morality as failing this test, see Allen Buchanan, "Justice as Reciprocity versus Subject-Centered Justice," *Philosophy & Public Affairs* 19 (1990): 227–52.

[14] Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Theory* (Cambridge: Cambridge University Press, 2002).

detriment of others.[15] But in addition to this, where robust equality before the law for all is realized, the equal status of every individual is publicly affirmed in a concrete and convincing way by virtue of the fact that each can invoke the power of the legal system to protect her rights, on equal terms with everyone else. Item 3, the inclusion of social and economic rights, like robust equality before the law, can be supported on instrumental grounds as contributing significantly to individual well-being. But it also can be grounded in a principle of equal status. Although the social and economic rights do not ensure material equality or equality of welfare, they constrain such inequalities and thereby reduce the risk that they will become so great as to put the individual at risk of being regarded as having an inferior status. The social and economic rights, which include rights to basic education, income support during periods of unemployment, and basic health care, help ensure that material inequalities do not become so extreme that the worse off are subject to exploitation and domination. In Rousseau's memorable phrase, they help to avoid a situation in which the poor are obliged to sell themselves.

As Waldron has shown, the connection between item 4, the right to political participation, and equal status is strong and direct in the tradition that leads from natural law to the idea of human rights, especially in the work of Locke.[16] Historically, the right to participate in the processes of government was asserted against ideologies that denied the equal status of vast numbers of human beings. For Locke, making the case for the right to political participation meant demolishing the theory according to which monarchs had the natural right to rule over others; for the opponents of colonialism, the goal was to counter the view that whole peoples were inferior in ways that disqualified them from self-government.

The idea of equal status is perhaps most obvious in item 5, the inclusion of strong rights against discrimination on grounds of race or gender. Historically, discrimination against people of color and women

[15] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd ed. (Princeton, NJ: Princeton University Press, 1996). Also see Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003), 46, 92.

[16] Waldron, *God, Locke, and Equality*. It should be emphasized, however, that Locke did not ascribe political rights to everyone: women and apparently males without property were excluded.

has usually been justified by appeal to beliefs about supposed natural differences that are understood not simply as differences but as marks of inferiority. In particular, discrimination has been justified on the grounds that women or people of color are naturally less rational than men or whites, in contexts in which being rational is thought to be a good thing. Against the background of the assumption that being rational is what distinguishes humans from "lower" animals, characterizing some human beings as less rational than others by nature conveys a message of inferiority: that they are, in a sense, less than fully human.

The label "strong rights against discrimination" is apt, because it signals that IHRs rule out any discrimination, formal or informal, private or public, on grounds of gender or race. For example, included in the rights against discrimination against women is the right to equal pay for equal work.[17]

All rights against discrimination have instrumental value: they help protect the individual's well-being. But the strong rights against discrimination found in IHR are hard to justify on purely instrumental grounds unless one is willing to embrace the idea that human rights not only protect individual well-being from serious threats but ensure the highest levels of well-being—an implausibly robust conception of the role of human rights which virtually all theorists reject. A woman or a person who is gay or lesbian may be subjected to discrimination in the workplace or in various other social settings yet may be able to achieve high levels of well-being. A highly successful woman executive, for example,

[17] Cf. article 11.1(d) of CEDAW. It might be objected that strong rights against discrimination on grounds of gender are not a central element of IHR because IHR practice has not prominently featured efforts to promote compliance with these rights. It may be true that, compared with basic negative human rights, rights against strong gender discrimination have thus far received less attention in IHR practice. However, the same is true of so-called positive IHRs, and yet it is now generally acknowledged that positive rights are a central feature of IHRs. The fact that strong rights against discrimination are prominent in a convention devoted to the special problems of discrimination faced by women, along with the fact that there is growing attention to issues of gender discrimination on the part of various nongovernmental international human rights, is evidence that these rights are a feature of IHR that a philosophical reconstruction must acknowledge. It should also be remembered that lack of compliance and strong cultural opposition do not in general disqualify a particular category of rights from being a significant element of IHR. (If it were, then one would have to say that the right against torture is not an important element of IHR, since, lamentably, torture is practiced very widely.) A more relevant consideration is whether there are serious efforts to promote greater compliance and to overcome cultural opposition.

may lead a life that is far better than that available to most people and yet may receive lower pay than a male doing precisely the same job.

The most secure and straightforward grounding for strong rights against discrimination is the idea of equal status. Given the history of racism and sexism, it makes sense to view any form of discrimination against women or people of color as detrimental to the unambiguous social affirmation of their equal status.

None of the seven egalitarian elements of modern human rights noted above presupposes or entails any egalitarian distributive principle (though each of them would under most circumstances constrain distributive inequalities). All of them can be seen as grounded in the idea of equal status. The institutional implementation of a system of human rights that includes these seven features would constitute a public affirmation of the equal moral status of all individuals and provide significant protections against the denial of equal status to anyone.[18]

The first five egalitarian items could perhaps be adequately grounded in instrumental considerations alone as providing valuable protections for individual well-being. Recognizing their role in safeguarding equal status augments the instrumental case for them, but it may not be essential. For the last three items, however, a purely instrumental justification is less than convincing. The more obvious and secure grounding for construing the right to an adequate standard of living in a social-comparative fashion, for strong rights against discrimination, and for the right to work is in the idea of equal status.

As Elizabeth Anderson has emphasized, contemporary philosophers writing on equality have tended to focus too narrowly on principles of equal distribution, arguing chiefly about whether the "currency" of equal distribution is welfare, opportunity for welfare, or resources.[19] In doing so, they have ignored the historical preoccupation of egalitarians with

[18] In his contribution to this symposium, Rainer Forst offers a theory of human rights grounded in a relational or comparative concept of dignity, but if I interpret him correctly his view of equal status is primarily if not exclusively a matter of equal political status. I am suggesting, in contrast, a concept of dignity as equal status that encompasses equal political status but is not limited to it. It seems to me that the latter concept better accommodates the emphasis in IHR on strong rights of nondiscrimination against women because these apply outside of, as well as within, the political sphere.

[19] Elizabeth Anderson, "What is the Point of Equality?" *Ethics* 109 (1999): 287–337.

unequal status—and with the oppression, dependency, and exploitation that the failure to affirm equal status seems inevitably to entail.

Similarly, philosophers have failed to appreciate that, in the historical process by which IHR emerged, equality of status has been a central concern. In the debate between liberal nationalists and liberal cosmopolitans that dominates the literature on global justice, the focus has been on whether human rights require egalitarian distributions of natural resources or opportunities, with little or no attention to the fact that equal status plays a prominent role in IHR.

The philosophers' inattention to the role of the status-egalitarian element in IHR may be the result of a neglect of history. The concern for equal status is evident in the three crucial moments in the development of IHR: the abolitionist movement, the drafting of the first international human rights document (the Universal Declaration of Human Rights), and the doctrinal development and institutional embodiment of human rights during the period of decolonization in the 1960s and 1970s.

The idea of equal moral status was at the heart of the abolitionist movement. Abolitionists insisted that slavery rested on a profound mistake about the status of Africans, namely, that they were not fully human. Being regarded as less than human was not merely a matter of being seen as different but also as naturally inferior, lacking in some of the characteristics that supposedly confer a unique moral status on human beings. The creation of the Universal Declaration of Human Rights was in significant part a reaction against the horrors perpetrated by the Nazis in the name of an ideology that explicitly relegated most of humanity—all non-Aryans—to an inferior status.[20] Given that the idea of unequal status was at the core of Fascism, it is not surprising that a conception of human rights that emerged as part of a strong reaction against the evil of Fascism and the destruction it had wrought would take the affirmation of equal status to be of great importance. In the 1960s and 1970s, as the membership expanded rapidly with the admission of newly liberated colonized peoples, the development of IHR came to reflect a public rejection of the notion of unequal status associated with

[20] Although the Jews of Europe bore the brunt of Nazi racial hatred, Nazi ideology also relegated not only gypsies (Roma) but also Slavs, Asians, and blacks—indeed, all non-Aryans—to an inferior status.

colonialism. Here the emphasis on the affirmation of equal status took two main forms. First, the assertion of a right of self-determination of peoples as a human right was in direct opposition to a colonialist premise that some peoples are inferior to others and hence not capable of self-government.[21] To the extent that colonial ideology attributed the incapacity of some peoples to be self-governing to the supposed natural inferiority of the types of individuals constituting them, affirming the right of self-determination as a human right was a rejection of the idea of unequal status.[22] Second, as human rights conventions were drafted, procedural provisions were added to reduce the risk that emerging human rights institutions would be dominated by representatives from the former colonial powers. For example, the treaty bodies charged with monitoring and promoting compliance with the conventions were required to have a geographically diverse membership. The same preoccupation with equal status that shaped the emerging list of human rights dictated that participation in the process by which the lists were generated should be inclusive. Given the historical context of the struggle against colonialism, exclusion from the process of shaping modern human rights would have reasonably been perceived as a public mark of inferiority.

This sketch of the history of the development of IHR, inadequate though it is, strengthens my argument that the idea of equal status is a prominent feature of IHR. My point is not that the protection of equal status is the sole value that grounds modern human rights, only that it is sufficiently prominent that a critical reconstruction of IHR ought to take it into account.

[21] The right of self-determination of peoples was not ascribed to peoples generally but in effect only to colonized peoples separated from their metropolitan masters by a body of salt water.

[22] Not all colonialist views assume that it is natural inferiority that makes a group a fit subject for colonization. On some views, even if all humans are in some important sense naturally equal, different groups are at different stages of moral or cultural development and those who are more developed may rightly dominate those who are not, at least if they do so in the name of enabling the undeveloped to develop. A thoroughgoing analysis of the role of equal status in IHR, which I do not pretend to provide here, would have to address the question of whether inequality of status is to be understood as referring exclusively to natural inequality.

A. *Dignity and equal status*

To the extent that human rights documents gesture, even feebly, toward justifying the assertions about human rights they make, they tend to invoke the idea of the dignity of the individual. The notion of dignity is both murky and multifaceted. As Griffin notes, the Renaissance humanist philosopher Pico thought of the dignity of human beings as what distinguishes them from all other creatures and confers a unique value on them: unlike other creatures, human beings do not have a nature that is determined in advance; they are self-creators.[23] The idea of self-creation here is closely linked to autonomy because self-creation occurs through choices guided by reason. Human rights can be seen as protecting the dignity of human beings in this first sense: if realized, these rights shield individuals from conditions that are not fit for beings of our sort.

But dignity also has a second *social-comparative* sense. If a caste system mandates that certain people are not allowed to eat with the rest of us, this is an affront to their dignity, no matter how nutritious their fare may be and even if the conditions in which they eat are of the sort fit for humans as opposed to "mere beasts." (Think here of Jim Crow legislation requiring separate dining facilities for blacks.) Pico's understanding of dignity can ground the judgment that human beings are deserving of adequate sustenance and should eat in conditions that are fit for the higher sort of being that we are rather than for mere beasts, but satisfying these conditions does not rule out social practices that publicly signal that some human beings are inferior. Pico's conception of dignity lacks a social-comparative dimension.

Protecting individuals from indignities in the social-comparative sense is one aspect of the public affirmation and protection of equal status for all. Once we recognize the social-comparative sense of dignity, we can see that the seven egalitarian aspects of IHR noted above help supply content for the vague notion that human rights are grounded in human dignity.

The argument thus far can be summarized. The idea of equal status plays a prominent role in IHR. If the idea of equal status plays a prominent role in IHR, and if the philosophical task is to provide a critical reconstruction of IHR, then philosophers should pay special attention to the idea of equal status. They should articulate the role that this idea plays in

[23] Griffin, *On Human Rights*, 31.

IHR and show that it is defensible; or, if they hold that it is not defensible, they must give weighty reasons why this is so. A theory that does not provide a justification for the prominent role of equal status in IHR is either radically incomplete (if it retains the emphasis on equality) or deeply revisionist (if it recommends that this emphasis be jettisoned). My strategy in the remainder of this article will be to focus on the justifications that the best available theories offer for claims about the existence of human rights and to determine whether the conceptual resources they offer can accommodate the importance of equal status in IHR.

B. A central concern of justification: addressing the charge of parochialism

A necessary condition for remedying the justification deficit is to provide a convincing answer to a perennial challenge to the very idea of human rights: the parochialism objection. According to this objection, what are called human rights are not really universal in the sense of being rights of all individuals, but instead reflect (i) an arbitrarily restricted set of moral values or (ii) an arbitrary ranking of certain moral values. Both sorts of arbitrariness are said to be due to cultural bias, the mistake of thinking that what happens to be valued from a liberal or Western perspective is objectively valuable. Whatever other strengths a justification for human rights possesses, it will be flawed unless it contains a convincing reply to the parochialism objection.[24] A philosopher who attempts a critical reconstruction of IHR must address the parochialism objection regardless of whether his initial subject matter for theorizing is HR (as with Griffin and Tasioulas) or IHR (as with Beitz and Nickel).

C. Theoretical desiderata

If a theory responds well to the parochialism objection but only at the price of scoring badly on other important theoretical desiderata for a critical reconstruction of IHR, then that would be a pyrrhic victory. The

[24] For an extended consideration of the various forms of the parochialism objection and an argument that an adequate response to it must include both a sound philosophical account of human rights and epistemically sound institutions for giving human rights norms sufficient determinacy for application, see Allen Buchanan, "Human Rights and the Legitimacy of the International Legal Order," *Legal Theory* 14 (2008): 39–70.

following desiderata, without any attempt to rank them, seem relatively uncontroversial:

1. *Consonance* with the most stable intuitions about human rights (e.g. if a theory cannot account for the right against torture or against slavery being a human right, this counts against it).
2. *Reasonable fit* with the doctrine and practice of human rights (a theory should account for the core features of human rights doctrine and practice; if it fails to do so, it must provide a strong reason for revising doctrine or practice).
3. *Constraint, content, and guidance* (a theory should curb human rights inflation, help determine the content of various human rights, and help resolve conflicts among human rights).
4. *An account of the existence-conditions for human rights, including a response to the parochialism objection* (a theory should explain how claims of the form "There is an IHR to R" are to be justified and do so in such a way as to provide resources for a plausible reply to the parochialism objection).

D. Reasonable fit, parochialism, and status egalitarianism

Because the idea of equal status plays a central role in IHR, the desideratum of reasonable fit creates a strong presumption that a theory should accommodate and explain that role. But an equally important desideratum is to provide a convincing reply to the parochialism objection. These two desiderata are in tension. The egalitarianism of IHR—especially the strong rights against gender discrimination and the right to equal political participation for all—is a prime target of the parochialism objection. The charge is that these are at most rights for liberal societies, not human rights. Pruning back the status-egalitarian element would make it easier to answer the parochialism objection, but the result would be a theory that does not fit an important feature of its subject matter.

Is there a critical reconstruction of IHR that can accommodate the status-egalitarian element, where this means spelling out and defending the idea of equal status and showing how it grounds important features of IHR, and that can do so in such a way as to deflect the charge of parochialism? In my judgment, Griffin and Nickel provide the best philosophical theories of human rights so far. I begin with Griffin's theory because, from the standpoint of providing a justification for

claims about the existence of human rights, it is the most explicit and the most ambitious. Although, as I have already emphasized, Griffin's initial subject matter is HR, he believes his theory provides the best basis for a critical reconstruction of IHR, so it is legitimate to ask whether it can account for the status egalitarianism of the latter.

III. Griffin's theory: human rights as protectors of normative agency

In *On Human Rights* (2008), Griffin offers what he calls the personhood or normative agency theory of what human rights are and how claims about their existence are to be justified. According to Griffin, "Human rights are protections of our normative agency."[25] Because, as I shall argue, there is an ambiguity in his notion of protecting normative agency, it is worth quoting in full his statement of the connection between human rights and normative agency. In the following passage Griffin uses "personhood" as interchangeable with "normative agency."

> Human rights can be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of [normative] agency. To be . . . [a normative] agent in the fullest sense of which we are capable, one must (first) choose one's own path through life—that is, not be dominated or controlled by someone or something else (call it "autonomy"). And (second) one's choice must be real; one must have at least a certain minimum education and must have at least the minimum provision of resources and capabilities that it takes (call all of this "minimum provision"). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this "liberty").[26]

This view of what human rights are dictates how claims about the existence of various human rights are to be justified: "All human rights will come under one or the other of these three overarching headings: autonomy, welfare ('minimal provision'), and liberty. And those three [autonomy, minimal provision, and liberty] can be seen as constituting a trio of the highest-level human rights."[27]

[25] Griffin, *On Human Rights*, 149. [26] Ibid., 133. [27] Ibid., 149.

So, according to Griffin, all human rights are either one or another of these three highest-level rights or are derived from them. The derivation may not be straightforward, however. Griffin stresses that to show that a particular derivative (lower-level) human right exists one may need to appeal to various empirical premises, including those that concern what he calls "practicalities." For Griffin, practicalities include several quite different considerations, including constraints on what persons can have a right to that are imposed by the facts about human motivation and cognition and the requirement that human rights be compatible with one another.

Griffin thinks that, from the standpoint of reasonable fit, his theory has an advantage: it fleshes out the idea, prominent in major IHR documents, that human rights are grounded in the dignity of the individual. "To adopt the personhood account of human rights is to adopt normative agency as the interpretation of 'the dignity of the human person' when that phrase is used as the ground of human rights."[28]

A. Grounding human rights in the good

Griffin's is an objectivist theory of human rights: for him, the reasoning needed to justify claims about the existence of human rights goes back eventually to the recognition that normative agency is valu*able*, not to the claim that it is valu*ed* by all people or assumed to be valuable according to the norms of all cultures or societies. He thinks that, when we properly appreciate the value of normative agency, we understand that it is of great intrinsic value, not just in our own case but wherever it exists.

B. "Protecting normative agency": a deep ambiguity

Griffin believes that his normative agency account satisfies the desiderata of constraint, content, and guidance: it can accommodate all or most of the rights that are plausible candidates for being IHRs, but it can also serve to help fill out the content of IHRs, avoid rights inflation, and provide guidance for how to resolve conflicts among IHRs. Griffin's account must also address the reasonable fit desideratum. To demonstrate that his theory is superior to other views from the standpoint of the

[28] Ibid., 152.

project of critical reconstruction, Griffin must either show that his account fits as well or better with central features of IHR, including the seven egalitarian elements listed above, or he must argue that if his view scores less well on this desideratum, its superiority to other desiderata compensates for that shortcoming.

When most concerned to show that his view provides constraint, content, and guidance, Griffin invokes *the austere interpretation* of the claim that human rights protect normative agency. According to the austere interpretation, human rights protect the individual's capacity for normative agency—they simply serve to ensure our existence as normative agents. He appears to opt for the austere interpretation when he writes of human rights violated as "destroying" personhood and of human rights as "preserving personhood."[29]

The austere interpretation curbs IHR inflation, and it may achieve greater determinacy of content as well, but it does so at a prohibitive cost: it is incapable of accommodating some of the most uncontroversial IHRs, including the right against slavery, and it therefore fails to satisfy the desideratum of reasonable fit. After all, slavery need not and typically does not destroy an individual's capacity for normative agency (if it did, emancipation would be a senseless enterprise). Further, slaves can still exercise normative agency: they can form a conception of a worthwhile life within the constraints to which they are subject and take effective steps to pursue it. Slavery need not make a worthwhile life impossible.

Recognizing that the mere preservation of the capacity for normative agency is inadequate, Griffin sometimes slides to a richer notion of the protection of agency. Thus he says that the role of human rights is "to protect . . . both our capacity for normative agency and our exercise of it."[30]

But this is clearly not rich enough: as I have just noted, slaves can and do exercise normative agency. So, if Griffin's theory is to accommodate a right against slavery, he must expand his characterization of the protective role further still to include the idea that human rights protect the opportunity for "reasonably effective" or "adequate" normative agency. Call this *the rich interpretation*. Griffin comes close to explicitly embracing the rich interpretation—or perhaps to exceeding it—in a passage

[29] Ibid., 33. [30] Ibid., 183.

I cited earlier, when he emphasizes the notion of "being a normative agent in the fullest sense we are capable of."[31]

The rich conception emphasizes liberty as one component of (adequate) normative agency. It therefore can accommodate the right against slavery. But it is not clear that Griffin has a principled way of spelling out what range of liberties is covered by the richer notion of normative agency. The difficulty for Griffin is that, while having the capacity for normative agency plus the mere opportunity for "some" exercise of normative agency is clearly inadequate (as the slavery case shows), the idea of being able to exercise reasonably effective or adequate normative agency, where this includes some package of liberties, has just the sort of indeterminacy that Griffin seeks to avoid. How much scope for the exercise of normative agency is enough and how effectively must an individual be able not only to form but also to pursue her conception of a worthwhile life? So far as I can tell, Griffin provides no satisfactory answer to these questions. His theory suffers the indeterminacy that it was supposed to avoid.[32]

Griffin might opt for the rich understanding of the claim that human rights protect normative agency but contend that his theory still does a better job on constraint, content, and guidance. To determine whether this reply is cogent, we must do what Griffin does not: examine Nickel's theory. The reason for focusing on Nickel's theory is straightforward: it is the best developed rival theory we have to date. I take up this task in Section IV.

C. *Why Griffin cannot account for the status-egalitarian element of IHR*

Earlier, I argued that the most secure and direct grounding for some of the most strikingly egalitarian aspects of IHR, including strong rights

[31] Ibid., 149.

[32] Griffin's notion of "practicalities" does not seem to remedy the problem of indeterminacy. Appealing to the natural cognitive and motivational limitations of humans in order to flesh out the content of human rights norms is dubious, not only because there is much controversy about what those limitations are (and these are empirical matters, not conceptual ones) but also because even if these limitations are specified we can still ask, within the domain bounded by these limitations, how much protection for their normative agency do we owe others? In other words, there is no reason to think that a specification of our cognitive and motivational limits will itself answer the question of how much we owe others, even if it rules out some answers to the question as unacceptable on the grounds that they demand more of us than we can deliver.

against discrimination, is the idea of equal status. It is hard to see how the idea that human rights protect normative agency, even on the rich interpretation, can accommodate these rights.

Griffin is aware that his theory has difficulty in accommodating rights against discrimination. He tries to show that his theory can accommodate a right to the legal recognition of same-sex marriage, arguing that failure to accord legal recognition to same-sex marriage offends against the liberty component of his three-part analysis of normative agency (autonomy, liberty, minimal provision).[33] An immediate difficulty with this reply is that Griffin has defined liberty as a component of normative agency, as the absence of coercive interference (in the passage quoted at length above), as others "not forcibly stopping" one from pursuing one's conception of a worthwhile life. But simply failing to give legal recognition to same-sex marriages is not coercive interference. Lack of legal recognition of same-sex marriages is more accurately described as refraining from creating a legal privilege rather than a case of coercive interference. Quite apart from that, Griffin's reply is unconvincing in the absence of an account of how much liberty (of what sort) is needed for reasonably effective or adequate normative agency.

Clearly, only the rich interpretation of "human rights protect normative agency" has a chance of ruling out legal discrimination against same-sex marriage (and then only if "liberty" includes more than absence of others forcibly blocking one), since being barred from legal recognition of one's marriage is obviously compatible with having the capacity for normative agency and for some considerable exercise of that capacity. Notice that Griffin cannot argue that there is a basic, that is, nonderivative right to liberty regarding the choice of marriage partners. On his view, which liberties we have a right to depends upon what the protection of normative agency (on the rich interpretation, the reasonably effective or adequate exercise of normative agency) requires. But the reasonably effective or adequate exercise of normative agency could be protected by having a system that secured a broad range of other liberties while interfering with the liberty to engage in same-sex marriage. There is no reason to believe that the liberty to engage in same-sex marriage is

[33] Griffin, *On Human Rights*, 169, 238, 252.

a necessary element of a satisfactory package of liberties, from the standpoint of protecting normative agency, even on the rich interpretation of the latter notion.

Yet, even if Griffin could supply the contours of a conception of reasonably effective or adequate normative agency in such a way as to make clear why a ban on same-sex marriage is an unacceptable limitation on liberty, explaining the matter in terms of liberty seems less intuitive than appealing to the notion of equal status. When gays and lesbians are denied the right to marry, they rightly feel that they are being relegated to an inferior status. Their exclusion from the institution of marriage can be reasonably viewed as a public judgment that their most intimate relationships—and hence they, themselves—are inferior.

Nickel's 1987 book, *Making Sense of Human Rights*, even before its substantial revision in 2007, was arguably the most systematic philosophical work available on human rights until the appearance of Griffin's *On Human Rights* in 2008. It is therefore disappointing that Griffin's book does not engage Nickel's view.[34] Griffin does quickly dismiss as far too demanding a different kind of theory—the view that human rights protect the individual's ability to flourish. But so far as I can tell, that is a theory that no one holds.[35] It is certainly not Nickel's theory. Nickel goes out of his way to emphasize that his theory is minimalist, saying that "human rights block common threats to a minimally good or decent human life"—they do not ensure flourishing.[36]

[34] Griffin thanks Nickel for comments on a draft of his book. The index of Griffin's book contains only one entry under "Nickel," and it is not a reference to Nickel's book or to his theory but rather to a remark Nickel made to Griffin in conversation.

[35] Griffin, *On Human Rights*, 34, 53, 55. Griffin also considers and quickly rejects a "needs-based" theory of human rights. He interprets "needs" as fulfillments of functions and then argues that the notion of functioning is too lean to ground a plausible list of human rights. Nickel's view, like John Tasioulas's and my own, is neither a "flourishing" view nor a "needs-based" (functionalist) view.

[36] Nickel, *Making Sense of Human Rights*, 36. Nickel could not be clearer in his rejection of the notion that human rights ensure flourishing: "Human rights are not ideals of the good life for humans; they are rather concerned with ensuring the conditions, negative and positive, of a minimally good life" (ibid., 138).

IV. Nickel's "minimally good life" theory

A. Nickel's "four secure claims"

Nickel proposes, as "a simple framework for justifying human rights . . . the basic idea that people have secure, but abstract, [valid] moral claims in four areas: a secure claim to have a life; a secure claim to lead one's life; a secure claim against cruel or degrading treatment; [and] a secure claim against severely unfair treatment." He suggests that there is something more basic than the four secure claims in his justification for human rights: the idea that each individual is entitled to the opportunity to live a "minimally good life." He thinks that honoring the four secure claims helps to create the conditions for a minimally good life.[37]

Nickel offers a six-step account of how to move from the four basic interests to justifications for claims about the existence of particular human rights.

> The first step requires showing that people today regularly experience problems or abuses in the area protected by the proposed right. The second step is to show that this [human rights] norm has the importance or high priority that is a key feature of human rights. We do this by showing the right protects things that are central to a decent life as a person. . . . The third step . . . involves seeing if the proposed [human rights] norm fits the general idea of human rights . . . for example, can it be formulated as a right of all people that they have independently of recognition or enactment at the national level? The fourth test requires showing that a norm as strong as a right is needed to provide this protection, that no weaker measures will be sufficiently effective. The fifth criterion is that the burdens the right imposes [the duties it grounds] are neither excessive nor severely unfair. The sixth and final test requires that human rights be feasible to implement in an ample majority of countries today.[38]

Thus, for Nickel, establishing the existence of a particular human right requires, inter alia, showing that the realization of that right—that is, the fulfillment of the duties the right grounds—would provide adequate protection, without excessive cost, for one or more of the four basic interests, against standard threats to those interests.[39]

[37] Ibid., 62. [38] Ibid., 70. [39] Shue, *Basic Rights*, 17.

The contrast here between Nickel and Griffin is clear. Because his conception of the interests that human rights protect is so lean, Griffin is faced with the unenviable task of shoehorning in all plausible candidates for human rights under the notion of normative agency. Nickel can acknowledge that other interests are equally important. Consider the right against torture. Griffin must argue that the right against torture is a human right because—and only because—torture destroys the capacity for normative agency, or, on the richer interpretation noted above, because being tortured is incompatible with the adequate or reasonably effective exercise of normative agency.[40] Nickel can acknowledge that being tortured can interfere with the exercise of normative agency, but he can also appeal, in a more straightforward way, to the fact that being subjected to extreme pain and terror is sufficiently bad in itself to be a threat to the individual being able to live a minimally good life.

Similarly, Nickel's theory provides a more direct and secure grounding for some rights against discrimination. Nickel can argue that at least the grosser forms of racial, gender, or religious discrimination threaten the basic interest in not being treated in a severely unfair way (the fourth secure claim). Griffin must argue that such discrimination is a human rights violation because, and only because, it undermines normative agency. On the lean interpretation of normative agency this is implausible: one can be subject to a good deal of discrimination and still retain one's capacity for normative agency and actually exercise it.

Were he to retreat to the rich interpretation of human rights as protections of normative agency, Griffin would have to show that being subjected to the grosser forms of discrimination prevents individuals from exercising reasonably effective or adequate normative agency. It is not clear to me that this can be done. But even if it can be done, it seems to be a roundabout and to that extent less secure justification for rights against discrimination. The claim against severely unfair treatment seems as morally basic as the claim to the protection of normative agency and not reducible to it.

Griffin would no doubt reply that having to give somewhat roundabout justifications for rights against torture and discrimination is a price worth paying in order to have a conception of human rights that avoids

[40] John Tasioulas, "Human Rights, Universality, and the Values of Personhood: Retracing Griffin's Steps," *European Journal of Philosophy* 10 (2002): 79–100.

rights inflation and provides content and guidance for resolving rights conflicts. The difficulty with this reply is that Nickel's more pluralistic interest-based view, when fleshed out with his six-step procedure, seems to provide at least as much constraint, content, and guidance as Griffin's approach.

Griffin might protest that it is unfair to complain that his three-part notion of normative agency is too lean to derive determinate rights; to do so is to overlook his insistence that the derivation depends also on "practicalities." As I have already noted, Griffin says too little about what practicalities are and how they figure in the derivation of human rights for this reply to be convincing. The hypothesis that human rights are only concerned with the protection of normative agency simply fails to provide a compelling explanation of some of what is most plausible in IHR.

B. Nickel's theory: a better fit?

When it comes to accommodating the status-egalitarian element in IHR, Nickel's view looks more promising. He can appeal to the basic interest in avoiding "severely unfair treatment" as being morally important in its own right. Given the importance of marriage in most societies, perhaps a ban on same-sex marriage qualifies as severely unfair treatment, if by severely unfair treatment one means unfairness with regard to matters that are, or are generally thought to be, highly important in themselves, independently of the inegalitarian attitudes they happen to signal in a particular social context. Alternatively, one might define severely unfair treatment as discrimination that tends seriously to diminish the well-being of those toward whom it is directed. But not all of the forms of discrimination prohibited in the human rights conventions cited above fit either of these characterizations of severe unfairness. It would be a stretch to say that some kinds of racial or gender discrimination practiced by private parties (e.g. paying females less than men doing the same work) constitute severely unfair treatment on either of these characterizations—unless one simply counts as severely unfair treatment that violates the notion of equal status.

Unfortunately, Nickel does not clarify the idea of severely unfair treatment sufficiently to enable us to know whether it can accommodate the broad range of discriminatory practices prohibited under current

human rights law. Providing an account of what severely unfair treatment covers would be a significant addition to his theory.

C. *Normative agency or a minimally good life?*

The fundamental difference between Griffin's and Nickel's theories is this: for Griffin, human rights protect normative agency; for Nickel, they protect the opportunity for a minimally good life. How can we resolve this dispute?

I have already noted one argument in favor of Nickel's theory: it provides more straightforward justifications for some relatively uncontroversial human rights, and it does so without any apparent disadvantage in terms of providing constraint, content, and guidance. But Nickel's approach has another advantage: it fits better with a plausible conception of the political functions of IHR. Satisfying this condition is one especially important aspect of the desideratum of "reasonable fit" between the theory and the actual doctrine and practice of human rights.

Elsewhere, I have suggested that IHRs supply standards of transnational justice (requirements of justice that every state ought to observe in its treatment of its own citizens) and of international justice (requirements of justice that international institutions ought to meet and that states ought to observe in their dealings with foreigners).[41] Acknowledging this political function is compatible with heeding Griffin's valuable reminder that human rights are not the whole of justice. It is compatible, for example, with there being requirements of justice within a particular state that exceed what is appropriately required of all states and with the claim that there are principles of justice that apply to relationships among states or peoples that are not reducible to human rights principles.

From the standpoint of this political function, the idea that IHRs protect the opportunity for a minimally good human life is more cogent than the idea that they protect normative agency. Why should a global standard of social justice focus only on protecting normative agency? That seems arbitrarily narrow. It might be somewhat more plausible to

[41] This is not to say that human rights comprise the whole of international justice. I have argued that human rights norms are not adequate to capture the justice of international institutions. In particular, it may also be necessary to appeal to principles that state requirements of fairness in the way international institutions treat states (or peoples). See Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics* 110 (2000): 697–721.

say that, as a matter of non-ideal theory, the best we can hope for in the pursuit of global justice at present is protection of normative agency, on the austere interpretation, but that is not Griffin's view. He holds that the protection of normative agency is the point of human rights, not the best we can hope for now. Griffin's richer interpretation of what the protection of normative agency requires might look more plausible as the standard of global justice, but only to the extent that it is so rich as to blur the distinction between protecting normative agency and securing a wider range of interests of just the sort that Nickel groups under the conditions for a minimally good life.

So far as I can tell, Griffin has only two possible replies. First, he might claim that only the narrow focus on normative agency can fulfill the desiderata of determinate content, constraint, and guidance. But I have already argued that this claim is unconvincing. It is only the austere interpretation of the protection of normative agency that confers any significant advantage in terms of constraint and determinate content, and that advantage comes at too high a price: it requires us to deny that some of the most central human rights, including the rights against torture and slavery, are human rights. Second, he might say: "I am attempting to construct a theory of human rights that takes seriously the only intimation of a justification for claims about the existence of human rights that is to be found in the major human rights documents—the idea that human rights are grounded in the dignity of the individual. Respect for normative agency is the most plausible interpretation of the notion of dignity in this context."

The question of what the chief political functions of human rights are cannot be inferred in any straightforward fashion from the preambular phrasing of a few human rights documents. The criterion of reasonable fit requires a broader view, attending not just to the wording of key documents but to the doctrine and practice of human rights taken as a whole as it has evolved since the ratification of the key conventions. The view that one of the chief functions of human rights is to supply standards of global justice provides a better fit with the international doctrine and practice of human rights taken as a whole than the claim that human rights are protections of normative agency. Furthermore, this functional view, if combined with an acknowledgment of the status-egalitarian element in IHR, can make good sense of the idea that these rights are grounded in the dignity of the individual. For, as I have argued,

the idea of dignity, so far as it includes a social-comparative aspect, is intimately connected with that of equal status. And it is intuitively plausible that the protection of equal status is an important aspect of global justice, given the history of colonialism and the current gaping disparities of power and wealth in our world. Moreover, because status-egalitarianism, as I noted earlier, does not imply distributive egalitarianism, it is not vulnerable to liberal nationalist objections according to which egalitarian distributive principles apply only at the level of the state, not at the global level.

In another sense, Griffin does not take dignity seriously enough. Although he presents his theory as providing an interpretation of the notion of dignity, he does not begin with an acknowledgment of the complexity of that notion. Instead, he immediately proceeds on the assumption that to acknowledge the individual's dignity is simply to protect her normative agency. But, as I noted earlier, the concept of dignity is far from transparent and warrants more thoroughgoing analysis than Griffin provides. Moreover, dignity—or some conceptions of dignity—can plausibly be understood to include a comparative dimension that cannot be captured by the notion of protecting normative agency. To put the same point in a different way, being treated as if one were by virtue of one's nature inferior is to be denied the dignity accorded to others. Being relegated to an inferior status under the rigors of a caste system based on color, ethnicity, or gender, or being in a condition of extreme dependency in comparison with other persons, can be an affront to one's dignity, even if one has considerable scope for the exercise of normative agency.

Griffin's concept of dignity is noncomparative: it has nothing to do with ideas of equal status or with social comparisons of any sort.[42] For him, whether one has the capacity for normative agency (the austere interpretation) or whether one can exercise normative agency in a reasonably effective way (the rich interpretation) depends solely on whether one can make judgments about what a worthwhile life could be, whether one has liberty to pursue what one deems to be a worthwhile life, and whether one has the resources to pursue it effectively. Hence, it

[42] Griffin thinks that all who are normative agents have an equal status, but that is a different matter.

should come as no surprise that Griffin cannot account for the status-egalitarian element in modern human rights.

To put the same point in a different way, Griffin's view of normative agency and of dignity is essentially nonsocial. On his view, it is possible to give a full characterization of the kind of life that human rights are supposed to protect without any consideration of the social standing of the normative agent. For Griffin, social standing is relevant to normative agency, and hence to human rights, only if it happens to be true that having an inferior social standing undermines one's normative agency.

Griffin would reply that in offering the normative agency interpretation of dignity he does not pretend to do justice to all aspects of our ordinary understanding of dignity.[43] The obvious rejoinder is that it is arbitrary to exclude the social-comparative aspect of this concept.

Griffin might reply that this exclusion is not arbitrary: it is motivated by a perfectly respectable holistic stance on theorizing about human rights. In other words, he would contend that the narrower, noncomparative notion of dignity with which he operates is acceptable because it yields the best overall theory, especially when one takes seriously the desideratum of providing determinate content to human rights. I have already indicated, however, why I think this reply is inadequate: Griffin has not made the case that his theory achieves greater determinacy of content than rival theories, in particular, Nickel's.

One final response is available to Griffin. He could argue that, although his notions of dignity and of normative agency are noncomparative, he can nonetheless accommodate the status-egalitarian element of IHR by invoking certain empirical psychological premises. He can argue that even the subtler forms of discrimination, the lack of a social guarantee of access to work, and the inability to make a decent public presentation of the person, tend to damage the individual's self-esteem and that loss of self-esteem tends to undermine normative agency.[44]

This reply has two flaws. First, it makes the validity of a central element of IHR—the emphasis on equality of status—depend on the truth of a very strong and highly contestable psychological claim about what undermines normative agency. (Recall that "normative agency" here must be understood, following the rich interpretation, as being

[43] Griffin made this reply at a conference at Rutgers Law School in October of 2008.
[44] Griffin, *On Human Rights*, 42.

able to function in a reasonably effective way as a normative agent.) Second, it puts the stamp of approval on the phenomenon of adaptive preferences under conditions of extreme injustice. Suppose, for example, that those relegated to an inferior social position in a caste society are so thoroughly brainwashed as to have a caste-relative notion of self-esteem. They are subject to morally arbitrary discrimination and publicly relegated to an inferior status, but because of effective brainwashing, their self-esteem is not damaged or not damaged enough to interfere with their normative agency. On Griffin's account, we cannot say that these individuals' human rights are being violated. Nor can we say that they are not being treated with dignity in the sense of "dignity" relevant to the claim that human rights are grounded in dignity.

Griffin has one remaining response. He could agree that whenever a person suffers racial or gender discrimination, she is treated unjustly but deny that her human rights were violated. Griffin is certainly correct in emphasizing that human rights are not the whole of justice. On his view, those injustices that constitute human rights violations are threats to normative agency. But the only reason he gives for distinguishing human rights violations from other injustices in this way is that doing so is the best way of giving determinate sense to the idea of human rights. I have already argued, however, that Griffin's theory is not superior in this regard to Nickel's.

The threads of the argument can now be pulled together. Griffin's personhood account does not provide a justification for the prominent role of strong rights of discrimination in IHR; nor can it accommodate a conception of equal status or a social-comparative conception of dignity that includes the notions of decent living conditions or the avoidance of extreme dependency. Nickel's theory has more resources for accommodating rights against discrimination, because it includes, among the interests on which human rights are based, the interest in not being subject to "severely unfair treatment." However, the strong rights against discrimination included in IHR are not plausibly construed as protections against severely unfair treatment, unless severely unfair treatment is stipulatively defined so as to cover all affronts to equal status. Quite apart from that, the basic interest in avoiding "severely unfair treatment" does not accurately capture what I have called the social-comparative conception of dignity or the notion that there is a human right to a standard of living that is not just biologically but also socially adequate.

Nor does the minimally good life approach provide a secure grounding for the right to work. Neither Griffin's normative agency theory nor Nickel's more pluralistic version of interest-based theory captures important dimensions of the status-egalitarian element of IHR because neither operates with a sufficiently social conception of dignity.

Nickel's "minimally good life" account is most attractive when he emphasizes its minimalism, when he says it portrays human rights as a morality of the depths, not a prescription for the ideal society.[45] If we think of human rights in this way, as only protecting against what tends to make life really awful, this will draw some of the sting of the parochialism objection because it is less likely that a conception of what severely diminishes well-being is culturally biased than one that sets a higher standard for treatment. But the price of this response to the parochialism objection is that treatment that relegates the individual to an inferior status without diminishing her well-being to the point that her life is really awful does not count as a human rights violation.

To appreciate this last point, consider Martin Luther King Jr.'s words in his "Letter from a Birmingham Jail": "You find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television."[46] I doubt that Dr. King would have judged that such discrimination rendered his daughter's life less than "minimally good" if this means falling below some uncontroversially very low level of well-being (and I am certain that he would not say that it undermined her normative agency). But he clearly did think that his daughter was being seriously wronged and that the wrong consisted in her being treated as if she were an inferior.

V. Conclusion

I have argued that equal status is an important element of IHR and that because neither Griffin nor Nickel can accommodate this fact, their theories are more revisionist than they acknowledge. Further, if a chief political function of IHR is to help supply a global standard of justice,

[45] Nickel, *Making Sense of Human Rights*, 36, 62.

[46] Martin Luther King Jr., "Letter from a Birmingham Jail," in *Why We Can't Wait* (New York: Signet Classic, 2000), 69.

that standard should reflect a richer, more social notion of dignity than either Griffin or Nickel provides. And it is not reasonable to reject out of hand the idea of equal status that encompasses strong rights against discrimination and the ideas of decent living conditions and the avoidance of extreme dependency.

My aim here is not to provide such a theory of global justice or to make a convincing case that IHR is properly regarded as articulating the standard that such a theory would include. Instead, I have shown (1) that the two most developed theories of human rights cannot, without significant revision, capture the status-egalitarian element of IHR and (2) that neither theory offers a conception of dignity suitable for a theory of human rights because both neglect the social-comparative aspect of that concept. I have also argued (3) that Nickel's theory is superior to Griffin's theory because the notion that human rights generally ensure the conditions for a minimally good human life is a more promising guiding idea than Griffin's notion that human rights protect normative agency.

Earlier I noted that one option is to conclude that the status-egalitarian element of IHR is an error—and thereby to embrace a highly revisionist theory. I will conclude by beginning to explore the other option.

A theorist who is attracted to the idea that human rights protect the opportunity for a minimally good life and who agrees with me that Nickel's view cannot fully accommodate the importance of status-egalitarianism in IHR, but who wishes to avoid extreme revision, might consider two alternatives. On the one hand, one could expand the list of basic interests whose realization generally provides the conditions for a minimally good human life to include something that might be called "the interest in equality of status," where the latter phrase is intended to cover strong nondiscrimination, the notion of decent living conditions, and the avoidance of extreme dependency. One could then hold fast to the core idea of Nickel's sort of interest theory: human rights would be seen as protectors of the opportunity for a minimally good life, but "a minimally good life" would be understood more expansively than in Nickel's theory so as to include some consideration of equality of status. Or, one could supplement the claim that human rights protect the conditions for a minimally good life (according to a "thin" conception of the good) with the claim that they also help ensure equality of status for all. Both options embrace the plausible idea that acknowledging the fundamental equality of persons requires, inter alia, helping to ensure

that they have the opportunity for a minimally good human life. But the second alternative holds that something more is required: it is also necessary to protect individuals from threats to the public recognition of their equal status even when they are not in danger of falling below the standard of a minimally good life.

Regardless of which option is taken, heavy lifting will be required. On the first option, one must develop a sufficiently rich notion of a minimally good life to accommodate a prominent role for social-comparative considerations, either by articulating and defending the public affirmation of equal status as something that is so objectively valuable that its absence renders life less than minimally good or by marshaling evidence-based psychological claims to show that being treated as an inferior is so psychologically damaging as to undercut the opportunity for a minimally good life. If, in contrast, one takes the second option and does not try to pack everything into the notion of a minimally good life, then one can operate with a leaner conception of a minimally good life but one must articulate the idea of equal status and show that the protection of equal status thus understood warrants being included at the deepest level in one's grounding of human rights.

I think there is something to be said in favor of the second approach. The idea of a minimally good life is (trivially) an idea of the good, whereas the notion of equality implicated in the demand for decent public presentation and the avoidance of extreme dependency is (again) trivially an idea of equality. Unless the notion of equality can be reduced to that of the good—which seems to me unlikely—it seems more perspicacious to distinguish these two components of the grounding of human rights.[47]

It would not be plausible to hold that a plausible theory of human rights would be based only on a notion of equal status. For one thing, equal status, as a purely comparative notion, would be inadequate, unless

[47] Some theorists who opt for a broader basis for human rights than Griffin, including Nickel, tend to use the phrases "a minimally good life" and "a decent life" interchangeably. In one respect the latter phrase seems more appropriate: the idea of decency seems to be more consonant with what I have called the social-comparative aspect of dignity. A decent life, e.g., might be thought to be one in which one can make a decent public presentation of oneself and in which one is not regarded as an exceptionally dependent being. In that sense, the notion of a decent human life seems conceptually closer to the egalitarianism of modern human rights than that of a minimally good life.

it was coupled with an independent commitment to promoting the good of the individual or at least protecting it against major threats. (A world in which all persons lived miserably but were equal in their misery and in which social practices and institutions marked no one as inferior to anyone else would satisfy an equal status principle.)

My suggestion, then, is not to replace the notion of a minimally good life with that of equal moral status. Instead, I think we should take seriously the idea that respecting human rights requires both ensuring that everyone has the opportunity to live a minimally good life and protecting them from the risk that they will be regarded as having an inferior moral status. In grander terms, one might say that a theory of human rights, at bottom, should include both a concept of the good and a concept of the right.

I noted earlier that there is a tension between these two desiderata for a theory of human rights, at least so far as the theory is intended to provide guidance for the critical reconstruction of the international legal–institutional phenomenon of human rights: reasonable fit, which, I have argued, includes accommodating the prominence of the idea of equal status, and providing a plausible reply to the parochialism objection, according to which at least two prominent expressions of the idea of equal status, namely, rights against gender discrimination and the right to equal political participation, are merely expressions of liberal bias. So far, even the best philosophical theories have failed to appreciate the role of equal status in IHR. It remains to be seen whether a theory that takes the status-egalitarian element seriously can reply successfully to the parochialism objection. My aim in this article has not been to offer such a theory. Indeed, I have not provided a thoroughgoing analysis of the notion of equal status and instead have appealed to its intuitive plausibility in light of the formative role in IHR of the struggles against sexual discrimination, racism, and colonialism.

I have outlined the general character of a threat to equal status: it is to be treated in ways that, given the historical context, put one at significant risk of being regarded as naturally inferior in certain respects, where being naturally inferior in those respects is thought to disqualify one from participation as an equal in important social practices or roles. To be regarded as naturally inferior—inferior by virtue of one's nature as a woman, or a person of color, or a gay or lesbian—is especially threatening because the assumption is that the flaw goes as deep as is possible and

is irremediable. If one is excluded from some important social practice or role on the grounds that one is naturally inferior, there is nothing one can do to become qualified for participation. Thus, for example, women are relegated to an inferior status when they are excluded from political participation or from higher education, in societies in which political participation and higher education are generally thought to be valuable, by social practices that are grounded in belief systems that regard women as naturally less rational than men and that take this supposed inferiority to be a good reason for disqualifying women from political participation or higher education. This general conception of a threat to equal status makes the kinds of treatment that threaten equal status, and hence the sorts of rights whose realization provides protection against the threats, contingent on the history of how certain groups have been treated, the belief systems invoked to justify that treatment, and the current social importance of the practices and activities from which they are now being excluded.

My aim has been to try to introduce the neglected idea of equal status into philosophical thinking about human rights. My main conclusion is that any plausible theory must either defend the emphasis on equality of status that figures so prominently in international human rights or acknowledge that it is a deeply revisionist theory.

In my judgment, it would be premature to conclude that such a revision is necessary for the simple reason that there has not yet been any serious attempt to develop an account of equal status that would make sense of the prominence of equal status in IHR. The general conception of a threat to equal status outlined above is only the beginning of such an attempt. Contemporary philosophers have addressed moral status, but they have chiefly been concerned to determine what gives a being moral standing of any kind (what makes a being morally considerable) or with what gives persons a higher moral status than other morally considerable beings. In some cases they have identified higher moral status with having rights, but they have not said enough about the connection between moral status and rights to shed light on the question of whether there is a plausible notion of equal status that can ground important features of IHR. More specifically, they have not engaged the question of whether there is a defensible conception of equal status that could ground the very strong rights against discrimination that figure so prominently in IHR.

If we turn to the history of philosophy, there are valuable resources, but they, too, may prove inadequate. Pico's conception of the dignity of human beings, as I noted earlier, includes the idea that all of us have the capacity for self-creation. It therefore provides materials for an argument to show that one way of denying the equal status of an individual is to treat her as if she lacked this capacity. At least on Waldron's reading, Locke is saying something similar: his rejection of the claim that some humans by nature have the right to rule others is grounded in the thesis that all normal human beings have the capacity to know what God requires of them or, in secular terms, to know how to conduct their lives. We can see Griffin's favorable citation of Pico's view and his project of generating human rights from the concept of normative agency as evidence that for him being accorded equal status—so far as it is relevant to human rights—is simply a matter of being regarded as equal to other agents in being capable of self-direction, of forming and pursuing a conception of a worthwhile life. All three philosophers, then, can be read as saying that to recognize an individual as having equal status is nothing more than responding appropriately to the fact that she is capable of autonomy. But I have already argued that such a conception of equal status is not capable of fully capturing the status-egalitarian element of IHR. For one thing, it does not provide an adequate grounding for strong rights against discrimination. When gays and lesbians are denied the right to have their unions recognized as marriages, there is no assumption that they are inferior in their capacity for autonomy. Rather, there is an assumption that their most intimate relationships are inferior, and the judgment that because they are gay or lesbian they are not fit for marriage signals their exclusion from one of the most important human institutions. Moreover, to judge a person's most intimate relationships and commitments inferior is not to make a judgment simply about what she does but also about what she is. This is a judgment of inferiority—a denial of equal status—that cannot be reduced to the judgment that the individual is inferior with respect to the capacity for autonomy. Similarly, when colonized people complained that they were treated as inferiors, it is doubtful that they were complaining only about being regarded as less than fully autonomous; the exclusion and subordination they suffered also expressed judgments that they were morally inferior, unclean, uncivilized, that their cultures were inferior, and so forth. The standard philosophical understandings of equal status as autonomy

cannot explain the complexity of equal status as the focus of real-world struggles for equality. On such understandings, all there is to equal status is proper recognition that all who meet or exceed some threshold of autonomy are entitled to be treated differently from beings who fail to do so; patterns of social discrimination above the threshold are not ruled out or even recognized as issues of equal status.

Both the idea that human rights importantly have to do with equal status and the idea that denial of equal status can involve judgments of inferiority that are not reducible to the denial of the capacity for autonomy are plausible. If this is so, then perhaps the best working assumption for further theorizing about human rights is that we need to examine the actual struggle for human rights in order to try to develop a more adequate conception of equal status, not that we should repudiate a central feature of IHR in order to remain faithful to a conception of equal status that reduces it to the capacity for autonomy.

5

Human Rights, Human Agency, and Respect: Extending Griffin's View

Rowan Cruft

I

The language of rights is used broadly: to encompass such important matters as human rights, criminal law rights, the rights of citizenship, and such trivialities as my right to park in the space I purchased, your right to feel aggrieved at my rudeness, a fouled footballer's right to a free kick; it also encompasses rights borne by non-persons such as animals, babies or groups.

James Griffin focuses on a particular subset: human rights. He argues that 'we do not yet have a clear enough idea of what human rights are'; his account builds on the intension of the concept as 'a right that we have simply in virtue of being human' (1–2).[1] For Griffin, the best way to make this determinate is to construe human rights as grounded in personhood, understood thus:

> We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be – often, it is true, only on a small scale, but occasionally also on a large scale. And we try to realize these pictures. This is what we mean by a distinctively *human* existence [. . .]

[1] References to Griffin 2008 are given as page numbers alone; all other works are referred to fully.

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life – that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real: one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty') (32–33).

This focus on personhood as 'normative agency', as Griffin calls it, is attractive as a development of the indeterminate intension. Our form of agency—our ability to make reason govern our will (to make decisions that we intend to result from our 'capacity to distinguish true values from false, good reasons from bad' (150)), and to act out what our reason-governed will determines—is both distinctive to humans and intuitively of paramount moral importance. Many other morally important features, such as the capacity to feel pain and to flourish or suffer, are not unique to humans. And many of our distinctive features, such as linguistic ability or technical expertise, are not so obviously of great moral significance.

But why focus only on normative agency and not, say, our capacity for theoretical reason, or our rich emotional life?[2] One answer is that the language of rights seems particularly apt to mark protections of agency. Consider the 'third-party beneficiary problem' (Hart 1955: 180–181): if I promise you that I will care for your father (thereby placing myself under a duty to care for him), does your father hold a right corresponding to my duty, just as you do? To make sense of the multifarious uses of rights language mentioned in my opening sentence, I think we have to adopt an 'Interest Theory' of rights that will include some third-party beneficiaries as right-holders, but that is a story for another day. For now, it is notable that even if your father holds a right corresponding to my promissory duty to care for him, this is much less obvious than the fact that you as promisee hold such a right. Similarly my violation of the duty seems more obviously disrespectful to you (the promisee) than it does to your father, even if my violation is more harmful to him than you. An

[2] Thanks to Tom Pink for pressing me on those important aspects of being human that are not encompassed by normative agency.

appealing explanation of these differences is that the language of rights is particularly appropriate to characterize the normative relation generated by reasoners engaging with each other as reasoners. When I make a promise, you agree to it, and I then violate it, I thereby disrespect your will as someone who agreed to the promise for what you saw as good reasons. I do not so directly disrespect your father's will; my violating my promise need not do this at all (perhaps your father was unaware of the promise). I suggest that it is because your agency is at stake—your will as someone responding to reason—that the language of rights seems especially appropriate to capture my relation to you. Rights language, although used broadly as outlined in my first paragraph, is most at home in characterizing the protection of agency.[3]

Thus by focusing on normative agency, Griffin homes in not just on one of humans' distinguishing features most naturally conceived as important, but on that feature to which rights language is most central. This does not imply that we should see all promissory rights as human rights. For Griffin, the importance of personhood as normative agency grounds three 'highest-level human rights': (1) the right to *autonomy*, construed as the capacity to assess options and form some conception of a worthwhile life; (2) the right to *liberty*, construed as freedom from interference in pursuing one's conception of a worthwhile life insofar as this conception encompasses 'the most important components of a good life available to human beings' (163–164); and (3) the right to *welfare* or *minimal provision*, construed as the degree of health, food, housing, etc. sufficient for forming and pursuing a conception of a worthwhile life.[4] Thus one does not have a human right to protection from any possible negative impact on one's capacity as a reasoner, nor to protection in the pursuit of whatever one has decided to pursue—such as any old promise accepted from another. Human rights are protections 'not of a fully flourishing life but only of the more austere life of a normative agent' (53).

[3] This, perhaps, explains the enduring appeal of the 'Will Theory' of rights despite its incompatibility with many everyday uses of the term. As noted in the main text, I favour the 'Interest Theory' but believe many of the intuitions driving 'Will' theorists suggest that rights are especially apt for protecting agency. See Kramer, Simmonds, and Steiner 1998 for the 'Interest'/'Will' debate.

[4] Because its justification as a human right turns, for Griffin, on its importance for autonomy and liberty (cf. 149), welfare seems, strictly, to occupy a lower 'level' than autonomy and liberty.

II

Despite its enormous appeal, the personhood-as-normative-agency approach is taken in surprising directions by Griffin. I will not criticize him for developing a 'natural rights' account (derived straightforwardly from the notion of the 'the rights we hold simply in virtue of being human'), as opposed to a 'political' account.[5] My concern is more sympathetic: while Griffin is correct to ground human rights in normative agency, he conceives this too narrowly. I focus below on five claims—while being painfully aware that they cover only a small portion of Griffin's text.

1. Griffin claims that human rights can conflict with and be overridden by retributive justice. A convict's just imprisonment must be understood as a *justifiable violation* of the convict's human rights (65–66). This seems implausible. If a conviction and punishment is just, then it seems mistaken to say there has been any form of human rights violation, even a justifiable one.[6]

Griffin is correct to note that many issues of justice are not human rights matters—such as the injustice of free-riding on a bus (41, 64). But this does not establish that justice can *conflict* with human rights. It simply reminds us that human rights concern only a subset of issues of justice. In my view, appropriate respect for a convicted criminal as an agent capable of responding to reason *requires* punishing them. Punishment is the appropriate way of engaging with such a person about what they have done, and the engagement here is precisely with the person as a reasoner who can come to understand the moral import of their actions. Rather than being in tension with respect for agency of the type protected by human rights, such engagement-through-punishment is the right way to respect a convict's normative agency.

2. While Griffin thinks there is sometimes a conflict between human rights and *retributive* justice (justice in punishment), he thinks that *rectificatory* justice (justice in compensation) for those wrongly punished falls outside the realm of human rights, without conflicting with them: 'In a society with proper welfare provisions, not to be compensated will not undermine the *personhood* of the victim of a miscarriage of justice'

[5] But see §IV below, final paragraph.

[6] Tasioulas is similarly concerned (2010: 673). Griffin's view is shared by Husak (2007).

(199). Nonetheless Griffin concludes that because of the 'settled use' of human rights to encompass such miscarriages, we can—on the basis of broadly Wittgensteinian considerations about meaning being a matter of family resemblances—allow current usage which sees miscarriages of justice as human rights issues (210). But for Griffin this is a stretch. Personhood as normative agency is not threatened by such miscarriages.

This again seems doubtful. First, simplistically, some forms of miscarriage of justice, such as wrongful imprisonment for thirty years, are clear infringements on normative agency because they significantly limit the person's capacity to pursue their choices. Griffin would accept this point; it seems entailed by the claim discussed above, that imprisonment infringes personhood in the relevant sense. (While this is mistaken with regard to *justified* imprisonment, it seems correct regarding *unjustified* imprisonment.) Griffin's contention is the subtler point that a miscarriage of justice *as such*—where this includes subjecting a wealthy person to an unjustified but trivial fine, or where this includes no more than an official condemnation—has no impact on personhood (199). But even this seems debatable. Respect for a person as a normative agent requires that miscarriages of justice suffered by that person be rectified. This follows from the same considerations driving point no. 1: punishment engages the convicted person's will as reasoner; failure to rectify unjust punishment involves failure to engage properly with someone as a reasoner. Personhood in the 'normative agency' sense seems at stake here.

The two issues mentioned so far both involve a difference between Griffin and me on the relationship between punishment and normative agency. The next two involve an alternative difference: about whether a person's normative agency can be affected by events of which they are unaware.

3. Griffin claims that undetected violations of privacy would not have an impact on the victim's normative agency: a peeping Tom 'does not actually inhibit his victim's agency' (237). Because of this, Griffin argues that there is a human right to privacy that protects against *all* violations (including those of which the victim would have remained unaware) only because such a right offers the instrumentally best method of protecting people from violations of which they *are* aware, these latter being violations that affect personhood. Notably, this rationale for a human right to privacy does not extend protection to the privacy of dead people (320, n. 27).

But isn't a 'pure' invasion of privacy—an undetected voyeur—sometimes still an attack on the victim's personhood? Maybe Griffin would respond that insofar as this is true, 'personhood' is being stretched beyond normative agency. If 'personhood' encompasses every aspect in which people should be respected, then of course any disrespectful action will violate it. But this will be the case whether or not the relevant action has any effect on the victim's normative agency.

We can resist this response. Undetected violations of privacy can be attacks specifically on normative agency. This is perhaps clearer in cases involving worse impositions than violation of privacy. Gardner and Shute's case of 'pure rape' (leaving no physical scars, committed on a sleeping or drugged victim who never discovers or suspects that they were raped or touched in any way) looks relevantly similar (Gardner and Shute 2000). While this involves an attack on many aspects of personhood, one of the things going on is that the perpetrator knowingly imposes on the victim something bad for them, and to which they would therefore reasonably object, and the perpetrator should have known this.[7] In this way the perpetrator's action fails to respect the victim as a practical reasoner even though this action has no effect on their consciousness and hence no effect on their will.

The same applies to some undetected violations of privacy. If the perpetrator acts in a way which they should know that the victim would reasonably object to, then the perpetrator fails to respect the victim's reasoning capacity even though it has not actually been exercised. I expand on this in §III below.

4. As in his defence of a right against undetected invasions of privacy, Griffin locates our duties to dead people and people with severe mental health difficulties as somehow *derived* from something supposedly easier to justify: the duty to respect the actual agency of full agents. The reason to respect the dignity of dementia victims is 'deep respect for the full persons they once were, traces of whom may still survive', and he takes a similar line concerning respect for 'the dead body of a beloved parent'

[7] A mental state conception of well-being would deny that pure rape can be bad for its victim. One could try to use such an account to defend Griffin's position on undetected violations of privacy, but Griffin himself points out the shortcomings of this approach to well-being in his 1986, 7–20.

(236–237). In 'neither case does the respect seem to be best explained in terms of possession of a human right' (237).

The refusal to use the phrase 'human rights' here might be correct, at least regarding dead people. But it seems strange to detach the reasons for respect in these cases from the *direct* importance of the relevant dead person or person suffering from dementia. Griffin writes that someone who fails to act respectfully in these cases 'has grossly defective feelings', and the implication is that that is the main failing in such disrespect (236). Perhaps I am misreading Griffin, but it appears that he thinks that because of the limitations built into our human psychological make-up, most of us could not be appropriately respectful to full living agents without also respecting them when dead or mentally disabled, and the requirement to respect the latter is derivative from the requirement to have the correct attitude to full living agents.

If Griffin's thought is as suggested above, it seems misguided. It fails to recognize that attacks on dead people or people with severe mental health problems are disrespectful of their victims independently of 'the full persons they once were'. They are disrespectful even if the victims were never full normative agents but were, for example, always severely disabled. Such disrespect derives directly from the importance of the victim, and not from whether respect for victims of this type is necessary in order to ensure respect for full agents. Whether such cases can be explained as disrespect for *personhood as normative agency* is debatable; I will argue that there is a sense in which they can.

5. My fifth focal point is the claim that *respect* for human rights (as opposed to *promotion* of their non-violation) is required only because of 'practicalities' such as human motivational and epistemic limitations. Griffin says this takes us to 'the heart of normative ethics' (69).[8]

This claim is akin to but more far-reaching than the fourth: that we only have duties towards dead and mentally disabled people because the structure of our sentiments makes such duties required if we are to behave well towards living full agents. The claim under consideration now concerns not the existence but the precise content of our duties (to full agents) as duties of *respect*. The default position for Griffin

[8] See also Griffin 1996, esp. 116–119.

appears to be that we should promote human rights (I think he would say the same about duties that do not correspond to rights):

> The obligation that human rights lay upon us is to do what is most likely to minimize their violation – for example to choose the form of government that is most likely to bring about this result. And minimize not just the government's violation of its citizens' rights, but also one citizen's violation of another's rights (253).

But Griffin notes that we are sometimes required only to *respect* human rights and thus, for instance, not to kill one person when so doing is the only means to prevent five similarly placed others from suffering similar rights-violating deaths:

> At times, the only moral life open to us involves *respecting* values, not *promoting* them. By 'respecting' the value of human life, for example, I mean primarily, but not solely, not oneself taking innocent life; by 'promoting' life, I mean bringing about its preservation as much as possible by any means open to one. We must come to terms with how certain limits to human nature determine limits to moral obligation (74).

In the paragraphs leading to this passage, Griffin mentions 'limits to our capacity to calculate consequences' and 'motivational limits' (70, 72). He goes on:

> [L]ife must be respected, and [. . .] one must simply follow the norm, 'Don't deliberately kill the innocent' – follow it because that is the only moral life available to the likes of us, though one might also adopt the policy that exceptions will be allowed only so long as the case for them is especially convincing. [. . .] Talk of an especially convincing case introduces an epistemic scale, not another moral one. It is the statement of a policy – an openly conservative policy – for what to do when something as important as human life is at stake and our calculations of the goods at stake are altogether too shaky and incomplete and badly conceptualized for us to be willing to live by (80; see also 126-128).

The implication is that if our calculations were not so shaky and badly conceptualized, and if our motivational capacities were not unavoidably biased—if we were superhuman 'archangels' in Hare's sense (1981: 44–45)—then we would not need the constraints on minimizing suffering that require respect for life rather than its promotion.

Yet should we really see the constraint to respect rather than promote life as grounded in our human limitations? Would archangelic surgeons violate no rights if they sacrificed a healthy archangelic patient in order

to save five others? This seems doubtful because, *independently of the human limitations Griffin outlines*, such sacrifice for others looks like an unjustified violation of, among other things, the patient's normative agency. *Even for archangels*, this violation does not seem justified by how it supports the normative agency of the five who are to be saved. Intuitively Griffin's approach makes the requirement of respect rather than promotion insufficiently foundational, and gives promotion an unwarranted default status. The approach also wrongly grounds the requirement of respect in the (limitations of the) character of the agents who have to engage in respect, rather than in the character of those being respected.[9] It seems more natural to regard respect as required, when it is, because of the particular nature of the people (or animals, artworks, etc.) who merit respect—a nature that would call for respect even from humans who lacked the limitations Griffin outlines.

Many human rights call for respect in this technical sense. For example, even though people's right not to be tortured might often require promotive actions (e.g. campaigning against torture), it would not allow me to torture one person if that was the only way to prevent similar torture to five comparable others. Maybe not all human rights call for respect in this way: consider positive rights such as the right to education. Nonetheless, because many human rights require respect, the previous paragraph implies that if we are to preserve Griffin's attractive main claim that human rights are grounded in normative agency, then we need an explanation that makes clear why normative agency (sometimes) merits respect. The calculative and motivational limits on our capacity to respond to human rights are not the correct explanation.

III

Griffin can retain his attractive 'normative agency' conception of human rights while avoiding the five problematic claims listed above if he adopts an enriched account of both normative agency and respect.[10] In the current section I develop this account to address the first four problems

[9] For an argument against such an 'agent-focused' approach, see Kamm 1996, 237–258.

[10] This is also, I think, the way to address Buchanan's complaint that Griffin leaves insufficient space for rights to equal status to qualify as human rights (2010).

outlined in §II. In §IV I tackle a difficulty. And in §V, I start on the fifth problem mentioned above.

The two key steps in addressing the first four problems are as follows: (i) We should conceive the respect for a person's normative agency that human rights require as not just a matter of ensuring that the person attains and continues in the state of 'being a normative agent', but also as ensuring that the person is treated in a manner minimally consistent with or appropriate to their nature as a normative agent. That is, we should extend our conception of the *respect* that human rights require to encompass more than the technical sense of a non-promoting 'constraint'. (ii) We should recognize that respect (in this broader sense) for a normative agent involves a central role, in our behaviour towards the agent, for the conception of a 'worthwhile life' (to use Griffin's phrase (33)) that the agent *should* adopt, as well as a role for the conception they *actually* adopt.

For Griffin, the function of a person's human rights is to make sure that the person attains and continues in the state of 'being a normative agent'. Insofar as a person's human rights require 'respect', this means that when, in the face of conflicting rights, we decide whether to *make sure that a particular person attains and continues in a state of normative agency*, we should do so in a non-promoting way: we should sometimes refuse to destroy the person's normative agency in order to make a net gain in the preservation of normative agency overall. In Griffin's technical sense, 'respect'—like promotion—governs *whether someone's attaining or continuing in a valuable state* will be ensured or not.[11] But this is a strangely narrow conception of respect. In everyday usage 'respect' covers much more: respecting something valuable means responding to it in a manner minimally appropriate to its value. If we plug this broader conception of respect into Griffin's account, we see a person's human rights as violated not just by behaviour that destroys their normative agency or leaves it unjustifiably unsupported, but also behaviour that is in some sense inconsistent with the person's being a normative agent, or deeply inappropriate given their normative agency.

[11] Admittedly, Griffin writes that '[b]y "respecting" the value of human life, [. . .] I mean *primarily, but not solely*, not oneself taking innocent life' (74). The italicized section suggests Griffin means respect to include more than the technical 'constraint' idea. But he does not expand on this to avoid the problems outlined in §II above.

In this broader sense, respect for normative agency includes, e.g., a (defeasible) requirement to engage with people when acting in ways that have a major effect on them. *As normative agents*, people should be engaged with—reasoned with, explained to, listened to—when we act in ways that affect them significantly. This applies even when our actions' effects are not effects on normative agency. Similarly, Raz notes that respect involves 'appropriate psychological acknowledgement' of what is valuable: we should *think* of normative agents *as normative agents*.[12] I touch below on further aspects of respect in this broad sense.

Buchanan argues that Griffin faces a dilemma in choosing between an 'austere' and a 'rich' interpretation of the claim that human rights protect normative agency. The austere interpretation maintains that human rights 'simply serve to ensure our existence as normative agents' (Buchanan 2010: 695). This limits rights inflation but leaves us with too few human rights: even slavery 'need not and typically does not destroy an individual's capacity for normative agency' (ibid.). By contrast, the rich interpretation sees human rights as protecting 'the opportunity for "reasonably effective" or "adequate" normative agency'—but it is indeterminate what counts as 'adequate' agency and the risk of rights inflation is high (ibid.). Raz and Tasioulas charge Griffin along similar lines (Raz 2010: 326; Tasioulas 2010: 660). Griffin replies that

> we can identify both states below normative agency (e.g., a life entirely consumed in a desperate struggle to keep body and soul together) and states above it (e.g. especially well endowed with practical wisdom and material resources). And in drawing the dividing line, a society should consider the general run of people. It must identify what is necessary to ensure that this general run of people will be above the threshold (Griffin 2010: 748).

This reply, by rejecting the austere interpretation, delivers conclusions—that slaves and impoverished people are, like babies and severely mentally handicapped people, not normative agents—that misdescribe people. It fails to highlight the distinctiveness of those who manage to make reason govern their will even while very restricted. We should do our best to avoid classifying slaves and deeply impoverished people as in a state 'below normative agency'. This classification risks leading us to forget

[12] Raz 2001: 161.

that slaves and impoverished people govern their own wills and have their own reasons, just like 'us'.

An alternative reply to Buchanan draws on my suggestion that a person's human rights not only protect their normative agency, but also require respect—in a broader-than-'constraints' sense—for them as a normative agent. Armed with this point, Griffin could stick to the most austere conception of normative agency and maintain that human rights against slavery and to liberty, say, are generated by the importance of *respecting* people's normative agency austerely conceived, rather than being necessary to protect people's *qualifying* as normative agents. Thus Griffin could—as he should—allow that slaves and impoverished people are normative agents; but he could simultaneously maintain that their human rights are violated because they are not being treated in ways that are called for by their status as normative agents. Their normative agency, while actual, is disrespected.

What is it to respect normative agency in my broader sense? The second step in addressing the first four problems outlined in §II is to recognize the importance, in one's dealings with normative agents, not just of their actual choices, but of what they should choose. Normative agents can make reason govern their will: they are capable of responding to the good, to what genuinely makes life worthwhile, and also to what is genuinely valuable in non-anthropocentric terms. We can conceive of something like an 'agent' that does not work in this way: a machine that will 'choose' one or other option depending on weights placed on its scales. This is not a normative agent because its decision is not responsive to reasons. One might think that respect for normative agency requires simply respecting whatever choices the agent makes: helping them or not impeding them in whatever they choose. But this does not recognize normative agents' difference from the machine mentioned above. As agents capable of responding to reason, we merit assistance in developing the *capacities* to choose in the light of reason, and Griffin is good on this (179–182). We also merit assistance in pursuing *what reason dictates* that we should pursue, and Griffin tends to overlook this. When a person makes poor life choices, the requirement to respect what they should have chosen will be in tension with the requirement to respect what has actually been chosen. We experience this tension when attempting to behave respectfully towards someone who, for example, embraces dogmatic religious or political views that they should have

avoided. In such cases, respect for the person as a normative agent should be guided both by respect for the person's choice *and* by respect for what should have been chosen: in typical cases it is not respectful to the person as an agent immediately to force them to pursue what they should have chosen, but nor is it respectful to their agency merely to accept their poor choice without engaging with them about this, and without sometimes being willing to act against what was chosen.

Of course I do not deny that respect for normative agency partially involves not impeding people's actual choices (Griffin's 'liberty'). For not only are we unlike the machine above; we are also unlike a cat or a mouse who makes choices governed by reasons, but not *understood as reasons*. Unlike animals, we make our choices for reasons that we can conceive of as reasons: we can respond to the good qua good. This is one ground for limiting paternalistic interventions. Because we know what we are doing when we make choices, it is appropriate to extend greater respect to them. Respect for normative agents who have made poor choices—unlike cats and mice—normally involves engagement with such agents as reasoners, rather than compelling them to pursue 'the good' independently of their reasoning capacity.

But this is all of a piece with my main claim that one strand in respect for us as *normative* agents must give a central place to what is good for us independently of whether we choose it. Griffin is deeply sensitive to the fact that our interests will not coincide with what we choose. This is the launch point for his persuasive rejection of the 'taste model' of value judgement and his defence of the objectivity of the values of 'accomplishment, enjoyment, deep personal relations, certain kinds of understanding, and [. . .] the components of personhood' (116). But he rarely considers that respect for personhood in his sense can *itself* sometimes license overriding a person's freely made choices or imposing what the person should have chosen when in the circumstances they could not make a choice. Instead, such cases are taken by Griffin to involve limitations on the personhood interests of the agent, justified by other values or by the personhood of other people.[13] This underplays the way

[13] See the cases discussed in Griffin's Ch. 3. Griffin countenances overriding a person's choices for the sake of that very person's normative agency in his discussion of suicide (217).

in which respect for the normative agency of a given agent involves, in part, respecting what they should have chosen.

The two steps sketched above let us make a start on alleviating Griffin's problems. First, they support the thought that justified punishment is not inconsistent with respect for normative agency. I am tempted by the communicative-retributive theory that hard treatment is justified as the only way to communicate to a wrongdoer the nature of their action and the community's condemnation of it (Duff 2001). If this is correct then punishment is required by respect for a convicted wrongdoer's normative agency. Failure to punish when this is justified is—perhaps setting aside cases of justified mercy—disrespectful of the wrongdoer's capacity to respond to reason: it involves failing to engage with the wrongdoer about the seriously mistaken choices they made.

Furthermore, if this is right then a convicted wrongdoer should choose to be punished. As responsive to reason, they should choose to be engaged with in the manner necessary to bring them to understand what they have done and to understand the community's response. Given the seriousness of wrongdoing, in such cases *what the agent should choose* dictates how to behave respectfully to them as reason-responsive, independently of what they actually choose.[14]

Secondly, given the discussion above, a miscarriage of justice will be a serious error in engagement with a person as a normative agent. Even if the punishment was materially slight, the message communicated will have diverged sharply from that appropriate to an agent who governed their will correctly in light of the good, and our thoughts about the agent will have been similarly divergent. Failure to acknowledge this will disrespect a person as a normative agent: it will be inconsistent with recognition that the person in question is a reason-responsive agent.

Thirdly, many undetected invasions of our privacy will be attacks on normative agency because they are actions we would ask others to eschew if we could—because important values are at stake that, as normative agents, we should be aware of. For example, a voyeur who,

[14] This perhaps supports a *right to be punished*, rather than simply showing the *consistency* of normative agency and justified punishment. But proving the consistency is enough for my purposes. It is less easy to do this for alternative theories of punishment, but I believe this can be done for rehabilitative and deterrence theories (at least, versions of the latter aimed at deterring re-offending by the convict): such theories make punishment a matter of engaging with the offender as a normative agent.

for their sexual gratification, observes someone undressing, can thereby violate values of sexual integrity which the person under observation should recognize and embrace. And someone who regularly observes another closely without the subject's knowing this, and who does so intending to document the person's life without telling them, can thereby violate an important value: the value of knowing what important things others know about one. Both values—sexual integrity and knowing what important features of one's life are known—should not be pushed too far. The latter does not extend to the prohibition of nosy curtain-twitchers. And the former should incorporate an exception for undetected observation of a subject known to be an exhibitionist: someone who has embraced sexual integrity in a manner consistent with being observed. Nonetheless, many undetected invasions of privacy involve violations of important values even though they go undetected. Because the victims, as normative agents, should be sensitive to these values, they would normally (barring cases of unusual response like the exhibitionist) and justifiably want any such invasions not to take place. Furthermore, these are uncontroversial values that most people should recognize. Persisting with voyeuristic activities in the face of these facts shows disrespect to the victim's normative agency.

This is consistent with the plausible thought that the values themselves—sexual integrity, awareness of others' knowledge of one—are the main reason why the relevant activities are morally wrong. Their wrongness derives directly from these values, as well as indirectly via the value of normative agency. This is compatible with our calling them *human rights* violations because they disrespect normative agency.[15]

Something similar can be said about respect for dead people and those who have lost their normative agency to mental illness. Here we cannot appeal to what the person *should* choose, for they cannot choose. We can only appeal to the way important values are at stake to which, if the person were a full normative agent, they should have been responsive. This extra distance from the actual choices of a victim who is a normative agent is one reason why the language of 'human rights' seems inappropriate (though in my view it remains attractive regarding those with

[15] See Griffin's similar point that what most obviously makes torture wrong is that it 'causes great pain', but its being a human rights matter depends nonetheless on its relation to normative agency (52).

severe mental health problems). Nonetheless there is an extended sense in which some types of disrespect to dead or severely mentally disabled people involve disrespect for normative agency. I hesitate to say that it is disrespect for *the victim's* normative agency, for the victim in these cases is not now a normative agent. But the victim, even if dead, can still be regarded as a human being, 'one of us', and we humans are generically normative agents even though not all of us have this character—just as generically dogs have four legs even though not all dogs do. I think this lets us make some sense of the thought that offending against what the victim *would or should have chosen if they could* involves a form of normative-agency-related disrespect even when the victim cannot make choices.

Perhaps this is a stretch and we should instead say that only other aspects of a dead or mentally disabled victim's personhood are at stake, aspects distinct from normative agency. Well-being is one obvious candidate: a dead person's well-being can be profoundly affected by disrespectful actions, I think, and we can make sense of this independently of their normative agency. Parallel things can be said about the well-being of people whose mental health problems deny them agency. In less bold moments this well-being-based view is my preferred approach to non-agents of the types under consideration It still differs from Griffin by making one of the victim's own features (namely, their well-being) our reason to respect them, rather than the importance of the 'full person they once were' or the importance of respect for other full agents. But it makes the issues more distant from human rights on the normative agency view.

IV

Griffin will worry that on my broad conception of respect for normative agency, especially if we take the bold position eschewed in the last paragraph above, 'human rights would expand to fill [the] whole domain [of moral obligation], which is so counter-intuitive a consequence that we must avoid it' (201). Griffin is certainly correct to want to avoid this, and I accept—although I am less certain here—his further wish to avoid human rights expanding to cover 'all substantial injustices' (ibid.). There are two grounds for these worries. One is that the conception of *respect* to which I appeal seems to encompass any requirement to treat a

person as normative agents should be treated; this appears to make every breach of promise or contract a human rights violation. The other is that I seem to allow any genuine value at all to become a matter of normative agency—and hence of human rights—because it is something to which a normative agent should be responsive; this does indeed seem to make human rights encompass all morality.

To some extent, the narrow idea of personhood as specifically *normative agency* can forestall the latter worry. It seems implausible to regard free-riding on the bus as disrespectful to other passengers' normative agency, even if it is disrespectful in other ways (198). Free-riding does not seem inconsistent with minimal recognition of one's fellow passengers as people responsive to reason. So not every failure to respect a value that normative agents should have recognized will involve disrespect for normative agency. I suggest that trivial values and values that few are likely to recognize seem, intuitively, too distant from normative agency even though there is a sense in which any normative agent should be responsive to them.

This still leaves every non-trivial promise and contract a matter of human rights, given that breaching a promise or contract is an archetypical case of disrespect for a person as someone whose reason one has engaged. In the remainder of this section, I consider three responses, the third arriving only in the section's final paragraph. First, one could use a notion of *importance* to limit what is meant by 'respect' or 'normative agency' or both. On the latter version of this account, human rights do not secure *respect for normative agency as such*, but rather *full or deep respect for the important aspects of normative agency*. Thus even crucial promises—to deliver the wedding rings on time, say—are not matters of human rights because they are not important enough in this sense. Breaching the promise here will not manifest full disrespect for the promisee as a normative agent; it will not be inconsistent with treating the person as a reasoner, in the way that torturing the person or engaging in some forms of invasion of privacy will be.

This appeal to 'importance' might seem too vague but although Griffin does not use my broader conception of 'respect', he has to appeal to this same conception of importance to draw the limits of normative agency *as a condition* where he wants it: so that slaves lack it and so do homosexual people seeking to get married in the UK today, yet people who are relatively poor but with enough to live on in a society of great

inequality do not.[16] In explaining why same-sex marriage is required by human rights, Griffin makes whether a person has attained the condition of normative agency depend on whether some of 'the most important components of a good life available to human beings' are open to that person (163–164). This looks like a useful notion of importance to flesh out respect for personhood in my broader sense: full or deep respect for the *important* aspects of normative agency requires only that we respect people's capacity to choose and their reason-governed choices when these concern 'the most important components of a good life available to human beings'; agency's relation to other matters falls outside the realm of human rights. This might deliver a plausible extension for human rights. And—to repeat a point from §III—doing it my way rather than Griffin's allows us to say that homosexual people in the UK now, like slaves and many torture survivors, are fully normative agents despite suffering a human rights violation: that violation is to be explained in terms of *disrespect* for (the important aspects of) normative agency, not non-provision of it.

However, the idea of 'importance' is worrying. Does relative poverty among affluent people really not count as important in the relevant sense? Does failure to deliver the wedding rings? The concept's vagueness allows us to get the extension right by appealing to intuitions that are difficult to substantiate. Maybe this is correct: I can picture an argument that this appropriately reflects everyone's vagueness about the extension of 'human rights'. But it is worth looking at further ways to limit the respect for normative agency that human rights require, bypassing 'importance'.

A second approach maintains that human rights—unlike other rights—have to be individualistically justified. A right is individualistically justified if and only if some valuable feature of the right-holding person is normally sufficient on its own to ground the existence of the right for this person, independently of whether this serves or disserves other people or values. If, instead, the person's right frequently vanishes when it conflicts with other people's interests or freedoms, say, or if it only exists because it serves or ensures respect for other people as well as

[16] See again Buchanan 2010: 695–696, Raz 2010: 326; see also Cruft 2010a 177–178.

the right-holder, then this right is not individualistically justified (Cruft 2006: 154–158).[17]

Tasioulas and Raz think all moral rights are individualistically justified:

> Individual moral rights, of which human rights are a subspecies, are grounded in some normatively salient characteristic of the individual right-holder. (Tasioulas 2010: 657)

> "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. (Raz 1986: 166)[18]

But many important moral rights—including most of a given person's property rights and a scientist's right to pursue research that will threaten cherished religious beliefs—are justified by what they do for the wider community, rather than simply what they do for their holders. Raz recognizes this when he argues that some rights are justified by how they serve the common good rather than simply their holders' interests; he mentions the journalists' right not to reveal their sources (Raz 1986: 179). Raz tries to accommodate such counter-examples by allowing that a person can hold a right in cases where that person's interests only justify a duty *because serving these interests in this way also serves other people's interests*. Thus Raz maintains that the journalist has a right not to reveal her sources because (as required by his theory) the journalist's interest justifies a duty; but he maintains that the journalist's interests only justify this duty because serving them also serves the common good (ibid.). While Raz presents this as a way to interpret his theory, it is actually an admission of defeat for, as Kamm notes,

> [i]f the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech. (Kamm 2002: 485)

[17] Individualistic justification is a matter of why a right *exists*, not of the conditions under which, although existent, it can be justifiably *overridden*. The adverb 'normally', in the main text, reflects the thought that a right can be individualistically justified in my sense even if its ground in the right-holder is defeasible in extreme circumstances (Cruft 2006: 155, n. 3).

[18] The quotation from Raz only makes rights individualistically justified in precisely my sense if one reads 'other things being equal' and 'sufficient reason' appropriately (see ibid.). The quotation from Tasioulas only makes rights individualistically justified if read with an implicit 'only' or 'primarily' thus: '[i]ndividual moral rights [. . .] are grounded [*only* or *primarily*] in some [. . .] characteristic of the individual right-holder'; Tasioulas's text supports this reading.

In my view, we should allow that many moral rights are not individualistically justified, but we should see individualistic justification as a distinguishing feature of *human rights*. A non-individualistic approach (e.g. one which made a person's human rights' existence depend partially on how they serve other people) would fail to make human rights mark an area of morality in which we should 'take seriously the distinction between persons' (Rawls 1971: 27). Surely *human rights* are individualistically justified, if any are. We can fit this within our Griffinian framework thus: a person's human rights are a subset of their *rights requiring respect for normative agency*: those grounded in the importance of *that person's normative agency considered on its own*, those that would exist on this ground even in the face of strong countervailing considerations and whether or not they will also serve what is important for others.[19]

This gives an alternative way to prevent my broadened conception of *human rights as securing respect for normative agency* from encompassing too much. Many rights that seem to protect normative agency are not individualistically justified and hence cannot qualify as human rights. I have already mentioned property rights and rights to pursue scientific research that threatens religious beliefs. We should, I think, adopt the individualistic requirement as a condition on human rights.

But can we thereby exclude important promissory and contractual rights? This depends on the success of a non-individualistic account of such rights, such as a consequentialist account which makes even the most important promissory and contractual rights justified primarily by their role in a system which serves the common good. I am not sure this works. My right that you deliver the rings on time appears normally to track only my important interests in the smooth running of my wedding.

[19] Raz thinks some canonical human rights are not individualistically justified: 'The right-holder's interest [in his own freedom of expression], conceived independently of its contribution to the public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the right to free speech' (1986: 179). Raz concludes that this human right is justified by how it serves the interests of people beyond its holder. We can argue against Raz by focusing on the importance *to the individual* of being unimpeded in speech, whether or not they use this opportunity. But we should also take the extended line I propose for Griffin: even when freedom of expression is not necessary to ensure fulfilment of some interest of the right-holder, *respect* for many of the right-holder's interests—responding to this person appropriately as bearer of these interests—requires respecting their speech. Specifically, respect for a person *as a normative agent* requires this, whether or not such respect serves anyone else.

So we are still left with the problem of excluding important promises and contracts. One response accepts that these are human rights. When taking human rights as a secular extension of the natural rights tradition, this can seem attractive. Options to avoid this include (a) returning to the notion of 'importance' and leaning on this heavily to exclude all promises—but I have said this is problematic, (b) abandoning my broadened conception of human rights as encompassing *respect* for normative agency, and reverting to Griffin's 'normative agency as condition' view (for breaking important promises or contracts does not stop one attaining a condition of normative agency, even if it disrespects a person as a normative agent)—but I have argued against this, or (c) heading for a more 'political' conception of human rights. One version of this last option maintains that human rights must be everybody's business, and hence permissibly enforceable by or on behalf of all humans. This would exclude promises or contracts as 'private' matters.[20] I find this option—when added, as an extra necessary condition, to my individualistic extended version of Griffin's theory—quite attractive as a way of mapping the rough extension of contemporary human rights language. But it makes human rights a messier normative category than if they were simply rights individualistically justified by their holders' normative agency. I shall not take a stance on this final suggestion; I leave it open whether we should allow important promissory and contractual rights to be human rights.

V

I have argued that Griffin is correct to ground human rights on normative agency (§I), but that normative agency generates a requirement of *respect* broader than the technical 'constraint' notion (§III), and that only rights to respect for normative agency that are *individualistically justified* will be human rights (§IV). Making these two moves allows us to address the first four problems in §II without broadening human rights to encompass all morality—though I have left unresolved whether they encompass important promises and contracts.

[20] Other versions of the 'political' approach would also do so, of course.

What of the fifth problem in §II? Why does an individual's normative agency merit respect? Unlike some values (e.g. happiness, welfare), normative agency—our ability to make reason govern our will—seems to cry out for respect, in both the technical and the broader sense. Griffin's account does not make this sufficiently fundamental. This is, I suspect, partly because for Griffin human rights are a subset of a wider class of norms advocating respect and promotion for *interests* or *needs*. He writes that his account

> can [. . .] be seen as a kind of need account: what is needed to function as a normative agent. What is needed will be air, food, water, shelter, rest, health, companionship, education, and so on. There will clearly be great overlap between the lists that emerge from [Griffin's own account and the needs accounts of human rights developed by David Wiggins or David Miller]. [. . .] But the lists will not be the same. The personhood account is more focused and exclusive in the role it specifies: what is needed to function as a normative agent. (90)

Note that the needs mentioned in this passage are fairly simple and 'material': food, water, companionship, education. In discussing the metaphysics of human rights, Griffin writes:

> [J]udgements about human interests can be correct or incorrect. They report deliverances of a sensitivity to certain things going on in the world: namely, interests being met or not met. [. . .]
>
> The notion of 'meeting an interest' is rather like the notion 'soothes': something is relieved. [. . .]
>
> [A] statement about being soothing and a statement about meeting interests must be much like one another because, on closer look, the first statement *is* an instance of the second. An ointment, say, soothes an irritation, and an irritation is in the general class of pains and discomforts, which are cases of disvalues. Compare 'That ointment soothes my irritation' with 'That accomplishment makes my life fulfilled'. In the second judgement, too, a value enters to explain why people are in certain respects as they are – namely, with interests met or unmet. It explains why some people suffer from a sense of emptiness or futility, especially at the end of life, whereas others do not. [. . .]
>
> [T]he emptiness in question occupies much the same sort of place in our life as does an irritation that some ointment might soothe. Both are lacks that are part of human nature. (119–120)

I do not dispute these claims. But to follow Griffin by focusing on *needs* and *soothing* can lead one to overlook aspects of normative agency relevant to its meriting respect. Soothing involves the material satisfaction of a felt appetite, changing someone's body and thereby changing

their sensations. Many aspects of personhood in Griffin's sense are correctly captured by this model: e.g. having enough food to survive in order to make decisions and follow them through. Being educated is similar, involving changes to one's body and (that part of it which is one's) mind that enable one to grow into a mature decision-maker. Nonetheless, I think Griffin's examples can lead one to overlook the unusually complex nature of normative agency, and the attendant complexity in how it can be disrespected. I mention three aspects briefly.

First, normative agency is knowingly guided by something external: *the good*, where this is not necessarily what is *good for the agent*. Many of our interests in our normative agency, and our interests generated by our being normative agents, are special: not just interests in doing something or getting something that will be good for us, but in doing or pursuing something that is good in a wider sense, and doing so because it is good. These central features of normative agency must be reflected in its moral importance. By contrast, simpler interests—in food or in being soothed—need not be interests in 'the good' in the relevant sense (e.g. even if the balance of reason requires me to go on hunger strike, I still have an interest in receiving food).

Second, the interests generated by my being a normative agent are partly cognitive or epistemic. I do not mean that we must have a certain cognitive capacity—to understand and mentally manipulate options, and make a choice—in order to be autonomous in Griffin's sense, though that is certainly true. What I mean is that any normative agent must, qua normative agent, unavoidably possess certain beliefs with a certain content. An example is mentioned by Weil:

> At the bottom of the heart of every human being, from infancy until the tomb, there is something that goes on indomitably expecting, in the teeth of all experience of crimes committed, suffered, and witnessed, that good and not evil will be done to him. (2005 [1943]: 71)

A less controversial example is the belief that one's arm is moving acquired when one decides to move one's arm. I think this belief and Weil's are examples of the same phenomenon: beliefs generated independently of inference from observation, simply from one's being an agent who acts (in the arm case) or an agent among others (in the Weil case).

I cannot defend this fully here, but I suggest that it is impossible to possess autonomy in Griffin's sense—the capacity to choose one's own path through life, governed by an appreciation of what is good—without possessing something like the belief that other autonomous reasoners will not do evil to one, including the beliefs that one will not be lied to, kicked or beaten. The phenomenology of observing or suffering evil supports this: there is not only the sensation of pain or anguish (as victim) and moral outrage (as victim or observer), but also a form of cognitive dissonance, a little akin to the sense one gets, when misjudging a staircase, of trying to step on a stair that is not there. But this analogy makes it seem more trivial and contingent than it is. In the case of severe evil, the cognitive phenomenology is that the world is not simply not as I believed it was; it is rather that the world is not as I cannot help but believe it to be. I cannot help but understand reasoners as beings who do not do evil to each other, and in some mental compartment I go on believing this in the face of evil (see Winch 1989: 155).

If this is correct, then respect for people as normative agents will involve not only fulfilling what are in some sense their 'material' needs (for food, water, for the materials of education, for companionship, for things not to get in their way) but also the cognitive or epistemic needs attendant on their being agents. That is, while disrespect for normative agency can involve violating a person's material flourishing, it can also (in a way that has no parallel for many other interests) involve undermining the success of beliefs they cannot help holding—in roughly the same way that preventing someone's arm from moving when they will it creates a cognitive dissonance in addition to the 'material' nuisance of preventing the person from using their body as they have willed.

Thirdly, normative agency non-instrumentally requires that certain rights exist. Raz puts this in terms of interests, writing that we have an interest in the existence of certain rights independently of whether they help us avoid suffering:

> Some rights may be based on an interest in having those same rights. [. . .] A right is a morally fundamental right if it is justified on the ground that it serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value, i.e. inasmuch as the value of that interest does not derive from some other interest of the right-holder or of other persons. [. . .] [But it is] very unlikely that all moral considerations derive from people's interests in having rights. Are not their interests in avoiding starvation, in being

adequately educated, and other similar interests of moral relevance as well? (1986: 191–192)

Kamm makes a similar claim. Her version eschews the language of interests. She says that our nature as 'high worth' beings requires the existence of certain rights independently of whether these rights best promote our interests:

> [T]here may be a type of good that already exists but that would not exist if it were permissible to transgress the right of one person in order to save many lives. This is the good of being someone whose worth is such that it makes him highly inviolable and also makes him someone to whom one owes nonviolation. This good does imply that certain of one's interests should not be sacrificed, but inviolability matters not merely because it instrumentally serves those interests. [. . .] Inviolability is a reflection of the worth of the person. On this account, it is impermissible for me to harm the person in order to save many in the accident, because doing so is inconsistent with his having this status.
>
> [. . .]
>
> It is important to distinguish the good [. . .] of the person, which may give rise to his inviolability, from its being good for the person to be a person of such worth and, hence, inviolable. Even if it is in his interest, this is not the source of the rights associated with his being inviolable. He must have a certain nature, rather than an interest, in order to be worthy of inviolability. (Kamm 2007: 253–254)

Both Raz and Kamm here argue that certain rights are justified (for Raz: because they serve certain interests; for Kamm: because they reflect our nature) independently of whether they help us in what I have been roughly calling 'material' terms. They are justified independently of whether they will be respected and even independently of whether the right-holder is ever aware of their existence—and hence independently of whether they will make the right-holder's life feel better.

It seems to me that our character as normative agents supports Kamm's and Raz's thought. It is precisely because we are able to make the good govern our will that we are 'high worth' beings who merit, or have a non-instrumental interest in, a particular normative status, a status requiring that we be *respected* in both the technical and broader senses. Such a respect-style moral framework seems essential to other valuable goods, such as friendship: the only conceptually possible way to be a genuine friend is for one to be subject to respect-type duties to one's friend. The relevant necessary constituent of friendship here is not simply *belief in* the existence of such duties, nor simply *compliance*

with or *acceptance of* such duties. Rather, the duties themselves—normative entities requiring 'respect'-type directed concern for a particular person—are a conceptually necessary constituent of friendship. Similarly, I suggest, Kamm is correct to think that a respect-type moral framework is an essential concomitant (if not, perhaps, *component* in this case) of normative agency. The directed concern that this framework requires is made necessary by our being normative agents, beings capable of responding to each other as reasoners.[21]

Each of the three claims above about normative agency needs much more discussion. Griffin could reasonably respond that he finds the last two claims (that respect for a person's normative agency requires respect for certain unavoidable *beliefs* about how one will behave in relation to the person, and that it also requires the obtaining of a respect-style normative framework) implausible. He has, after all, offered his own account to rival the third claim: the account of respect I criticized under no. 5 in §II.

Nonetheless, the three claims remind us that normative agency can be disrespected not just by stopping someone being an agent or acting on their agency, but also by failing to respond to what the agent should embrace, by failing to respect the agent's unavoidable epistemic commitments, and by treating the agent as someone who lacks rights even when so treating them does not otherwise harm them. I think we need something like the claims above in order to make a start on a more attractive account of the nature of respect, and of why normative agency requires it—(a) one that makes normative agency require respect even from Hare's 'archangels', rather than making respect required by our human limitations, and (b) one that grounds the need for respect primarily in the nature of normative agency, rather than in the nature of the beings who encounter it. Focusing on interests that are appropriately complex, less straightforwardly 'material', less like soothing, can get us closer to this. In my view, the most promising way of building on the vague intuitive intension of the notion of human rights is to develop an account of *human rights as respect for normative agency* that takes its cue from these thoughts. As Griffin has persuasively shown, human rights protect normative agency; but they protect it by requiring *respect* for it in

[21] For a development of the argument of this paragraph, see Cruft 2010b.

a broad sense that we can only fully understand by thinking further about what it is to make reason govern our will.[22]

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6

Griffin on Human Rights: Form and Substance

Roger Crisp

James Griffin's *On Human Rights* is an extremely insightful and penetrating discussion of the philosophy of human rights. In this paper, I intend to examine Griffin's own understanding of the structure of his account, and then look at whether that structure should be filled out in the ways he suggests.

1. Form: top-down and bottom-up strategies, Kant, and Mill

Griffin draws a contrast between what he sees as his own historical, bottom-up approach (HBU) and what he sees as the standard top-down approach (TD)—exemplified in the work of Kant and Mill—in which rights are derived from a small number of high-level moral principles (2–4).[1] HBU will start with the notion of human rights that has developed since the late Middle Ages, through the Enlightenment, to the present day. But its aim is not just to plot and systematize this series of historical understandings. The strategy will move to the provision of a criterion for the ascription of human rights which, though based in the historical tradition and so entitled to be offering a genuine account of human rights, will provide a level of determinacy currently unavailable because the 'term "human right" is nearly criterionless' (14). TD, by

[1] All references are to Griffin (2008).

contrast, is ahistorical. In its standard form, it 'commandeers' (3, 62) the notion of rights or of human rights to serve in moral theory as a derivation from some other, more basic principle or principles. (There is room, of course, for a pure 'top only' strategy, which includes among its basic principles underivative ascription of human rights. Griffin does not discuss such a position, but that may well be because of its immediate implausibility. Human rights appear not to be basic, in the sense that they are ascribed *for reasons*, and the questions at issue are what those reasons are and how we should understand them.)

I suggest that the contrast is significantly less stark than Griffin suggests, and that this is something he should welcome. Kant of course would reject as anthropological and empirical any attempt at deriving an account of human rights from a history of the concept. But this is not what Griffin is doing. He is seeking to ensure that the concept he is elucidating is indeed that of a 'human right', and also to gain intellectual inspiration from that history. These aims Kant would have found quite acceptable. He himself was perfectly familiar with the history and jurisprudential discussion of *ius*, and would, one presumes, have taken care to use the notion of *recht* appropriately. As Griffin himself says, 'the top-down approach cannot do without some explanation of how the notion of human rights is used in our social life' (29). And, as far as inspiration is concerned, what would have mattered to Kant would have been that any view ultimately be validated by reason and rational reflection, as indeed it is in Griffin's account.

Mill's account is yet closer to Griffin's. He begins his survey of the different senses of justice and rights in the final chapter of *Utilitarianism* with the following: 'To find the common attributes of a variety of objects, it is necessary to begin by surveying the objects themselves in the concrete. Let us therefore advert successively to the various modes of action, and arrangements of human affairs, which are classed, by universal or widely spread opinion, as Just or as Unjust.' His historical focus is broader than Griffin's, largely because he is aiming to explain not just the notion of rights but that of justice itself; but the general tenor is substantially the same.

Griffin claims that past thinkers, in particular those of the Enlightenment, have failed us, in that there are now 'unusually few criteria for determining when the term is used correctly and when incorrectly . . .

The language of human rights has, in this way, become debased' (14–15).[2] I am not persuaded, however, that the notion of human rights is in any worse shape than many other ethical or political notions. Griffin himself mentions the case of 'justice', and claims that once we have worked out which *kind* of justice we are talking about—distributive, retributive, or whatever—we will be left with a 'tolerably determinate sense' (15). But there is no more agreement about what counts as, say, distributively just than there is about whether there is a human right to life, or to paid employment. Griffin's aim is to provide criteria for determining the scope and content of human rights on which all might agree. But that is what all philosophers writing in this area have been aiming to do. And they have indeed failed. Of Kant and Mill, Griffin says: 'their stipulations have been around long enough for us to be able to conclude that not enough speakers or writers have accepted them—in contrast to some philosophers accepting their larger theories—for them to have become a broadly accepted part of the criteria for the correct and incorrect use of the term "right" or "human right"' (28). That seems right. But the message here must surely be that at present the prospects of any philosophical account of human rights, however well constructed, bringing to an end disagreement at any level—philosophical or practical—are not good. For that reason, I think Griffin should welcome the fact that his account is in line with those of Kant and Mill. For both those writers, and others in their respective traditions, have many followers. If Griffin can enlist those followers to his project, that can only be helpful to him, since his aims are not merely philosophical but practical—to influence, develop, and complete the real-life discourse of human rights (19; see 92–94, 203).

But even if Kant and Mill would not have objected to the kind of historical approach adopted by Griffin, is there not a difference between him and them in their 'deriving' their views on rights from high-level principles? Again, if we restrict our focus to human rights as opposed to morality as a whole, I find it hard to see any sharp contrast here between

[2] Allen Buchanan has suggested to me that determinacy in practice is more likely to emerge out of the legal process than out of philosophical reflection. One of the interesting characteristics of recent moral and political philosophy is how much agreement there is among theorists of different schools on specific first-order issues. So it may be that practical agreement in the courts could be supported by quite different philosophical approaches.

Griffin and these earlier writers. Just as Kant has his 'Universal Principle of Right', and Mill his principle of utility, so Griffin has his principle of normative agency. Though Griffin characterizes the TD approach in terms of derivation, he himself is prepared to use the notion of derivation in explaining the relation between normative agency and human rights: 'From a well-developed form of the idea of personhood, we should be able to derive all human rights' (192); the rights to security of person and to bodily integrity are 'derivable from normative agency' (239). At 40, Griffin draws a contrast between derivation (of lower-level ideas from higher-level axiomatic ones) and grounding, where grounds are to be understood as 'the sorts of ideas that will substantially help us to settle what human rights exist and what their content actually is'. Again, I see less of an opposition here. Kant, Mill, and Griffin are all aiming to derive accounts of rights from a higher-level principle, in the sense that each is trying to offer an account of the reasons we have for attributing and respecting rights. And all are aiming to supply practical guidance. Griffin modestly describes his proposal as a 'hunch', but Kant and Mill, though perhaps less modest, would be quite happy to allow that their approaches be seen as attempts to provide a grounding for the notion of human rights that will 'best suit its role in ethics' (4).

Griffin offers an alternative conception of the bottom-up strategy.[3] This is non-historical, so let me call it NBU. On this approach, 'one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight' (29). Griffin says that he prefers NBU to TD, partly because it does not require one 'to assume, at least initially, the correctness of any . . . contentious abstract moral principles'. Now here there does seem to be a contrast with Kant and Mill, both of whom come to the discussion of rights armed with previously justified principles. But this contrast seems of little philosophical significance. If you already have a comprehensive ethical theory, then you will doubtless want to use it to analyse human rights. If you don't, then you will need to develop such a theory at least as far as human rights are concerned, and that is exactly what Griffin goes on to do. It is not clear to me why we should think that

[3] This strategy is closer to that recommended by e.g. Charles Beitz and Allen Buchanan.

either the Kant/Mill approach or the Griffin approach is preferable. If you have a comprehensive ethical theory, and that theory is wrong or unjustified, then it would be better not to have it, and perhaps to start again in the piecemeal way Griffin recommends. But if your theory is right or well justified, then giving it up to go piecemeal would seem to be epistemic decline rather than ascent. What many will do, I suspect, is what Griffin himself is doing, and that is to steer a middle way between HBU and NBU on the one hand, and TD, on the other. One begins by seeking to understand the history and contemporary practice of human rights. Even before that, one will have some ideas ('hunches') of values and principles that might plausibly be thought to play a role in the justification of human rights, and these will affect one's view of the practices of human rights. One may well think, for example, that human rights should be restricted to protecting especially weighty interests, and so be inclined, as is Griffin, to be suspicious right at the start of alleged human rights to decide the number of children one has (14). But in any plausible account, in the final analysis understanding of the concept of a right will be combined with advocacy of one or more grounding principles.

I have been claiming that Griffin's methodology is closer to that of Kant and Mill than he suggests, and that this is not something for him to regret. In addition, there are several more substantive points of contact between these authors and Griffin. In its stress on the worth of agency, personhood, autonomy, dignity, and respect, Griffin's theory seems highly Kantian. Consider, for example, the following passage from the *Metaphysics of Morals*:

> [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 himself, 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.
>
> (6: 435; trans. Gregor)

Griffin says:

> There is much overlap between what Kant says of 'natural rights' and my personhood account of 'human rights', because they are both centred on the idea of respect for persons. But there is also a great difference. What I mean by 'liberty' is freedom to pursue one's conception of a worthwhile life; liberty is one

among other rights, the other ones on the same high level of abstraction being autonomy and minimum provision. These rights are protections of something quite specific: our status as normative agents. What Kant means by 'freedom' is much broader than this: it is the area of action left to us after excluding what we are required to do and prohibited from doing by the Doctrine of Right. So what I called Kant's fateful move does indeed result in a list of rights considerably longer than the ones in the Enlightenment tradition. (61)

How significant is this difference between Kant and Griffin on the scope of freedom? I think what it shows is that Griffin's conception of natural or human rights is not Kant's. But it does not show that Griffin's account is not Kantian. Indeed, on the face of it, there seems to be nothing to prevent Kant from agreeing with Griffin's stress on the notion of normative agency and importing into his own account Griffin's idea of human rights as a species of natural rights. Such a move would itself be highly Kantian, grounded as it would be on the value of normative agency so clearly recognized by Kant himself. It is true also that Kant himself might wish to distance himself from the notion that liberty is to be understood teleologically, in terms of its role in the worthwhile life. But again this difference—though an important one—seems to me insufficient to show that Griffin's account is not, in several respects, Kantian.

Mill of course would be in sympathy with the broadly teleological nature of Griffin's project: '[i]t is because of the special importance . . . of these particular human interests that . . . we ring-fence them with the notion of human rights' (36; see 80). Compare Mill: 'To have a right . . . is . . . to have something which society ought to defend me in the possession of. . . . The interest involved is that of security, to every one's feelings the most vital of all interests' (*Utilitarianism*, 5.25). Mill is thinking here in particular of rights against harm by others, but clearly present is the general idea of grounding the notion of rights in important human interests. Elsewhere, of course, he stresses the significance of what Griffin calls 'normative agency' and Mill calls 'individuality': 'He who lets the world . . . choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. . . . It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? It really is of importance, not only what men do, but also what manner of men they are that do it' (*On Liberty* 3.4). Again, it is true that the more positive,

enabling aspects of Griffin's conception of human rights contrast with the account of Mill, who is more concerned to place limits on societal interference with the individual. But both value autonomy, and, as in the case of Kant, there seems nothing to prevent our seeing Griffin's account of human rights as a development of Mill's theory of rights, a development very much in the spirit of Mill's own views.

2. Substance: which rights?

According to Griffin's account, human rights are to be understood as grounded on normative agency (e.g. 33, 149, 221). The three highest-level rights are to autonomy, liberty, and minimum provision. We might say, perhaps, that the very highest level right is to normative agency, and that this is in fact constituted by autonomy. So the right to autonomy drops out, and the rights to liberty and to minimum provision are rights to necessary conditions for the exercise of the highest-level right to normative agency. Normative agency might also be seen as partly constituted by living, so the right to life could also be reduced to the right to normative agency.

Griffin's account could be said to be in various ways too narrow, and in another way too broad. First, narrowness. Our capacity for normative agency, according to Griffin, constitutes or grounds our dignity as persons. But I suspect that many who find this notion of dignity attractive will see it as having more than one ground. Consider a case in which a weak and vulnerable sufferer from dementia, in institutional care, is systematically abused. She is often left for hours in a soiled bed, for example, or bullied by staff. This might be seen as violation of her human dignity in just the same way as, say, the imprisonment of a political opponent. Griffin says that there are 'several acceptable uses of "dignity" not relevant to human rights', and mentions the case of dementia as an example (151). Given that Griffin's aim is to respect and to develop contemporary human rights discourse, however, and that he sees human rights as grounded in interests of great significance to human beings, I believe he should be prepared to extend the ground of human rights beyond normative agency. Human dignity has much to do with one's being treated with respect by others, and for most of us it is hugely important that this respect be maintained even if our cognitive faculties are failing.

Many people speak also of the dignity of the human embryo or foetus. There is a question here about whether Griffin's teleological account does not in fact support such a position. Griffin himself argues that embryos and foetuses do not have human rights, because they are not normative agents (86–91, 220). If Griffin's account were an austerely respect-based position, this is what we would expect him to say. No normative agency, so no dignity, so no respect. But his account is, as we have seen, teleological. It is grounded on the *value* of normative agency, and human rights seek to protect that form of agency. Given that many embryos and foetuses will come to instantiate this value, it remains unclear why human rights—in particular the right to life—should not be ascribed to them. What will Griffin say of a case in which a person is in a temporary coma following an accident? Or someone who is under general anaesthetic? Imagine that it is discovered that the state has carried out executions of individuals in such conditions for political reasons. Not only would many see this as a gross violation of human rights, but it would plausibly be one on Griffin's own account. Consider also whether some of the 'aspirational' rights Griffin rejects could not be justified as protections of normative agency—the right to peace, for example, on the ground that war often prevents the formation and pursuit of one's conception of the good (194). (Griffin asks whether a country that defends itself against invasion could be said to be violating its citizens' rights. But they have already been violated by the invading force, and the defending country can plausibly claim to be defending its citizens' rights to be left in peace.)

Griffin is in favour of some kind of bottom-up approach, at least as a starting point. He is quite rightly suspicious of many of the alleged human rights to have emerged during the twentieth century—to paid holidays, and so on. But it might be said that his response to over-extension is to have gone too far in the other direction. Essentially, Griffin's account is monistic. What he calls 'practicalities' are not *grounds* of human rights in the same way as normative agency, and he does sometimes accept that it is really personhood that is doing the work (51). Personhood 'generates the rights', while practicalities merely 'give them, where needed, a sufficiently determinate shape' (192). But the result of Griffin's monism is that he has to shoehorn certain human rights which have no direct link with normative agency into the category of those justified by it. One obvious example is the right not to be

tortured. Griffin claims that '[T]orture has characteristic aims. . . . In one way or another, they all involve an attack on normative agency' (52). This strikes me as dubious. The Stanford Prison Experiment and much other data suggest that, in certain circumstances, it is a brute fact that human beings will tend to act sadistically towards one another, presumably often for the sake of nothing more than the pleasure it gives. But Griffin does not need this claim about the motivations of torturers, and it is indeed true that one of the reasons we object to a good deal of torture is that it undermines normative agency. But it need not. It might be infrequent, and it might be entirely unclear to the victim what she would have to do to avoid it. What is wrong with that kind of torture may be that it violates human dignity (as in the case of the person with dementia), and also, surely, that it causes severe suffering.

Once we note that practicalities themselves do not generate rights, another form of narrowness in Griffin's account manifests itself. Given the role of normative agency in his account, we might expect every violation of normative agency to constitute a violation of a human right, and that where there is no violation of normative agency, then there is no violation of a human right. Neither of these, however, is the case. An undetected peeping Tom, Griffin suggests, does violate his victim's right to privacy: 'a human right is a right that one has simply in virtue of being human; one does not actually have to be a victim. What grounds the right to privacy is that certain forms of publicity typically inhibit human agency' (237). At present, this may be true. But imagine that a drug becomes available which removes people's inhibitions, to the point that they really don't care in the slightest about peeping Toms, and that all except one person take that drug. It would no longer be the case that violations of privacy typically inhibit human agency. Indeed, it would be very rare. But it seems to me more plausible that human rights are to be understood as individualistic, so that at least in the case of the person who hasn't taken the drug a violation of privacy would be a violation of a human right. It may not be sensible to protect such a right judicially or to include it in statements of human rights. But that is a contingent matter—one of practicalities rather than of the real grounds of human rights.

Now for breadth. Any interference with normative agency constitutes a potential violation of a human right, according to Griffin. So if I fail to throw you a lifebelt when you are drowning, this is a violation of your human right to life (97–98). Further, my parents violate my human right

to liberty by moving me to a simple, Bible-dominated community (164). Or, to adapt one of Griffin's examples, a husband who over many years seriously undermines his wife's self-esteem might be said to be violating her right to autonomy (52, 55). I am no expert in human rights law. But the last two of these cases show that Griffin is seeking to extend the notion of human rights beyond current practice to cover cases of personal interaction. I am not sure this is a good idea, for the same sorts of reason that Griffin himself gives against the extension of human rights talk to reproductive choice, inheritance, and so on. The notion of human rights is most at home in the political sphere, and the Universal Declaration is directed in the first place at 'nations and peoples'. This is not to say that we should regret the recent extension of human rights legislation to cover cases such as that of institutional abuse that I described above. But it is just not clear how human rights law could adequately be put to use to regulate personal relationships.

Here perhaps lurks a potential danger for bottom-up strategies, whether historical or non-historical. Human rights law at present is primarily a matter of broadly political or institutional morality. Some theorists would prefer to see human rights law as constituting recognition of certain natural rights, and those natural rights should not be assumed from the start to be political. Perhaps the husband who abuses his wife is violating one of her human rights in the same way as the state violates an individual's right by imprisoning her for political reasons on a trumped-up charge. When writing on human rights or indeed any issue in ethics, it is probably advisable from the philosophical perspective to keep any practical aims at arm's length, at least to start with. So it is at least possible that human rights law has indeed gone off the track, not only by postulating rights where there are none, but by failing to recognize those that exist outside institutional contexts.[4]

References

Griffin, J. (2008), *On Human Rights* (Oxford: Oxford University Press).

[4] For very helpful comments on a previous draft I am grateful to participants at the conference on Griffin on human rights held at Rutgers University in 2009, especially Allen Buchanan and John Tasioulas.

7

Personhood versus Human Needs as Grounds for Human Rights[1]

David Miller

In this essay, I want to compare the *personhood* grounding for human rights that James Griffin presents in his book *On Human Rights* with the *human needs* grounding that I have defended elsewhere.[2] It is very tempting to assume that this issue of the best grounding makes little practical difference when we have to draw up a substantive roster of human rights, and so the debate between the two positions is academic in the pejorative sense. Griffin himself thinks that the two accounts are near neighbours. 'I must not exaggerate the difference between the need account and my personhood account . . . There will clearly be great overlap between the lists [of human rights] that emerge from these two accounts' (p. 90). Yet he goes on to claim that the overlap is not complete, and that where the lists diverge the personhood account is superior since it specifies more precisely the kind of need that can ground human rights. '[It] is more focused and exclusive in the role that it specifies: what is needed to function as a normative agent' (p. 90). I agree with Griffin that the grounding we offer for human rights will affect the list of

[1] I should like to thank Roger Crisp for his very helpful comments on an earlier draft of this chapter.

[2] Griffin 2008; subsequent chapter and page references are to this work. Miller 2007: ch. 7; Miller 2012.

human rights that we finally endorse, but I shall argue for the superiority of the need account and the set of human rights that it generates.

Before we begin to examine in detail the structure of the personhood account, and especially its key concept of 'normative agency', it may be helpful to sketch how my general approach to human rights compares with Griffin's. I believe that there are three ways in which my approach resembles Griffin's, and two ways in which the approaches diverge. I should begin by acknowledging the deep influence that Griffin's work has had on my own thinking about human rights, to the extent that when I first encountered it I was inclined to think that any differences between us were merely ones of verbal presentation (see Miller 2002: 181). Further reflection, however, has led me to conclude that our disagreements may run deeper than that. But before coming to those, let me state what I see as the main points of convergence.

We both agree that human rights must be given a philosophical foundation. That means that if someone were to ask why something that is claimed to be a human right (freedom of speech, say) really is a human right, we must be able to give an answer that justifies that claim normatively. It is not enough merely to point to the fact that the right appears in a number of official declarations and covenants. That might be sufficient if our aim was to show that the alleged right was a positive right in international law, but to show that it has the special significance that we attach to human rights, more is needed. Putting it in its broadest terms, we need to show the value to human beings of the right's, being recognized, and to do that we need to appeal to some feature it possesses that makes having and enjoying the right essential to them.[3] What precisely that feature is remains in dispute between us, but the need to find some feature is not. In that respect, we both stand opposed to what I have elsewhere called the practice-based approach, that establishes the bona fides of any given human right by showing that it can be included in the ongoing *practice* of human rights—meaning the various international declarations and covenants and their conversion into

[3] This is common ground between Griffin and I, though not all philosophers of human rights would agree. Deontological conceptions of rights pay primary attention to the issue of compossibility—a candidate right only qualifies as a human (or 'natural') right if it can be exercised without infringing the equal right of everyone else. Since my aim is to illuminate the differences between Griffin's approach and my own, I shall not spend time defending positions on which we agree against rival views.

international law through the decisions of relevant courts, the corresponding practice of governments, and the claims made by human rights organizations.[4]

Next, and as a corollary of the first point, neither of us treats the detailed lists of human rights contained in documents such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights as definitive for purposes of working out which rights really *are* human rights, rather than, say, merely desirable goals that one would like to see modern states pursue. Griffin speaks in Chapter 11 of 'discrepancies' between the best philosophical account of human rights and human rights as presented in international law. The enterprise of constructing a theory of human rights is to some extent revisionary: it may exclude some rights that are found in the official documents and introduce others that are not listed there. Of course, if the revisions were very extensive, this might suggest that something has gone wrong with the theory, since the documents have to be taken seriously as recording the considered convictions of their drafters about which rights deserved to be given human rights status. Yet at the same time, these documents must also be seen as political in nature, reflecting the pressures exerted by representatives of the signatory states, and therefore not necessarily always reliable as guides to the demands that human beings can legitimately make against their states. The same applies to a degree to customary international law, insofar as this has been influenced by state practice. So we should not be embarrassed if the account of human rights we defend on philosophical grounds generates a set of rights that does not exactly match the list that an international lawyer would cite.

Our final point of agreement is that human rights have to be distinguished from other values, and especially from justice in a wider sense. Breaches of human rights are also very often serious injustices, but there are other forms of injustice that cannot be understood in this way (Griffin refers to several cases of unfair behaviour that are not human rights violations, such as free-riding on the bus; we might add potentially more serious breaches of principles of justice, such as cheating on one's

[4] For the fullest defence of this approach, see Beitz 2009. A different version of the practice-based approach is presented in Raz 2010. My reasons for not taking this approach are set out in Miller 2007: 168–172.

tax return). There is a temptation today to advance the whole agenda of social justice under the heading of human rights, whereas Griffin and I would both agree that maldistribution of society's resources, though an injustice, does not violate human rights unless it pushes some people below the threshold where they have insufficient resources to lead properly human lives (how this last phrase should be understood is the main issue that divides us, as we will shortly see).

I come now to two respects in which our approaches diverge, which I think may bear upon the dispute between personhood and needs as grounds for human rights without fully determining its outcome. The first is that whereas Griffin sees human rights as playing a central role within our *ethical reasoning*, I see their main use as occurring in the course of *political argument*.[5] We appeal to human rights when we are deliberating about a state's constitutional arrangements, or criticizing the policy it is now pursuing. This is not to say that we never reproach individuals for behaving in ways that violate the human rights of others, or consider rights-related moral obligations that we might have (say towards the global poor), but these uses within ethical discourse are, I suggest, subsidiary ones. The idea of human rights has evolved as a way of evaluating the behaviour of states, first towards their own citizens, and then towards others beyond their borders, and this helps to shape their content.[6] So although when we are deciding what should count as a human right, we are thinking primarily of the value to the right-holder of that right's being fulfilled, we must also consider, as a second relevant factor, what states might or might not do to threaten that right. At this point, the primarily philosophical approach to human rights I am endorsing can learn something from the rival political, or practice-based, approach. Beitz, for example, argues that we must understand human rights not only in terms of the 'urgent individual interests' of the right-holders, but also of the 'standard threats' that they protect individuals against in the circumstances of modern societies governed by states; some of these will be threats that states can and should protect us from,

[5] Griffin does not deny that some human rights should be made into legal rights. Nevertheless, as he puts it, 'my proposal that we see human rights as protections of personhood is primarily a proposal in ethics, but secondarily with implications for law' (Griffin 2010: 353).

[6] By extension, we also use the idea to condemn the behaviour of corporations, military leaders, warlords, and so forth.

while others will be threats that states themselves impose.[7] If one begins one's reasoning about human rights from within the field of ethics, this second dimension may well be lost from sight.

Our second point of methodological disagreement concerns whether human rights need to be justified cross-culturally. Should it worry us if the justification we provide appeals to values that are prominent only in certain cultures, which in practice will mean the different varieties of liberalism that flourish in Western societies? According to Griffin, we should not be worried: we should 'put the case for human rights as best we can construct it from resources of the Western tradition, and hope that non-Westerners will look into the case and be attracted by what they find' (p. 137). He argues that the cultural differences between Western and non-Western societies have in any case been exaggerated, and moreover that such differences as may once have existed are being reduced by forces such as global communication. He also suggests that the widespread acceptance of the concept of human rights in political debate everywhere supports this convergence thesis. In contrast, I believe that we need to treat this (apparent) acceptance with some caution. It may be that lip service is being paid to human rights by people whose real view is that they are a Trojan horse whose purpose is to smuggle liberal values into societies whose political ethos is of a different kind, being based, for example, on religious foundations. To avoid this suspicion, it would be better if we could ground human rights on features whose significance is universally recognized, by liberals and non-liberals alike.

Let me now turn, therefore, to examine Griffin's personhood account of human rights more closely. Personhood, he tells us, as a ground of human rights, must be combined with a second ground that he calls 'practicalities' (pp. 37–39). However, 'practicalities' are not a ground in the same sense as personhood. Their role is not to explain why it is valuable to recognize a particular right as a human right, but to prevent the scope of human rights from expanding too far and to make their content more determinate. To do this we need to ask what it is feasible for a society to provide for its individual members. I agree with Griffin that a factor somewhat akin to his notion of practicalities has to be introduced into our theory of human rights, although as I shall suggest

[7] Beitz 2009: esp. sect. 17.

later I believe that there is a better way of achieving this end. For now, however, I want to set practicalities aside and focus more narrowly on personhood.

According to Griffin, personhood has three components: autonomy, minimum provision, and liberty (p. 33). These are conditions that must be fulfilled if someone is to qualify as a 'normative agent'. She must first choose for herself what her path through life will be, or as Griffin also says be a 'self-decider' (p. 46). Then she must have access to sufficient resources to make that choice a real one. And third, for the same reason, her path must not be blocked by the intervention of other agents—the range of options that lie open to her must be sufficiently large. What human rights do, if they are respected, is to ensure that these three conditions are fulfilled for everyone in the relevant domain.

Much criticism of Griffin has focused on the potential indeterminacy of the latter two conditions. What level of resources is required for someone to function as a 'normative agent'? How many options must be open to them if they are going to count as genuinely autonomous? These are important questions, but before tackling them in detail it is worth pausing to examine the underlying picture of human agency that Griffin presents. It is recognizably a liberal picture, by virtue especially of the central role given to the idea of autonomy: 'what we attach value to, in this account of human rights, is specifically our capacity to choose and to pursue our conception of a worthwhile life' (p. 45). Griffin goes on to say that this is not the same as having a fully worked out 'plan of life', nor should 'a worthwhile life' be identified with Socrates' notion of 'an examined life' (p. 46). Nevertheless the emphasis is unmistakably placed on the importance of each individual working out for himself what he personally values, and how therefore he should live. This picture is undeniably attractive to many people living in liberal societies. But it is by no means uncontestable. For it appears to deny that human beings can live perfectly good lives according to some inherited pattern that they have not chosen for themselves, but simply taken for granted. Of course no human being has ever lived *exactly* according to a blueprint laid down in advance; there are always specific choices to be made. But for most of history, people have lived in circumstances under which answers to most of the big questions that preoccupy us were taken for granted: which religion to practise, which social group to associate with, what occupation to take up, and so forth. Even though we, as children of John Stuart

Mill and the whole Romantic tradition that he transmitted to us, may regard these past lives as cramped and unfulfilling, it is a further step to claim that they were not properly human. It is worth noting here that the idea of autonomy, as an ethical/political value, which plays such a large role in contemporary debate (and as we have just seen is central to Griffin's account of human rights), only acquired its present sense in the second half of the twentieth century, escaping its origins in the philosophy of Kant. This was not a case of finding a new label for a value whose significance had long been recognized in public discourse.[8] Its emergence rather signalled a transformation of values whereby the idea of 'a good life' was replaced by the idea of 'a self-chosen life'.

It is this close internal link between the (post-Kantian) idea of autonomy and the conditions of life in latter-day liberal societies that in my view disqualifies autonomy as a ground of human rights. It is a sectarian value that can reasonably be rejected by those who adhere to rival traditions of ethics and social philosophy. The effect of admitting it will be to bias the substantive set of human rights that emerges in a particular direction. Rights whose purpose is to protect choice—say in matters of religion—will be over-extended, to the detriment of other considerations. There is no objection to compiling a list of 'liberal rights' and recommending that they be given fundamental status—say via constitutional entrenchment—in societies where liberal values prevail, but this is not the purpose of human rights doctrine. Here we can press into service the distinction that both Griffin and I accept between human rights and other values with which they may be conflated, and insist that human rights should not be captured by a liberal programme whose aim is to promote the conditions under which people can autonomously choose their personal conceptions of the good life.

One reason for preferring human needs as the ground of human rights is precisely to avoid this charge of sectarian bias that can justifiably be levelled at the personhood account. Before considering Griffin's objections to it, let me say briefly why needs seem a promising place in which to start our thinking about human rights. Human rights are meant to be important: they impose weighty obligations on governments and other

[8] It can plausibly be argued that Mill's concept of 'individuality' foreshadowed the late-twentieth-century notion of individual autonomy: see Mill 1989: ch. 3. But this concept was never widely used at the time Mill wrote.

institutions; the charge that they are being violated is a serious one, and grave consequences may follow for the violator if others believe that they have an obligation to intervene. So they should be grounded on considerations that are equally weighty, and needs appear to fit that bill. By identifying something as a human need, we are already distinguishing between human interests that are urgent and others that are less so. Moreover needs occur as an unchosen element in human life: one has a need for food, say, but one does not choose to have it. So they are immune to the criticism that might be levelled against other claims that a person might advance, namely, that if the person were to choose differently—adopt a different plan of life, say—the claim would no longer arise. Since human rights are also supposed to be choice-independent, this counts in favour of needs as the grounds for asserting them.

Griffin, however, is sceptical. He begins by making a move that is often made by those who want to deflate the significance of need claims. He says 'statements of need are always of the form: *x* needs *a* in order to ϕ' (p. 88). The effect of this move is to focus attention away from the idea of need itself and onto the goal or end represented by ϕ. But the move is controversial. Most philosophers writing on need draw a distinction between needs that are merely instrumental to some further end, and needs that are 'categorical' or 'fundamental' or 'course-of-life' or 'intrinsic'.[9] In the case of such non-instrumental needs, the statement form proposed by Griffin is misleading, because it suggests that the sense of the need claim is indeterminate until the goal or end is filled in. In the case of human needs this is not so. If we were to spell out a human need claim using Griffin's formula, it would read '*x* needs *a* in order to live a human life'. Clearly, nothing is added here by specifying the ϕ variable; it is already understood when one speaks of a human need.

This is not to say that the idea of a human need is unproblematic. It does require some clarification. Griffin's own suggestion is that 'a basic human need . . . is what human beings need in order to avoid ailment, harm, or malfunction—or, to put it positively, what they need to

[9] See Wiggins 1987: 6–11 (who prefers 'categorical'); Thomson 1987: ch. 1 (who prefers 'fundamental'); Braybrooke 1987: ch. 2 (who prefers 'course-of-life'); Miller 1999: ch. 10 (who prefers 'intrinsic'). In an earlier discussion, Griffin professed himself to be uncertain as to whether there was 'a separate non-instrumental sense of "need"', but argued that for purposes of moral theory this was not important: see Griffin 1986: 327.

function normally' (p. 88). He goes on to argue, however, that if the emphasis is placed on 'ailment' or 'malfunction', then need will be understood in terms of an idea of mental and physical health, which is in one respect too narrow, because it cannot be used to generate important human rights such as freedom of religion, and in another respect too demanding, because it would suggest that our human rights extend to remedies even for minor bodily ailments like the common cold. The same problem infects 'harm': of all the ways in which human beings can be harmed, only some seem relevant as justifying arguments for human rights.

I agree with Griffin that a purely biological-cum-psychological understanding of 'human need' is not adequate as a basis for human rights. I propose instead that we should start with the idea of the human form of life, as a common element that runs through the many specific forms of life that human beings have evolved in different times and places. That is to say, although human societies organize themselves in various contrasting ways, there are certain key elements that are reiterated throughout, best understood in terms of the range of activities that human beings engage in. There is no society in which human beings do not, for example, participate in productive labour, raise families, play games, sing and dance, engage in religious rituals, and so forth—or to be more precise, no society in which they do not engage in these activities unless prevented from doing so by coercion, by material deprivation or some such cause. That allows us to speak of a human form of life: if we were to encounter a group of beings who appeared to have no interest at all in engaging in one of these activities, we would simply be perplexed.[10] It is against this background that we can understand the idea of human needs, as conditions that must be fulfilled if people are to be able to live a human life at a minimally decent level. Where their needs are met, they will have the opportunity to engage in each of these core activities without having to forgo any of the others. We cannot specify such a level precisely. For instance if we think about the *length* of a decent life, we

[10] Individual human beings may decide to forgo one of these activities, either because they lack the personal capacity to engage in it, or because they believe that they must do so in order to participate fully in another, as in the case of a religious person who takes a vow of chastity. Accordingly I say that human needs are fulfilled when the *opportunity* to engage in each practice exists.

cannot say whether that should be set at 70 years or at 75, though we know for certain that a person who as a result of malnourishment dies at 40 has *not* had a minimally decent life, whereas someone who by virtue of advanced medical technology remains fit until 100 has enjoyed more than decency requires.

A human needs approach will generate a list of rights that can be roughly divided into the following four categories. First, there will be rights whose purpose is to provide the material means to living a minimally decent life, such as rights to food and shelter. Second, there will be rights to specific forms of freedom, such as freedom of religion and occupation that allow people to engage in the practices that make up such a life in the manner that suits their own particular dispositions and capacities. Third, there will be rights that enable people to participate in social relations and activities, such as the right to associate and the right to marry and raise a family. Fourth, there will be rights whose purpose is to protect people's enjoyment of rights in the first three categories by safeguarding them from various threats, such as the right to equality before the law, to a fair trial, and to political participation. This last category of rights is less immediately related to human needs, but they can be justified as essential protections if such needs are going to be met consistently and securely.[11]

It is important to understand, when evaluating this approach, how the human needs justification for human rights is supposed to work. It is not normally the case that one moves from a specific need to a corresponding right. Rather each candidate list of human rights is assessed by how effectively it will protect the conditions for a minimally decent life. This

[11] One criticism that might be levelled against this approach is that it cannot explain some of the rights that intuitively we think are human rights, in particular the right against torture—since being tortured on one occasion need not prevent the victim from living a minimally decent life overall. About this three things are worth saying. First, the grounds that one gives for the human right not to be tortured do not have to explain the full wrongness of torturing, such as the cruelty or contempt shown by the torturer. Second, if one thinks clearly about what torture involves, and does not confuse it with the mere infliction of severe pain, it is apparent that being tortured is likely to cause permanent damage, physical and/or mental, that will indeed prevent the victim from leading a minimally decent life thereafter (see, for example, Sussman 2005 on the peculiarly destructive quality of torture). Third, a minimally decent life must include knowing that one is protected against unwanted kinds of bodily invasion; an effective right against torture provides this assurance in one domain, as also does the right not to have body parts removed without one's consent in another.

has two specific implications. One is that a right may be important not only for fulfilling a need directly, but also because it helps support other rights. Thus a right such as freedom of movement is important because the ability to move around in physical space is indeed a basic human need, but also because in order to fulfil rights such as the right to work, to practise religion or meet potential marriage partners, one must be able to go to places where these opportunities are available. Second, when defining the scope of a particular right, we must consider which obligations that right (as specified in one of several different ways) would place upon other people, and how far this would interfere with *their* rights. Thus the right to free expression cannot be understood in such a way as to impose obligations on others to listen to what you might have to say; their right to freedom of movement includes the right to walk out of the hall in which you are delivering your interminable speech. Or for a weightier example, consider how a very extensive right to medical care might impose obligations on others to provide that care which would prevent *them* from leading minimally decent lives. The aim, then, is to come up with a list of rights that everyone can exercise without entrenching upon the equal claims of others, the whole list being justified as the most effective means of ensuring that basic needs are met.

This is how, within a basic needs approach, the problem of rights becoming over-expanded can be dealt with. How does Griffin deal with the same problem? He certainly recognizes its relevance. He writes, '[Human rights] are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*. They are protections of that somewhat austere state, a characteristically human life, not of a good or happy or perfected or flourishing human life' (p. 34). But the concept of personhood as he defines it pushes him in a more expansive direction. Recall that one of its components is 'liberty', meaning the availability of an adequate range of options to choose between. As he begins to explore what liberty means, in Chapter 9, it turns out to require society to supply its members with a rich enough array of options that 'any plausible conception of a worthwhile life' can be pursued. Griffin acknowledges that because of personal incapacities, a given individual may not succeed in realizing the conception of the good life she has chosen; he also concedes that 'liberty may not require broadening options restricted entirely by nature' (p. 168). Therefore, he concludes, 'liberty is not a right to a worthwhile life itself, but merely a right to

pursue it with no more impediments than those imposed by mother nature, including, prominently, human nature' (p. 168). But the 'merely' here conceals the fact that what is being required is actually very demanding indeed: not only the removal of all socially created obstacles to whatever conception of a worthwhile life a particular person may choose, but also the *creation* of social practices that allow for one or more of these conceptions to be pursued. Griffin gives the example of same-sex marriage and raising of children. He says of it 'no matter how many options there are already, this one, because of its centrality to characteristic human conceptions of a worthwhile life, must be added' (p. 163). Recall that the issue here is not whether same-sex marriage should or should not be permitted. The issue is whether it should be counted as a human right. On Griffin's view it is a human right, because personhood requires the liberty to pursue all 'plausible' conceptions of a worthwhile life (when not prevented from doing so by 'mother nature') and since same-sex marriage and child-rearing qualifies as such a conception, a human right must be put in place (presumably by extending the existing right to marry and have a family) to enable it. We seem at this point to have moved considerably beyond 'that somewhat austere state, a characteristically human life'.

Now Griffin, as I noted earlier, does try to limit the expansive tendencies of the personhood account by introducing 'practicalities' as a constraint. What does this involve? He says first that human rights must be sufficiently determinate that they can constitute 'an effective, socially manageable claim on others', which I take it means that their content must be precise enough that they can serve as guides to law and social policy. But he also implies that they are subject to feasibility constraints. 'Practicalities will be empirical information about, as I say, human nature and human societies, prominently about the limits of human understanding and human motivation' (p. 38). His meaning here is again not completely clear, but a plausible interpretation is that a human right should not require others to behave in a way that oversteps 'the limits of human understanding and human motivation' as best we can judge them. Examples might be that there could not be a human right to forms of medical treatment that have not yet been discovered (oversteps human understanding), or a human right to be loved (oversteps human motivation, since one cannot love at will). Yet there are dangers lurking here. The limits of human understanding are being rolled back over time,

so one would have to accept that the practicalities constraint on human rights is likely to weaken as human knowledge advances. More worrying perhaps, *some* limits to human motivation should not set bounds to human rights, no matter how well established they are empirically. Should the fact that people are unwilling to make significant financial contributions to meet the needs of distant others necessarily mean that there is no human right to subsistence that imposes global obligations? This seems to get things back to front. Assuming there is a human right to subsistence, it follows that people *should* be willing to make financial sacrifices if this is what it takes to secure the right.[12] Although this is not their main purpose, human rights do also constrain the motivations that people are required to have.

The human needs approach does better here, because the bounds that it sets to the expansion of human rights are essentially normative ones. As I suggested earlier, a candidate for human rights status will be disqualified if the effect of recognizing it would be to impose obligations on others that prevent them from leading minimally decent lives. Need is here set against need. Your need for medical care is set against my need for a form of life that involves more than just caring for you. I do not mean to suggest that contingent facts about human beings are completely irrelevant; after all it is simply a contingent fact about the human form of life that it involves clashes between people's needs such as the one I have just described. The point rather is that these clashes are to be resolved by normative reflection on the relative importance of meeting different needs, when considering what it means to lead a decent human life. The problem with recognizing a hugely demanding right to medical assistance is not merely that people are unlikely to be willing to give up most of their waking hours to supply such assistance—a claim about motivation—but that if we reflect on what we would count as a minimally decent life, we see that it must include opportunities for rest, leisure, care of children, participation in community activities, all of which set

[12] I want to remain agnostic on the question of whether asking people in rich countries to donate through charity to the global poor is an effective way of meeting the latter's human right to subsistence. The point is simply that if this were the only effective means, the fact that rich people were *unwilling* to donate should not entail that there is no such human right.

limits to the obligations to serve others that can properly be imposed on any one person.

I argued above that one reason for preferring the needs approach to Griffin's personhood approach is that it was not in the same way vulnerable to the challenge that it appeals to values that are prominent in liberal societies (autonomy, liberty) but are less highly regarded in others. Human needs, I implied, were universally recognized, or at least universally recognizable, since we are all participants in the human form of life and therefore understand what is required to live such a life at a decent level. This is not to deny the possibility of wilful or inadvertent error—as, say, when the members of a particular society fail to recognize the importance of a nutrient to their diet, or a form of medical treatment. But even here it will be possible to demonstrate the existence of a need through commonly accepted forms of reasoning. It might nevertheless still be the case that there will be cultural variation when it comes to assessing the relative importance of meeting different needs. A culture that makes religious observance central to its understanding of a decent human life will weigh the needs associated with that practice, such as for religious education, more highly than needs of other kinds. Since lists of human rights are generated, on the needs approach, by comparing sets of rights to see which set will do the best job of ensuring that needs are met overall, it seems that each culture must generate its own list of human rights to reflect those weightings. Whereas the personhood approach is vulnerable to the charge of sectarianism because of the particular values it invokes to ground human rights, it seems that the needs approach is vulnerable to the equally serious charge of indeterminacy.

At this point we need to reflect on what we should expect from a general theory of human rights. It must be sufficiently determinate that it can help us decide what should go into international human rights documents and what should not. Is there a human right to democracy, or simply a right to political participation that can take different forms in different societies? Should the human right to freedom of movement be understood in such a way that it includes the right to cross state borders without hindrance? These are the kinds of questions that we want our theory to be able to answer. On the other hand, we do not expect it to be able to specify how any particular right should be interpreted when it is being incorporated into a state's constitution or into domestic law. We can show that there is a right to freedom of religion, for example, but our

general theory cannot tell us whether this right entails that there can be no religious establishment. There is room, therefore, for a second stage at which the general theory is interpreted in the light of the specific account of human needs, and their relative weightings, that prevails in a particular society. So our account of human rights will not be fully determinate at this level. But should that worry us? Our main purpose in constructing a doctrine of human rights, and spelling it out in declarations and covenants, is to set standards that states can be expected to adhere to and that will lead to action by the international community when they are not. We include a right to freedom of religion as a tool to condemn states that oppress religious dissidents by criminalizing them or denying them jobs. But whether a country's constitution requires a strict separation of church and state, or on the other hand recognizes one particular religion as having official status, is not an issue that international human rights doctrine needs to address. The right itself is flexible enough that it can be implemented through either of these arrangements, and we should expect political communities on each side of this argument to claim that their interpretation is superior, without supposing that this gives them a licence to interfere with the other's practice.

Griffin's final worry about the needs approach appears to relate to this question of indeterminacy. Commenting on a version of that approach developed by Braybrooke, he says that 'if the need account spells out the notion of "normal functioning" by appeal to the especially basic roles in a characteristic human life—say, parent, householder, worker, and citizen—then the convergence of the two lists [of human rights] will be still greater'. Nevertheless 'the personhood account is more focused and exclusive in the role that it specifies: what is needed to function as a normative agent' (p. 90). The thought here seems to be that by focusing attention simply on what is required by normative agency, we will get a tighter specification of human rights, and presumably (though Griffin doesn't say this explicitly) avoid possible conflicts between what might be needed to function properly as a parent and as a worker, say. Although the account of human needs I have presented here is not quite the same as Braybrooke's—I refer to the activities that human beings characteristically engage in, rather than the specific roles that they perform—there is sufficient similarity that Griffin's criticism might appear to apply to it as well.

But is the criticism valid? One may doubt whether the personhood account, and the idea of normative agency to which it appeals, does yield a determinate account of 'need' and thereby of human rights. It has a tendency to flip-flop between a narrow understanding of a normative agent as a being capable of making choices and giving reasons for those choices, but with nothing implied about the range of options over which she can realistically choose, and a much broader understanding in which having access to a rich array of options is indeed included as one of its conditions.[13] If we are uncertain whether to include a right to education, for example, among the list of human rights, it is not clear what illumination we can get by thinking in abstract terms about what it means to be a normative agent. We have to ask questions of the form 'why is it important to be educated?'; 'what can an educated person do that an uneducated person cannot?'; and 'what part do those extra capacities that education confers play in human life as a whole?' We have to think, in other words, about the human form of life as we experience it, and ask which parts of it we regard as essential and which parts we regard as optional. The need approach encourages us to think in this more down-to-earth way.

It also encourages us to think, *from the outset*, about possible conflicts of priorities that arise within the idea of a human life. I assume here that when we finally formulate our canonical list of human rights, we want the rights it includes to be defined in such a way that we should expect conflicts between them to be rare. In other words, we want it to be the case that the demands made by each separate human right can be met without prejudice to the others. Rights-conflicts cannot be avoided entirely, but our hope must be that they can be confined to rare cases in which an emergency of some kind means that rights of one sort have to be suspended to preserve weightier rights of another sort (quarantining people in an epidemic, for example). I have underlined above that as we move from considering needs to considering the rights that they support, we have to make judgements about the relative importance of meeting different needs. In this way conflicts between need and need that arise in the routine circumstances of human life can be resolved before rights are fully specified.

[13] Several of Griffin's critics have made this point already. See, for example, Raz 2010, and Tasioulas 2010, and Buchanan 2010.

Griffin may be less concerned than I am about conflicts of rights. In Chapter 3 he discusses and rejects the view that human rights must be strictly compossible. His conclusion is that 'human rights are resistant to trade-offs, but not completely so' (p. 76). When it is a question of conflicts between rights, he argues that we have to assess the weight of different rights, and we do so 'by appeal to their effects on one's personhood' (p. 81). As I have just indicated, I agree with Griffin that sometimes one cannot avoid weighing rights against one another, but this should only need to be done in quite unusual circumstances (whereas Griffin appears to regard such conflicts as endemic). This difference may reflect our underlying disagreement about the role that human rights should play in practical reasoning. If one sees them as part of ethics—as guides to be used by individuals in their moral reasoning—then negotiating conflicts between rights by means of weighing will seem uncontroversial; after all much ethical reasoning takes the form of weighing up conflicting considerations when deciding what to do. On a primarily political understanding of human rights, in contrast, alarm bells are supposed to ring whenever a human right is infringed: so it is important that this should happen rarely, and only in circumstances where it is readily apparent that the normal course of human life has been disrupted. If human rights are to be taken seriously in this way, we need to make sure when defining them that we will not immediately have to begin sacrificing one to make room for another. They should be defined austerely, and a need approach, I have suggested, will allow us to do just that.

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8

Griffin on Human Rights

Brad Hooker

The rhetorical power of claims made in the name of human rights seduced many people and groups into stating their moral claims in terms of human rights. Moral claims made in the name of human rights thus proliferated wildly. Proliferation was so widespread as to threaten not only to debase the rhetorical power of the term 'human right' but also to blur conditions for appropriate application of the term. The practical result has been a series of heated but unclear debates.

James Griffin's *On Human Rights* is the product of more than ten years of reading about, discussing, and writing on the nature and extent of human rights. The whole book is highly polished, carefully and powerfully argued, and immensely rewarding. Furthermore, it does precisely what a book on human rights should do—address on-going debates about the extension of human rights, assess competing views about what makes something a human right, and make a compelling case that 'the sense of the term "human right" must be made much more determinate' in a certain way.[1] This book is a masterpiece.

The book begins with a survey of the history of the concept of human rights and of ratified lists of human rights. It proceeds to put forward a philosophical account of human rights, to develop this account in detail, and then to consider the most prominent debates about the extension of human rights. Civil rights, rights to life, rights to death, privacy rights,

[1] *On Human Rights* is hereafter referred to in footnotes as '*OHR*'. The quotation is from page 53.

rights to democratic government, and group rights receive careful scrutiny.

There is so much in this book that deserves to be celebrated that I shall not be able here even to mention all of Griffin's persuasive arguments. What I shall mostly do is describe the book's core, which is the philosophical account of human rights that Griffin defends and develops. Along the way, I hope to provide at least a glimpse of the range of topics the book addresses. In the final section, I shall criticize one argument of Griffin's.

1. The concept of human rights

'Our modern sense of a "right" . . . is an entitlement a person possesses to control or claim something.'[2] What marks off human rights from rights of other kinds is that, 'A human right is a claim of all human agents on all other human agents'.[3] You may have rights against me that depend on the fact that we are members of the same association, or that depend on the fact that we are subject to the same legal jurisdiction. Such rights are not human rights. Whatever club rights and legal rights we have are grounded in our membership of particular groups. But human rights are universal. They are grounded not in varying facts about particular groups. The ground of human rights is membership of humanity.

Griffin contends that the term 'human right' suffers from an unacceptable indeterminateness of sense. As he puts it, this 'term "human right" is nearly criterionless'.[4] Suppose we disagree about whether there is a human right to decide what happens in and to one's body. Griffin reports, 'In this case there is practically no agreement about what is at issue. We agree that human rights are derived from "human standing" or "human nature", but have virtually no agreement about the relevant sense of these two supposedly criteria-providing terms'.[5] He goes on, 'In the case of "human rights" there are so few criteria to determine when the term is used correctly or incorrectly that we are largely in the dark even as to what considerations are to be taken as relevant'.[6]

Why not, then, offer a compelling definition of 'human right'? Citing Wittgenstein's discussion of concepts that are correctly predicated of a thing if and only if that thing shares enough features with other things to

[2] *OHR*, 30. [3] *OHR*, 177. [4] *OHR*, 14.
[5] *OHR*, 16. [6] *OHR*, 17.

bear a 'family resemblance' to them, Griffin eschews the aspiration to define 'human right'.[7] Might 'human right' have an acceptably determinate sense in virtue of fairly settled social practices of using the term? Griffin's answer is that there are not fairly settled social practices of using the term 'human right'.[8]

Some think that, given these troubles with the term 'human right', we should try to get by without it. Griffin admits that 'our ethical vocabulary is ample enough for us to drop the term "human right" and carry on instead with a more circuitous way of saying the same thing'.[9] Saying the same thing in a more circuitous way would presumably replace references to human rights with references to people's liberties or moral powers to do or not do certain things, and with others' duties to do or not do certain things, with all these liberties, powers, and duties being grounded merely in shared humanity. Replacing references to 'human rights' with references to liberties, powers, and duties that are grounded merely in shared humanity would be conceptually simpler—because then the moral concepts invoked would be one fewer.

But that conceptual parsimony is not what Griffin recommends.[10] Moral claims expressed in terms of human rights are obviously more succinct than claims expressed in terms of people's liberties or moral powers to do or not do certain things and others' duties to do or not do certain things where all these liberties, powers, and duties are grounded merely in shared humanity. Moral claims expressed in that less succinct way would be less memorable. Being less memorable, moral claims expressed in that less succinct way would be less likely to play an explicit role in everyday thinking. And they would be less likely to become rallying cries than would the same claims expressed in the catchier idiom of human rights. Thus there can be strong practical reasons for persisting with the idiom of human rights.

2. Griffin's attacks on rival theories of human rights

No acceptable theory of human rights can be strongly counter-intuitive in its implications about what human rights there are. On precisely this

[7] *OHR*, 18. [8] *OHR*, 18. [9] *OHR*, 18, cf. 94, 272. [10] *OHR*, 19.

ground, Griffin attacks Ronald Dworkin's famous structural account of rights as trumps over appeals to general welfare.[11] Human rights, Griffin points out, *do not always* trump general welfare. Sometimes the amount of general welfare at stake is enormous and the right in play is not particularly important.

Suppose Dworkin accepts this criticism and moves to the view that human rights *regularly* trump appeals to general welfare. But justice and fairness likewise *regularly* trump appeals to general welfare. And yet justice and fairness, while overlapping with human rights, contain elements that are not part of human rights.[12] Finally, and perhaps most compellingly, the structural importance of human rights is not merely that they trump appeals to *general welfare*. Their structural importance also centres on their role in restraining rulers whose *personal preferences* would be served by silencing or eliminating those who oppose the satisfaction of those preferences.

Another view of human rights with implausible implications is the view that John Rawls set out in his *Law of Peoples*.[13] For Rawls, the role of human rights is to identify the justifying reasons not only for war and the legitimate ways for conducting it but also for forcefully intervening in another nation's internal affairs. A devastating problem for this account of human rights, Griffin points out, is that many human rights 'obviously have a point intra-nationally: to justify rebellion, to establish a case for peaceful reform, to curb an autocratic ruler, to criticize a majority's treatment of racial or ethnic minorities'.[14]

Robert Nozick's account of rights is superior to Dworkin's in stressing that rights serve as restrictions not only on the pursuit of general welfare but also on the pursuit of other goals. Moreover, Nozick briefly identifies what he takes to be the basis of human rights, namely, that they reflect the moral separateness of persons. But, as Griffin rightly complains, the separateness of persons is too abstract and thin an idea to serve on its own as a useful explanation of rights.[15] We need something more substantial.

An account of human rights that is much more substantial is the view that human rights are grounded in 'basic' human needs. Need accounts

[11] *OHR*, 20–21. [12] *OHR*, 41–43, 198–199, 271.
[13] J. Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999).
[14] *OHR*, 24. [15] *OHR*, 22.

of human rights are grossly and immediately implausible if they fail to limit the needs that supposedly ground rights to needs that are universally shared rather than to 'needs' dependent on varying personal aspirations and tastes. A common way of restricting needs is to say that they are what human beings must have to avoid harm and to function normally. But Griffin puts forward two fatal objections to the idea that something is a human right if and only if human beings must have it in order to avoid harm and to function normally.

First comes his objection to the idea that something is a human right *only* if human beings must have it in order to avoid harm and to function normally. My human right to freedom of religion does not depend on my being harmed or malfunctioning if the right is violated.[16] As Griffin writes, '[t]he idea of health, mental and physical, may be central to a useful notion of basic needs, but it is the wrong place to be looking for an explanation of human rights. It is too narrow'.[17]

Then comes Griffin's objection to the idea that something is a human right *if* (i.e., whenever) human beings must have it in order to avoid harm and to function normally. This idea would generate too many and too indulgent human rights. Griffin points out that some ailments and malfunctions I might have are too minor to ground a human right that others cure or correct them.[18]

Griffin could have made a related point that does not rely on the minor status of some harms. I am likely to die of cancer or heart disease within the next thirty years. To prevent such harm, investment in medical research on those two diseases could be massively increased. But it would be ridiculous to hold that I have a *human right* that investment in medical research on those two diseases be massively increased.

While there is a duty not to harm others, there is no human right not to be harmed in general, according to Griffin. One of the themes of the book is that 'There are obligations, including highly important ones, that are not correlative to a human right'.[19] 'It is a great, but now common, mistake to think that, because we see rights as especially important in morality, we must make everything especially important in morality into a right.'[20] One prominent instance of this mistake is to assume that,

[16] *OHR*, 89. [17] *OHR*, 89. [18] *OHR*, 89. [19] *OHR*, 85.
[20] *OHR*, 43, repeated almost exactly on 199; see also 92.

because there is an important duty not to harm others, others have a human right not to be harmed.

Griffin illustrates this idea with the following example. Imagine that one partner to a marriage continually treats his or her spouse in a cold and callous way, and that this treatment causes considerable unhappiness for the spouse. The unhappiness of course constitutes harm to the spouse. Indeed, as Griffin notes, the harm in this unhappiness 'might mount up into something much worse than a short period of physical torture'.[21] Whether or not the harm in the unhappiness mounted up to something worse than a short period of physical torture, causing the unhappiness violated a general duty not to cause harm. Nevertheless, no human right came into play in the situation.[22]

That point serves as one of Griffin's counter-examples to Joseph Raz's influential account of human rights. For Raz, human rights arise when there are universal human interests important enough to justify imposing duties on others towards the right-holder, where these duties entail 'exclusionary reasons' for treating (or not treating) the right-holder in certain ways.[23] For example, since you have a human right not to be tortured, I have not only a duty not to torture you but also a reason not to consider the economic, political, and personal advantages I could obtain by getting out of you information that only torture could induce you to reveal. Griffin has reservations about being able to specify when in general an interest becomes weighty enough to constitute an exclusionary reason. Griffin also uses against Raz the example of the harm done by the cold and callous partner. This harm was bad enough to justify imposing a duty on the partner not to cause it. But from the fact that there is a universal human interest in not being harmed, and the fact that this interest is important enough to justify imposing a correlative duty on others to avoid causing harm, it does not follow that there is a general human right not to be harmed. And, Griffin contends, in fact there is no such general human right.

Another argument that Griffin uses against Raz's account of human rights is an argument that concerns justice and fairness. Griffin holds that some kinds of justice and fairness are reflected in human rights. For example, procedural justice, such as the right to a fair trial, is a matter of

[21] *OHR*, 52. [22] *OHR*, 52, 54, 55, 90, 201.
[23] J. Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986), ch. 7.

human rights. But there are forms of distributive justice that are not a matter of human rights. And yet these forms of distributive justice may have more impact on the lives of most people than procedural justice does, since relatively few people might ever personally encounter procedural justice, at least in the form of arrests, trials, and the like.[24]

Finally, an argument that Griffin seems to think bites Raz's account as well as Nozick's separateness-of-persons account is as follows. 'Our ultimate aim is to make the sense of the term "human right" satisfactorily determinate.'[25] But Raz's account and Nozick's separateness-of-persons account do not make the sense of the term 'human right' satisfactorily determinate. Separateness-of-persons is simply too abstract and thin a ground to yield a satisfactorily determinate sense for the term 'human right'. Raz's account cannot satisfactorily pinpoint where on the spectrum from trivial to massively important a universal human interest has to be in order to be protected by a human right.[26]

3. Human rights grounded in personhood and practicalities

Griffin maintains that the account of human rights that is truest to the Enlightenment tradition, least counter-intuitive, and capable of rendering the term 'human right' satisfactorily determinate is what he calls the 'personhood account'. According to this account, the essence of human rights is that they protect human dignity, and in particular human agency. Unlike other animals, humans can form conceptions of what a good life would be. Then they pursue these conceptions, insofar as success is thought possible. The ability to form conceptions of the good and the capacity to pursue these conceptions Griffin dubs 'normative agency'. Normative agency has very great value.

Our picture of the capacity for normative agency should not be over-intellectualized. To have a conception of a good or worthwhile life does not necessitate having a highly detailed plan of life.[27] Because one doesn't know all the problems, opportunities, and changes the future will bring, locking oneself into a highly detailed long-term plan would be

[24] *OHR*, 54; see also pp. 41–43, 19. [25] *OHR*, 92.
[26] *OHR*, 54–56, 263–264. [27] *OHR*, 45.

unreasonable. A conception of a good life might modestly be merely 'ideas about what makes a life better or worse' and these ideas can be 'piecemeal and, to varying degrees, incomplete'.[28]

Griffin breaks down the notion of normative agency as follows:

> To be an agent . . . one must (first) choose one's own path through life—that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real: one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty').[29]

Thus Griffin's account of human rights divides them into autonomy rights, welfare rights, and liberty rights. Note that the welfare rights are neither as extensive as rights to everything one needs in order to have a good life, nor as extensive as rights to everything distributive justice requires. Human rights concerning welfare, according to Griffin, are to at least the minimum provision necessary for agency.

Griffin convincingly argues that his 'personhood and practicalities' account of human rights can easily underwrite a human right to life, a human right to security of the person, a human right to free expression and to a say in political decisions, a human right to freedom of association, a human right to a free press, a human right to freedom of religion, and a human right 'to basic education and at least minimum provision needed for existence as a person'. Unless one has each of these rights, one's normative agency is diminished or eliminated. Griffin's account also justifies a human right not to be tortured. Torture's goal is typically to undermine one's ability to hold fast to one's decision not to reveal information or sign a 'confession'.[30] Hence, a right not to be tortured protects one's capacity to have one's decisions determine one's behaviour.

However, when we try to go beyond the above rights, thinking about personhood (or normative agency) by itself will leave us with human rights that are too vaguely and indeterminately specified. We need, according to Griffin, to attend not only to personhood but also 'practicalities'

[28] *OHR*, 46. [29] *OHR*, 33. [30] *OHR*, 33, 52–53.

concerning human nature and the nature of society.[31] Prominent examples of such practicalities are human limitations in motivation and cognition.[32] I shall come back to the limitation in our powers of cognition in the final section. Right now, however, let us focus on the limitation in human motivation.

Griffin maintains that the price of our ability to be deeply committed to certain other people, institutions, careers, and projects is that certain actions will be beyond our motivational capacity. For example, if I am deeply committed to my own child in precisely the way that I should be both for her sake and for mine, then I will be motivationally incapable of refusing to save her so that I can save two strangers instead.[33] Let us assume that 'ought' implies 'can'. Then, since it is not true that I am motivationally able to refuse to save her, it cannot be true that I ought to refuse to save her. If the above assumptions are correct, then my motivational incapacity to refuse to save her prevents me from having a duty to refuse to save her.

Some might believe that what follows from my motivational incapacity is not that I have no duty to save the strangers rather than my child. They might think that what follows from my motivational incapacity is that I am seriously defective and in need of being galvanized by a more inspiring ethics. Griffin's response is that examples of *sustained* motivation of the kind here being imagined are rare. Indoctrination and training can bring up a generation enthusiastic *for a while* about serving 'the party' and informing on their parents. But over time human beings go back to caring deeply and intensely about only their own projects and the particular people to whom they are closely tied.[34] And, given that people find such limits in their motivational capacities, moral norms in general and human rights in particular must be shaped around these practical limits. Thus,

> A Bill Gates or a John Paul Getty has a great ability to help the needy. . . . But the obligation upon them does not go on until their marginal loss equals the marginal gain of the needy; nor does it with us. . . . The Gateses and the Gettys—and we—are

[31] *OHR*, 37–39, 44, 70–75, 192, 235.

[32] Here Griffin draws on a line of argument prominent in his earlier book *Value Judgement: Improving Our Ethical Beliefs* (Clarendon Press, Oxford, 1996), ch. 5.

[33] *OHR*, 72.

[34] *OHR*, 73.

allowed substantially to honour our own commitments and follow our own interests, and these permissions limit our obligations.[35]

One might think that an upshot of this discussion of permitted partiality would be that Griffin would be forced either (1) to deny that there is a universal human right to at least minimum provision of health care and other resources or (2) to deny that the universal human right to minimum provision of health care and other resources is a right against all other individuals. Instead, he concludes, 'There is a sound line of thought leading us to an acceptance of human rights to life and to minimum provision. But there is also a sound line of thought leading us to acceptance of a domain of permitted partiality. Might not the former line of thought lead to a level of demand that the latter line of thought does not require that we supply?'[36]

One of the best chapters in the book is about conflicts involving human rights.[37] We have just seen one such conflict: the conflict between some people's rights to life and minimum provision and other people's right to pursue their own projects and focus on their loved ones. This is a conflict between rights. Griffin also considers conflicts between respecting rights and promoting welfare and between respecting rights and serving justice.

Later chapters consider various putative human rights, such as a human right to death, a human right to privacy, a human right to compensation following a miscarriage of justice, a human right to paid employment, a human right to as much health as possible, a human right to make gifts between generations, a human right to inherit, a human right to equal pay for equal work, and a human right to promotion on merit (chs. 11–13). His discussions of all these and more are original, nuanced, and persuasive, as is his discussion of the question of whether human rights are socially relative (ch. 7).

4. Griffin's teleology

As indicated earlier, Griffin's account of human rights is not merely structural but also substantive. The values from which human rights grow are the ones associated with normative agency, namely the ability

[35] *OHR*, 103. [36] *OHR*, 110. [37] *OHR*, ch. 3.

to 'recognize good-making features of a human life, both prudential and moral' and the liberty to pursue those features.[38] Think of *the good* as comprised of normative agency and other values (such as welfare). Think of *the right* as all moral requirements, some of which come from other people's human rights. Griffin's teleology bases at least part of the right, namely requirements that come from other people's rights, on part of the good, namely normative agency.[39]

But, to the extent that requirements on action are based on their connection with (part of) the good, why not ignore or qualify those requirements whenever complying with them would fail to promote the good? If our account of human rights is teleological, why wouldn't we be willing to 'trade off' human rights whenever complying with them would not produce good?

Griffin's first answer is that normative agency is somewhat more valuable than other parts of the good such as welfare. Admittedly, sacrifices of normative agency are reasonable where such sacrifices would produce *much* greater welfare. Nevertheless, 'once we are above a minimum acceptable level of material provision . . . it takes some unusually large amount of welfare to outweigh personhood'.[40] An example might be a case where suppressing freedom of expression would prevent a large loss in welfare.

Another kind of case is more difficult. Here protecting some people's normative agency is possible only if other people's normative agency is infringed. If people are killed, for example, then not only is their welfare capped but also their normative agency is terminated. Cases can arise in which the only way to save many people from being killed involves deliberately killing a smaller number of other people. In such a case, the way to maximize the amount of normative agency protected is to kill the few (thereby terminating their normative agency) in order to prevent the killing of the many (since the killing of the many would terminate the normative agency of more people).

Griffin does not advocate a blanket permission to infringe the normative agency of some agents for the sake of protecting the normative agency of more other agents. Instead, Griffin holds, 'At times, the only moral life open to us involves *respecting* values, not *promoting* them. By

[38] *OHR*, 156. [39] *OHR*, 80. [40] *OHR*, 80.

"respecting" the value of human life, for example, I mean primarily, but not solely, not oneself taking innocent life; by "promoting" life, I mean bringing about its preservation as much as possible by any means open to one.'[41] Six pages later he writes,

> Respecting goods, as well as promoting them, can be a teleological position; both positions can hold that the good is basic in the moral structure and the right derived from it. My example earlier was that life must be respected, and that one must simply follow the norm, 'Don't deliberately kill the innocent'—follow it because that is the only moral life available to the likes of us, though one might also adopt the policy that exceptions will be allowed only so long as the case for them is especially convincing. . . . It is the statement of a policy—an openly conservative one—for what to do when something as important as human life is at stake and our calculations of the goods at stake are altogether too shaky and incomplete and badly conceptualized for us to be willing to live by.[42]

The above passages weave together three different theses. One is the thesis that Griffin's account of human rights leads to, or at least is compatible with, a prohibition on deliberately killing the innocent oneself, rather than an injunction to minimize the number of killings even if doing so involves killing some oneself. The second is the thesis that this prohibition is part of the only life open to us. The third is that we often face cases where we don't have compelling evidence about what all the consequences would be of the different things we could do.

These three theses are woven together, but what is their logical connection? I tentatively suggest the following. Often, when assessing different possible moral policies, including different possible understandings of particular moral rights, we 'cannot do the calculation of consequences to a reliable degree of probability'.[43] But we might find that particular policies are already widely accepted in our society.[44] Though such policies can be criticized, 'at a fairly early point in assessing policies such as "Don't deliberately kill the innocent" we reach a point where we can no longer tell that one policy is better than another'.[45] Furthermore,

[41] *OHR*, 74. [42] *OHR*, 80. [43] *OHR*, 126.

[44] Griffin writes, '[S]uch policies usually emerge in a society without anything so deliberate as a group decision' (*OHR*, 127). No doubt, different causal factors were at work in different historical instances of policy establishment: sometimes certain policies were the legacy of a religion, sometimes of a charismatic leader, sometimes of subjugation by a foreign power, sometimes the conclusion of rationally compelling considerations, etc.

[45] *OHR*, 128.

if certain policies have been established in our society, they outline the moral life available to us. And in fact the policies established in our society include a prohibition on deliberately killing the innocent oneself.

Griffin tries to clarify his view by contrasting it with the best versions of indirect consequentialism. Such versions of consequentialism ask: which rules and rights are the ones whose establishment would have the best consequences in the long run, impartially considered? But Griffin observes, '[t]he assumptions on which the calculations in cost–benefit analysis are based are often so oversimplified that we are rightly hesitant to act on them. And an indirect consequentialist would have to calculate on a vastly greater scale than any cost–benefit analyst has yet attempted.'[46]

A version of indirect consequentialism that is modest about our powers of predicting and calculating consequences might hold that we should abide by the policies in the currently accepted morality unless and until we can calculate to a reliable degree of probability which changes to this morality would result in a net increase in value in the long run. Call this view incrementalist rule-consequentialism. Griffin rejects incrementalist rule-consequentialism, however, because he thinks that we cannot clear-headedly be confident that various changes in the currently accepted moral rules and policies would or would not result in better consequences in the long run.

To illustrate, he imagines that the widely accepted strict policy 'Do not deliberately kill the innocent' could be weakened a bit so as to allow deliberately killing non-combatants in war, to allow making people who express dangerous political views 'disappear', and to allow surgeons to kill one innocent patient in order to redistribute that patient's organs to save the lives of five other patients.[47] Now which policy would have the better consequences in the long run: the strict policy 'Do not deliberately kill the innocent, period', or the less strict policy 'Do not deliberately kill the innocent except when necessary to win a war or to get rid of people who express dangerous political views or to redistribute body parts from one innocent patient in a way that would save the lives of other innocent patients'? Griffin insists that we cannot do the calculations, to a reliable degree of probability, necessary to answer such questions.

[46] *OHR*, 70. [47] *OHR*, 71, 126–127.

True, in many cases we cannot confidently be sure that a person's accepting and following one policy would produce better consequences in the long run than would his or her accepting and following a different policy. One person's accepting a terrible policy might, by some quirk, have excellent consequences on the whole and in the long run, consequences better than would have resulted from this person's accepting any other policy. For example, a particular surgeon might kill one innocent patient and use the body parts to save many others *without this ever being made public*. Or one person's accepting a terrible policy might instead be found out and then serve to persuade others to eschew that policy. Likewise, we might have good grounds for lacking confidence that any one society's following a certain policy will produce better consequences than its following a different policy. For, again, one society's adopting a terrible policy might have the excellent consequence of persuading all other societies to eschew that policy.

But are these points against the best forms of indirect consequentialism? The best forms of indirect consequentialism focus neither on the consequences of *one individual's* accepting and following policies nor on the consequences of *one society's* accepting and following policies. The best forms of indirect consequentialism are more 'cosmopolitan'. What we might call incrementalist cosmopolitan rule-consequentialism assesses possible moral rules and policies in terms of the expected value of their acceptance (not just by one individual or by one society but) by *all societies* simultaneously.[48]

So let us ask whether incrementalist cosmopolitan rule-consequentialism can handle Griffin's examples. Well, we can calculate, with a reliable degree of probability, that 'Do not deliberately kill the innocent, period' has much greater expected value than 'Do not deliberately kill the innocent except when necessary to win a war or to get rid of people who express dangerous political views or to redistribute body parts from this one person in a way that would save the lives of other innocent people'. If all societies accepted a rule allowing the deliberate killing of innocent non-combatants in war, there would probably be a great deal of killing of innocent non-combatants in war. The aftermath would not be happy. Wars are much harder to forgive when either or both sides have

[48] This theory is defended in my *Ideal Code, Real Word: A Rule-consequentialist Theory of Morality* (Clarendon Press, Oxford, 2000).

been deliberately killing innocent non-combatants. And political malfeasance, corruption, and incompetence are much harder to expose and stop if those in power feel free to get rid of people who express what those in power persuade themselves are dangerous political views. Finally, people will be much more reluctant to put themselves in the hands of surgeons if they know that surgeons might redistribute their vital organs to others. A rule that results in widespread surgeon-phobia would not have good consequences on the whole and in the long run.

When faced with the question of how to defend the stricter 'Do not deliberately kill the innocent, period' against the laxer alternative 'Do not deliberately kill the innocent except when necessary to win a war or to get rid of people who express dangerous political views or to redistribute body parts from one person in a way that would save the lives of other innocent people', Griffin seems to back himself into the corner of saying simply that the stricter policy is established in our society. The best form of indirect consequentialism can go further, by arguing that the stricter policy can indeed be defended as superior if assessed by the proper (i.e. cosmopolitan) tests.

As I said near the beginning, Griffin's book is a masterpiece. It will be studied carefully by very many scholars for a long time to come. In this final section of my discussion, I have focused on the one argument in the book that did not seem to me persuasive. Even if there are mistakes in that one argument, they are unobvious ones. And even if Griffin were to accept my criticism of that argument, the most this could force him to do is amend slightly his teleological account of human rights.

9

Griffin on Human Rights to Liberty[1]

James W. Nickel

Almost all accounts of universal human rights endorse the view that they include rights to some basic liberties. Familiar examples of such rights to liberties include freedoms of thought, expression, assembly, and movement. This essay focuses on James Griffin's treatment of human rights to liberties in his 2008 book, *On Human Rights*. Philosophical theorists of human rights have given insufficient attention to rights to the fundamental freedoms, in my opinion, and hence Griffin's work in this area is most welcome. Much of the paper is devoted to explaining Griffin's views on human rights to liberties in a friendly and constructive way. I am critical, however, of Griffin's failure to take account of fecundity in thinking about freedom of movement and residence, his too-narrow basis for liberties to flee from and defend oneself against crime, and his failure to recognize the great difficulties in providing a justification of the nondiscriminatory and equal enjoyment by everyone of human rights without having an independent principle of fairness or equality as part of one's justificatory framework. This final shortcoming leads Griffin to underestimate, I suggest, the strength of the case for rights to political participation and democratic institutions in contemporary societies.

[1] I wish to express my appreciation for useful comments and criticisms to Kimberley Brownlee, Roger Crisp, Matthew Kramer, John Tasioulas, and Patricia White.

(Moral) human rights generally

A major thesis of Griffin's book is that human rights can be made clearer and more coherent by tying each and every one of them to autonomy or normative agency. Griffin thinks that all human rights have the same general role, namely protecting this value and its indispensable conditions. Nevertheless, Griffin makes some key assumptions or stipulations about what human rights are apart from this role. I find five of them. First, he thinks of human rights as *moral* rights, not as purely political or legal notions. They are successors to the Enlightenment notion of a natural right (but without its 'theological content') and involve 'ethical judgments as applied to the assessments of our societies' (1–2). Accordingly, Griffin opposes 'political' conceptions of human rights such as those of John Rawls and Charles Beitz (Rawls 1999, Beitz 2009). He recognizes that universal human rights are often used in criticizing or holding accountable other countries for their treatment of their residents, but he does not take this 'political' role as definitional. Second, Griffin thinks of human rights as *claim rights*—as rights having 'correlative duties' held by persons and institutions (48, 51). Third, a human right is 'a right that we have simply in virtue of being human'—although this is qualified to apply only to humans who have normative agency or autonomy (2, 277). Consequently, human rights cannot be 'special rights' resulting from promises or personal connections and must be (nearly) universal rights—ones possessed by every human who enjoys at least a threshold level of normative agency or 'personhood' (48, 50). Fourth, human rights have a 'minimalist character' that keeps them from being too demanding and that distinguishes them from ideals (53). Griffin is critical of long lists of putative human rights and of what he calls the 'ballooning of the content' of specific rights (220). Finally, human rights are 'resistant to trade-offs, but not completely so' (76, see also 36). They are not absolute but they are very strong. Griffin says, for example, that even if a million people were upset by one's exercise of a core liberty, 'Upset and distress are not the kind of thing that could ever match the centre of a person's liberty' (68).

In Griffin's view the 'existence conditions' and distinctive role of human rights should derive from 'substantive values' that all such rights protect, not from the fact that they are rights (33–34). He rejects the attempts of philosophers such as Joel Feinberg (who described rights as

'valid claims' (Feinberg 1970)), Ronald Dworkin (who viewed rights as 'trumps' (Dworkin 1977: 191)), and Robert Nozick (who described rights as 'side-constraints' (Nozick 1974: 28–33)) to construct the nature of human rights from an analysis of the concept of a right (20–22). Instead, Griffin proposes normative agency or autonomy as the substantive value that gives human rights their character and defining role. It is unclear to me why Griffin thinks proposing a defining role for human rights in terms of protecting normative agency is a reason to avoid offering an analysis of the elements and functions of rights generally (see Tasioulas 2010 and this volume).

To have normative agency is to have a functioning capacity to choose, evaluate, deliberate, plan, revise, pursue, and follow one's own course in life (32). Griffin uses several names to describe this capacity—'normative agency', 'autonomy', 'autonomous agency', 'status as a self-determiner', and 'personhood'. He thinks that this notion of personhood 'can generate most of the conventional list of human rights' (33), and that tying all human rights to normative agency will give them clearer limits and greater unity and coherence.

Seeing all human rights as protections of normative agency is Griffin's proposed means of remedying the 'intolerable degree of indeterminacy of sense' with which he thinks the concept is afflicted (143). Limiting human rights to norms that protect autonomy is a material condition (in contrast to a structural or conceptual condition) on human rights that unifies and limits them (40, 58). Griffin says that 'Human rights grew up to protect what we see as constituting human dignity: the life, autonomy, and liberty of the individual' (249). All human rights provide protections, direct or indirect, of 'that somewhat austere state, a characteristically human life, not of a good or happy or perfected or flourishing human life' (34).

Although Griffin emphasizes the need to constrain and prune human rights, the amount of pruning that he wants to do is actually modest. With qualifications, Griffin endorses most of the rights in the 1948 Universal Declaration of Human Rights. Griffin advocates a 'bottom-up' rather than 'top-down' approach to human rights theory that 'starts with human rights as used in our actual social life . . . and then sees what higher principles one must resort to in order to explain their moral weight . . . ' (29).

Human rights are unified by their common root in normative agency, but they nevertheless comprise, Griffin says, three distinct branches: protections of (1) autonomy, (2) liberty, and (3) minimum material provision. 'All more specific human rights can then be seen as falling under one or the other of these abstract headings' (159). I find it puzzling that the list of abstract rights does not include security. Contemporary human rights practice strongly emphasizes security rights against murder, rape, enslavement, and torture. Further, Griffin clearly endorses rights to security (14, 33, 37, 41, 73, 128, 212–216, 239) including the right to self-defence (63). And the reason for omission cannot be that security is for Griffin a derivative right since the abstract right to minimum material provision, which is one of his three abstract human rights, is clearly a derivative right (179–180).

One worry that arises immediately is whether focusing entirely on the value of human agency and accomplishment is too austere and narrow a ground for human rights. This cuts out any aspect of the quality of people's lives and experiences that does not fall under agency and achieving one's goals and plans. This means that Griffin will justify the right against torture in terms of the protection it provides for agency, not in terms of protecting against the horrible pain and anguish that torture usually involves. Further, Griffin's approach excludes reliance, or much reliance, on a conception of fairness or equality to deal with the distributive dimensions of human rights. There is little reason to believe that normative agency is the only moral value or norm that can generate high-priority moral duties that are 'perfect' because they are owed to all other persons. For example, considerations of fairness might generate high-priority individuated moral duties to make it possible for all people to have a say in political matters that affect them substantially. If such a moral duty exists, and if it generates a universal moral right to have a say in such matters, Griffin will deny that this right is a human right. We will return to this denial in the final section.

A theory that ties all human rights to autonomy thereby limits the role of considerations pertaining to human well-being, but a limited role is different from no role. Griffin notes that autonomously choosing 'paths through life' and 'being at liberty to pursue them' are values whose realization 'characteristically enhances the quality of life' (36, 181). Another important way in which Griffin takes concern for human well-being into account is through his abstract right to minimum

material provision (159, 176–187). This abstract right yields specific rights to goods such as education and adequate nutrition. He justifies this abstract right, and the economic and social rights falling under it, with a linkage argument that asserts that its protections are indispensable to realizing the abstract rights to autonomy and freedom (on linkage arguments see Nickel 2008). Accordingly, the abstract right to minimal material provision is entirely derivative of the other two abstract rights and hence does not make the value of protecting minimal well-being an independent source of human rights.

A third way in which considerations of human well-being can enter is through Griffin's idea of 'practicalities'. After asking whether normative agency could be the only ground needed for human rights, Griffin answers negatively, saying that this would leave human rights 'still too indeterminate' (37). To remedy this without necessarily looking to international treaties and adjudication he invokes practicalities to give human rights 'a sufficiently determinate shape' and draw boundaries for them that do not 'take too many complicated bends' (37–38, 192). In discussing the boundaries of the right to life, for example, Griffin says that in order to draw those boundaries with more precision 'we need to consider human psychology and the ways in which societies function, and decide whether we need a safety margin, and how generous it should be. And here an element of policy enters' (128). Griffin also allows that 'some practicalities come down to consideration of quality of life' (73), but insists that not all do. Griffin's account of practicalities is brief and undeveloped, however, and this leaves us unsure of exactly what it covers and how much work it can or is intended by Griffin to do. Moreover, Griffin makes the surprising claim that practicalities 'are not tied to particular times or places' (38). This supports the universality of human rights while making it impossible for practicalities to take into account contemporary threat and resource levels.

Griffin on the human right to liberty

Griffin's book devotes four chapters to issues about liberty. The first of these, Chapter Nine, offers his general account of the human right to liberty. The three other chapters on liberty are near the end of the book and deal respectively with rights to life and death, privacy, and democratic institutions. Together they offer an autonomy-based conception of

the human right to liberty. As such, Griffin's view excludes defending liberties as rights because of their contributions to well-being, equality, or democracy. Griffin does not need to deny that moral human rights often promote these values, but his view is that doing this is not what makes them human rights.

Griffin holds that human rights protect not just the development, use, and maintenance of the capacity to make choices and plans ('autonomy') but also freedom to pursue and realize what one has chosen ('liberty'). Liberty is not just a matter of choosing and revising a conception of a worthwhile life but also of being able to pursue it and live it. Griffin agrees with Rawls that there is a higher-order interest in advancing one's conception of the good (Rawls 1972: 55; Rawls 1996: 74). Because autonomy and liberty are so valuable to nearly everyone they generate 'claims on us not to destroy them, and within limits, to protect and promote them' (185). Griffin is committed to 'a large range of liberty rights' (193).

In international human rights treaties the fundamental freedoms are an important family of human rights (on families of human rights see Nickel 2007). They are found in almost all contemporary human rights documents and treaties—where they are presented as lists of rights to specific areas of liberty rather than as an abstract human right to liberty. Most frequently listed are freedoms of: (1) thought, conscience, and religion; (2) communication or expression; (3) assembly and association; (4) participation in politics and voting; (5) marrying a person of one's choice and having children; (6) privacy of home, family, and correspondence; (7) choosing, pursuing, and changing one's occupation; (8) owning property and engaging in economic activities; and (9) movement, residence, leaving and returning to one's country, and seeking asylum in other countries. These rights are generally not taken to be absolute; they are subject to restriction and regulation when there are strong and legitimate reasons for limitations on their scopes.

Griffin rejects the view that philosophers should exclusively talk about specific liberties and devote themselves to constructing and defining a list of basic liberties (for this view see Dworkin 1977: 266). In contrast, Griffin proceeds by first setting out the abstract human right to liberty and then moving on to discuss the derivation of specific liberties. He is not unfriendly, however, towards most of the fundamental freedoms

listed in the previous paragraph. In the passage that comes closest to offering a list of basic liberties he says:

> We must be free to worship, to enjoy ourselves, to form the personal relations we want, to try to arrive at certain basic forms of understanding, to create works of art. We must also be free to inform others of what we believe . . . (193)

Griffin also endorses a right to some degree of privacy on the grounds that without it people would not be 'secure or comfortable enough' to choose their own goals in an autonomous way or to pursue their plans confidently (193, 225–241).

The concept of liberty Whether protected by human rights or not, liberty is for Griffin the absence of barriers imposed by people, institutions, and traditions that 'stop us' from engaging in actions that we have chosen. The enemies of liberty, according to Griffin, are 'compulsion', 'constraint', and 'impoverishment of options in life' (151). Griffin emphasizes that a denial of liberty need not take the form of active intervention. He observes that 'The mere presence of a powerful agency able to intervene can be enough to cow people into self-censorship' (160, 248).

Options are choices provided by one's culture and technological milieu such as types of social, family, and romantic relationships, having children or not, various possibilities for work and career, and recreational possibilities such as sports, music, reading, and computer games. Griffin says that 'paucity of options' is one of the enemies of liberty and emphasizes that people have an 'important interest' in there being 'a rich array of options in life from which we may choose' (55).

Griffin's exclusive focus is moral claim rights to liberties—ones that impose or are constituted by moral duties on others. Rights offer a way of giving special normative protection to the availability of broadly valuable liberties. They typically do this by conferring normative advantages such as claims, powers, and immunities on the rightholder(s) and by conferring normative burdens such as 'perfect' or individuated duties (and perhaps some liabilities) on the addressee(s). If there is a right to the liberty to do O/not-O, then that liberty is the 'object' or centrepiece of the right's scope. Rights put the focus on their objects and the rightholders who are entitled to enjoy them. The duties and other normative elements that the right's scope specifies, sketches, or implies serve in various ways to ensure the availability to the rightholder of the liberty to do O/not-O.

It is illuminating to apply the tripartite analysis of liberty found in Felix Oppenheimer and Gerald MacCallum, Jr., to Griffin's account of liberty (Oppenheimer 1961; MacCallum 1967). The tripartite analysis holds that any fully specified claim about someone's having or not having a liberty must instantiate three variables: the agent who is free or unfree; the restraint(s) that are present or absent; and the kind(s) of action or option that the agent is free or unfree to do. Thus we get the schema: A (the agent) is free (or not) from R (the restraints) to choose and do O/not-O (the option). For Griffin the characteristic agent is a biological human person with operative normative agency. The characteristic restraints are compulsion, constraints, intimidation, and circumstances that impoverish options. That is, one can lack freedom to do O because one is forced to refrain from O-ing, because one is coerced or cowed into not O-ing, or because the option O/not-O is unknown or unimaginable. But restraints imposed by the laws of nature or a harsh natural environment do not diminish freedom even though they diminish abilities and options (161, 168). And the characteristic options in Griffin's view are ones that are involved in developing, maintaining, and using autonomy and in pursuing the valuable plans and goals one has chosen.

The positive side of liberty Griffin's account of human liberty seems largely negative since people will enjoy freedom on Griffin's account if others refrain from compelling them, coercing them, or intimidating ('cowing') them. But there are three 'positive' dimensions to Griffin's account. First, the sort of unfreedom that comes from almost irresistible compulsions is at least partially set aside by Griffin's stipulation that the sorts of agents who have human rights to freedom are ones who are above some threshold of personhood or normative agency (see the discussion of freedom of the will on 157–158). Second, Griffin thinks that avoiding 'paucity of options' is often a matter of moral duty. Parents, teachers, and public officials may have 'a positive duty to make the options wider' (166). And third, Griffin endorses a qualified social and personal duty to help provide people with 'the all-purpose means to pursue any plausible conception of a worthwhile life' including education, basic health services, and income support (162). This is the abstract human right to 'minimum material provision' (159, 176–187).

The exact meaning of 'providing' an option is unclear. Consider an option that became available around 1980, namely using or not using

email. For Griffin, providing this option does not seem to require giving people effective opportunities to use email by giving them access to a computer with an internet connection. Perhaps this option—or at least the funds to access it—would be covered by the duty to provide 'all purpose means' or 'minimum material provision', but Griffin recognizes no universal moral right to have opportunities equalized beyond this (162). So providing someone with this option may just be telling them about electronic mail or allowing them to learn about it. The example Griffin gives of paucity of options is an isolated, technology-free, Bible-dominated society that deliberately, or as a consequence of following its religious and cultural heritage, restricts through isolation its residents' knowledge of worldly options (161–162). Few of them know about email, and no effort is made to spread that knowledge.

The link to normative agency As we saw earlier, the centrepiece of Griffin's book is a proposal that human rights be tied to the value of normative agency. Unfortunately, Griffin never settles on a single precise formulation of how strong a tie to normative agency a liberty must have in order to qualify as a human right. Sometimes the test seems very hard to pass because it is formulated in terms of whether one's personhood, or normative agency, would be 'threatened' (195) or 'destroyed' (185) by not having a liberty. This test seems too strong since free political speech cannot pass it. Free political speech was not widely enjoyed in the Soviet Union during the 1970s, but most residents of the USSR nonetheless developed, exercised, and maintained normative agency and were able to pursue worthwhile lives. At other times the test seems quite loose: A claim to protection of liberty falls under the abstract human right to liberty 'only if the claim meets the material constraint that what is at stake is indeed *conceivable as mattering* to whether or not we function as normative agents' (167, my italics) and can pursue reasonable plans for a good life. This weak test is more plausible but perhaps excessively permissive.

How demanding is the right to liberty? Griffin is no absolutist about rights to liberties. As we saw earlier, he thinks that the best account of human rights—including liberty rights—will make them 'resistant to trade-offs, but not too resistant' (37). Even when a particular liberty in fact matters greatly to our functioning as normative agents it may still fail to be a specific human right if it is incompatible with the 'demands of justice', involves 'wasteful, inefficient use of public funds' (164), has

'alternatives, as good or nearly as good', is 'costly and reduces options for others' (168), or has a 'substantial public interest' to outweigh it (235). This is an ample menu of grounds for rejecting or qualifying liberties that are candidates to be human rights.

He assigns higher priority, however, to 'the free circulation of information and ideas'. Without rights and protections in this area 'one cannot either properly form a conception of a worthwhile life, or effectively pursue it, or satisfactorily live it' (162). As this suggests, the criterion of importance is how central a liberty is to the operation of one's normative agency and the pursuit of one's conception of a worthwhile life: '[B]ehind the idea of major and minor infringements of rights is the idea of an attack on something nearer to or further from the centre of one's agency' (67).

Specific liberties This extended subsection addresses the issue of how to select some specific liberties as human rights. The value of particular liberties ranges from extremely high to very low and on to negative. For example, freedoms of communication and movement are extremely valuable. Freedom to ride in motor vehicles is of substantial value. Freedom to eat small amounts of sand is of modest value in allowing one to eat shellfish and other foods that contain sand. Of no value whatsoever, however, is the freedom to eat five pounds of sand for lunch. And freedoms to murder and rape are worse than valueless; they are positively bad and ought to be taken away by criminal prohibitions. The question for a theory of human rights is not primarily which liberties are valuable. It is rather which liberties are *so* valuable, or otherwise morally or politically imperative, that they ought to be objects of human rights. The class of liberties protected by justifiable human rights is far smaller than the class of valuable liberties (see Carter et al., 2007).

Griffin emphasizes that the abstract right to liberty does not imply specific rights to every kind of action, or even to every harmless action. Because of their specificity rights to drive the wrong way down one-way streets or to refuse to wear a necktie are said not to follow from the generic right to liberty. What the abstract human right to liberty requires, it seems, is that all people have access to broadly useful paths for pursuing plausible conceptions of a worthwhile life. Griffin is a mild perfectionist and a strong liberal. In judging the plausibility of taking something to be part of a worthwhile plan of life he is prepared to rely

heavily on desires and propensities that seem to be part of human nature (35, 116–120). He clearly sees the pursuit and maintenance of familial and social relationships, for example, as a natural propensity among humans (163–164).

Griffin rejects the General Presumption of Liberty—the idea found in J. S. Mill, Joel Feinberg, and John Rawls, that the restriction of any option whatever requires justification and that the burden of giving (or at least having) a justification falls on those who propose or impose the restriction (Mill 1859: ch. 1; Feinberg 1984: 9; Rawls 1996: 292). This rejection is part, I believe, of Griffin's explicit rejection of Mill's Harm Principle (173). The grounds for rejecting the Harm Principle that Griffin gives are, first, that it is so vague that illiberal societies can construct conceptions of it to justify their many restrictions (172) and, second, that the Harm Principle protects much that is 'without positive value or of such slight value that it doubtfully merits the powerful restrictive role' that it yields (173). The Harm Principle does this precisely because it demands adequate justification for every restriction of liberty.

Let's now consider two examples of liberties that Griffin discusses: same-sex marriage and freedom of residence. Reasonably enough, Griffin holds that many specific options are not covered by the abstract human right to liberty. Liberty to wear or not wear a necktie, Griffin says, does not follow from the human right to liberty. The reason is that 'Whether or not I wear a necktie now and then will have no effect on my choosing and pursuing my idea of a worthwhile life' (169). Griffin says the same about smoking. It is not really an issue of liberty (170)—meaning that it is not really part of the liberty covered by human rights. Here Griffin seems to be following Joseph Raz without noticing that Raz inserted an important qualification, namely that autonomy may require more specific options when 'they affect one's ability to pursue the more pervasive ones' (Raz 1987: 374, 409–411). This qualification applies to being blocked from wearing neckties since it can keep one out of professions such as law and banking that require men to wear neckties on some occasions.

If tie wearing and smoking are not valuable or important enough to form a major component of a worthwhile life, Griffin believes that having family and children is. He is prepared, therefore, to extend full access to family ties and children to same-sex couples:

> [I]f there are same-sex couples who want to form some sort of union and raise children—who want, that is, to have the rich, stable, recognized, respected relations that are at the heart of most people's conceptions of a worthwhile life—and . . . there are no social institutions to allow it, then we should create one or other form of them. This . . . is an issue of liberty. (163)

Griffin considers the objection that given his view that many specific options are not required by the human right to liberty he should hold that society has no obligation to make available to same-sex couples the option of having families and children. The objection is that 'Homosexuals could still find . . . alternatives that would allow them to have fulfilled lives and to preserve their normative agency' (163). Griffin's reply is that restricting the liberty of homosexuals in the areas of family relations and children has too large an impact on their ability to pursue worthwhile lives: 'No matter how many options there are already, this one, because of its centrality to characteristic human conceptions of a worthwhile life, must be added'. Griffin elaborates this by saying that 'What is at stake for same-sex couples are several of the most important components of a good life available to human beings' (163). The 'conditions of a hundred years ago' would stifle their affection and keep them from having and raising children (164). As this illustrates, Griffin's fundamental test of whether free access to an option is required by human rights is not ultimately whether the option is general or specific but whether denying access to it seriously impairs access to 'the most important components of a good life'.

Suppose that we agree with Griffin that family ties are an important component of a good life for most people. How does this lead to *freedom* of association—where that is understood to include the option *not* to pursue family relationships? If having close ties to one's parents, siblings, and children is so valuable, and not having them so sad, why should there be an option to pursue family relationships or not as one sees fit? Perhaps it would make more sense to have a *duty* to pursue such relationships. Maybe morality and law should side with middle-aged parents when they urge their unmarried adult children to find a nice partner and produce or adopt some grandchildren. More abstractly, if liberties are bilateral (freedom to do O/not-O) then it is hard to explain the value of the liberty solely in terms of the value of doing O. What about the value of not O-ing?

Perhaps a more indirect approach can resolve this puzzle. It is often the case that the good of O-ing is best realized when people who want (or think they have a reason) to do O at a certain time are permitted to do O, and people who don't want (or think they have no reason) to do O at a certain time are permitted not to. The road to family relationships has an exit ramp for at least two reasons. One is that people need to decide for themselves how valuable relationships with their parents, siblings, and actual or possible spouses and children are likely to be at a particular time. Perhaps one has little taste for family relationships, one's family is in constant conflict and turmoil, or one does not much like children. That may be sad, but it isn't uncommon. Free association as an option allows one to act on that assessment—and to revise it if one's values, opportunities, or circumstances change. The second reason why association is an option rather than a duty is that there are other dimensions of a good life that may reasonably seem more promising to some people, all things considered, than family ties. A person who is extremely talented in science and who does not desire marriage and children may decide to devote herself substantially to an almost monastic pursuit of science because that is the valuable way of living most promising to her given her interests and talents.

If the justification of rights to liberties depends, as Griffin suggests, on judgements about the most important components of a good life for human beings it is reasonable to worry that these judgements will carry a large subjective component. I may believe that a good life for human beings must include access to the visual arts, but many reasonable people care little for them. Griffin rightly believes that plausible views of human nature and society help reduce subjectivity, but one wonders if they can eliminate most of it. A supplemental approach, towards which Griffin seems friendly, is found in David Braybrooke's *Meeting Needs* (Braybrooke 1987: 31). In an endnote Griffin mentions favourably Braybrooke's idea of defining needs with reference to 'basic social roles namely the roles of parent, householder, worker, and citizen' (293). If almost all adults today must play these roles in one way or another, and if there are activities that are central to understanding and exercising these roles, those activities would have strong claims to be among the liberties protected by human rights. We might still disagree, of course, about which roles should be included. For example, I would prefer to change 'parent' in Braybrooke's list to the broader role of social being. I'd also

want to add something about the role of inquirer and believer that would yield freedoms to try to make sense of our world and the place of humans in it. Perhaps freedoms in the areas of art and music could be brought under this, or given a separate place by introducing the role of aesthetic being. Considerable subjectivity will reappear, I fear, in our conceptions of standard roles.

Let's now turn to another of Griffin's examples, freedom of residence. He rejects this liberty as a human right. Griffin's argument for the proposition that freedom of residence is not really a human right is based on the assertion that 'One's personhood [that is, one's normative agency] would not be threatened if one were required to live in a particular place, so long as the basic amenities were provided: a decent education, adequate material provision, access to art, and so on' (195). As an example he mentions being required to reside in the interior of a country rather than being free to live on the coast.

Feinberg's notion of fecundity (or Raz's related notion of pervasiveness) is helpful in thinking about freedom of residence, but Griffin does not mention it (Feinberg 1984: 208; Raz 1987: 374, 409–411). Feinberg explains fecundity as follows:

> Options that lead to many further options may be called 'fecund'; those that are relatively unfecund can be called 'limited.' The closing of fecund options, then, is more restrictive of liberty, other things being equal, than the closing of limited options, and the more fecund the option closed, the more harm is done to the general interest in liberty.

Liberties with the highest levels of fecundity are indispensable or almost so. Block them and you will block many other liberties as well. The idea of fecundity is not without problems since it is extremely difficult to count options (on this see Feinberg 1984: 208). To make counting possible one will have to stay at the same level of generality since movement, for example, turns into an indefinitely large number of possible actions of arriving as soon as one specifies all of the places to which one might move. Still, we are able to discern that denial of the liberty to pace the floor of one's bedroom at night would not block many other options, denial of freedom to engage in recreational travel would block quite a few, and denial of freedom of movement generally would block a great many. Fecundity interacts with Griffin's idea of access to the most important components of a worthwhile life. Blocking highly

fecund options is likely to impede seriously access to these components and much else. Basic liberties such as communication, association, and movement have enormous fecundity since substantially blocking them greatly limits other options.

The option to change or maintain one's place of residence has a fairly high level of fecundity. Without this liberty people may not be able to move to where their loved ones have long resided. A young person who lacks the freedom to change his place of residence may not be able to move to a university town to pursue education or to take up occupations available only in certain areas (oil rig diver, say). Griffin himself discusses the case of a young person leaving a conservative religious community to go to university. The rejection of freedom of residence seems inconsistent with his statement that 'The elders of the isolated Christian fundamentalist community that I imagined above can allow the child who wants to become a philosopher to move to the larger society. Otherwise they would violate the child's liberty' (163).

Because of its relatively high level of fecundity the right to freedom to change one's residence is important enough to normative agency to be a matter of human rights. Perhaps, though, it is not among the human rights with highest priority, particularly in light of the ill effects of high levels of internal migration such as the growth of shantytowns and the weakening of social and family bonds. Griffin endorses the right to asylum in another country '*if exile is necessary to protect our lives or our status as agents*' (193, my italics). Changing one's residence without leaving one's country is also sometimes indispensable to saving one's life or protecting one's autonomy (as when people flee a famine-ravaged area of the country to move to one where food is available) so it seems that Griffin should at least endorse freedom of residence in the qualified way he endorses the right to asylum.

Liberty and security Within Griffin's theory the pursuit of enjoyment and the avoidance of pain play no role in the justification of human rights. Recall that normative agency, the ultimate ground of human rights, is a 'somewhat austere state', not 'a good or happy or perfected or flourishing human life' (34).

In this section I question whether this austere ground can justify security rights that are sufficiently broad. I focus on security rights that are liberties such as the right to self-defence.

I noted earlier that Griffin does not make security one of his abstract human rights, even though he recognizes claims to provision of security. Under 'rights to certain necessary conditions of agency' he mentions the right to life, to security of person, and 'a right not to be tortured' (193; see also 33, 42–43, and 53). Some security rights are rights to liberties, to engage in actions that promote the security of oneself and others. Self-defence is one such liberty that Griffin recognizes; he says that it is derived from the right to life (63). This is a powerful liberty because it permits one to use normally forbidden violent means to fight off attackers. Defence of innocent others is also permitted. Beyond this, it seems plausible that there are moral liberty rights to flee attackers (part of freedom of movement) and to take precautions against crime by enclosing oneself in a locked room or building.

If human rights to liberties to protect one's security are all and only derived from the requirements of normative agency I believe they will be excessively narrow. Lots of crimes that one may justifiably try to resist or avoid do not threaten one's autonomy, liberty, or minimum material provision. A thief could steal one's wedding ring and a bully could punch one in the stomach without posing any threat to one's life or autonomy. One's agency will still be intact and one will be just as able as before to pursue a worthwhile life. Liberties to resist a petty thief or run away from a bully fall under the human right to security, but they do not seem to derive from normative agency. Perhaps avoiding unhappiness and pain play a larger role in justifying universal moral rights to liberties than Griffin's view can recognize.

The justificatory role of fairness and the right to democracy Griffin rejects fairness as a full ground of human rights and this leads him to oppose the idea, rooted in the Universal Declaration, that human rights include liberties of political participation and a right to democratic institutions. As we have seen, Griffin believes that linking every human right to normative agency (plus practicalities) yields an adequate list of human rights while marking off human rights from other moral considerations. His *weak pluralism*—as I shall call it—allows that practicalities and other values such as fairness may play a role in working out the scope and implementation of human rights to liberties (43–44, 249). But normative agency is in the driver's seat. Every human right must be linked to it and have its content largely determined by it. Setting practicalities aside, a more *strongly pluralistic* view would see two or more

important values as co-pilots (to change the metaphor slightly). Most strong pluralists would allow that normative agency is one of the values supporting human rights while insisting that there are others.

Griffin explicitly allows that a fairness norm plays a role in shaping the universality and equality of human rights: 'I acknowledge that I shall sometimes later make appeal to equality, fairness, and justice in arguing for my conclusions about human rights' (43). For example, he says that if men's rights are respected but women's rights are not, this is unfair (43, 249). He denies, however, that this commits him to strong pluralism on the grounds that fairness only plays a role in 'working out the implications of human rights' (43) and that some dimensions of fairness are 'internal' to human rights. These two considerations are supposed to block the charge that he is committed to strong pluralism.

I believe that it is a serious error to claim that considerations of fairness or equality only play a role in working out the implications of human rights. A major part of any justificatory theory for human rights must be devoted to their distributive dimension. This dimension includes the ideas that they are rights that one simply has as a human person, that they are universal or near-universal among humans, and that they are not easily lost by bad behaviour. A normative conception of fairness or equality is needed to do this work. The (arguably) true empirical claim that almost all humans have some capacity for normative agency will not do it by itself. There are large variations in how autonomous people are (ranging from barely to enormously) and that could yield reasons to give fewer rights—and particularly fewer liberty rights—to the less autonomous (as we already do with children and the mentally ill).

Griffin emphasizes that some areas in which unfairness can be displayed have nothing to do with human rights. After acknowledging that considerations of fairness make regular appearances in human rights discourse and in his account of human rights, he says that 'My point is that the domains of human rights and fairness overlap but are not congruent' (41). I cannot see how this response helps. Suppose that there are forms of symmetry in mathematics in addition to the ones found in music. This tells us nothing positively or negatively about how important symmetry is to music. Further, this reason for denying the importance of fairness to human rights would apply to normative agency as well. The value of normative agency has many applications that are

outside the realm of human rights. This value might, for example, lead us to choose children's activities and games so as to develop early on skills in deliberating, planning, and choosing, but this is not a matter of human rights. By parity of reasoning this would require Griffin to say the value of normative agency overlaps but is not congruent with human rights.

Griffin's other way of arguing that his appeals to fairness and equality do not commit him to strong pluralism is to say that these considerations are 'internal' to human rights. In an endnote Griffin gives an indication of what he means by 'internal' when he says that 'the only equality that human rights need is one that nearly all of us have—viz. being above the threshold' (287):

> [W]hat we regard as giving dignity to human life . . . is our capacity to choose and to pursue our conception of a worthwhile life . . . [T]he vast majority of adult mankind are capable of reaching (a factual claim) this valuable state (an evaluative claim) . . . [A]nyone who rises any degree above the threshold, is equally inside the class of agents, because everyone in the class thereby possesses the status to which we attach high value. It is true that, above the threshold, certain differences in degree persist . . . But none of these continuing differences in degree prevent there being a status entered just by passing the threshold, and a status that does not come in degrees. (45)

I do not deny that we can define a threshold of autonomy and agency such that most adult humans are equal in having the status of being above this threshold. And it is true that the human rights tradition has emphasized this equal status. But the assertion that it is exclusively being above this line, and not one's current comparative level of autonomy or agency, that matters to human rights is a normative claim, not a factual or conceptual one. We could perfectly well base only a few human rights (such as the right to life and to freedom from torture) on the equal status and make all the others proportional to one's individual level of autonomy or agency. We do this with children's rights to liberties. Toddlers are heavily controlled by their parents, but 14-year-olds are entitled to some circumscribed liberties that are appropriate to their level of maturity. There are, of course, arguments to be made against a 'proportionalist' scheme of human rights (and I would be among those loudly making them), but those arguments are likely to rely in part on some conception of fairness or equality. Explaining and defending the distributive dimensions of human rights is a central and difficult task, not a marginal or easy one. And views that ground human rights in the single value of

normative agency (plus practicalities) are likely to have a hard time with it.

Beyond this, the moral value of fairness may also provide the primary justification for the substance (and not just the distributive dimension) of some moral human rights. A possible example is the right to equality before the law.

Does Griffin's rejection of fairness as a ground of human rights lead him to unnecessarily reject a right to democratic institutions? If Griffin had taken seriously fairness or equality as one of the basic grounds of human rights he would have been friendlier to equality rights such as equal citizenship, equality before the law, and nondiscrimination. He also would have been less critical of rights of political participation and to democratic institutions.

Rights of political participation are an important family of legal human rights. They include rights to (1) petition government; (2) access the courts; (3) assemble and protest peacefully; (4) communicate about politics; (5) form, join, and quit political parties; (6) contribute time and resources to political activities and campaigns; (7) run for public office by seeking appointment or competing in an election (when there is one); and (8) vote in national and local elections (should they occur). Each of these is literally a liberty. The right to democracy is also part of this family, but it involves more than just allowing and protecting these liberties. It requires governments to use periodic elections to choose political leaders, legislators, and other high officials and thereby solve problems of political succession and promote accountability. Running elections is providing the public a service, namely an organized and recurring platform for political participation in which liberties of political participation can be put to use. One reason this service is so valuable is that it makes the political liberties more effective and meaningful.

Griffin contrasts human rights, which are based in normative agency, with democracy, which he takes to be substantially based in fairness (249). Accordingly, excluding fairness from a substantial role in justifying human rights also makes it harder to justify democracy and equal voting rights. '[T]he form of fairness relevant to democracy, a fair say, cannot be derived from the various forms of fairness that are encompassed by human rights' (250).

Griffin's argument here goes something like this. First he tries to show that the best justification for democracy is found in fairness (the idea of 'a

fair say in a political decision'), not in liberty or autonomy (249). Second, he asserts that some types of fairness are internal to human rights, but this 'fair say' type of fairness is not. Griffin says that 'the form of fairness relevant to democracy cannot be derived from the various forms of fairness that are encompassed by human rights' (250). From these two premises Griffin concludes that the best case for a democratic institution is not an argument of the sort that can establish human rights. Further, he denies that there are adequate liberty-based arguments for democratic institutions. Finally, he reaches the conclusion that political democracy is not a requirement of human rights.

I have two critical points. First, if Griffin had accepted a stronger form of pluralism that includes a plausible principle of fairness or equality then a broader range of fairness considerations—including ones about having a fair say in political decisions in one's country—would be available for justifying rights to political participation and democratic institutions (more of them would be 'internal' to the justificatory structure for human rights). Second, I think that Griffin fails to consider all of the plausible liberty-based justifications for human rights to political participation and democratic institutions. For example, countries that allow political participation and effectively use democratic institutions along with the protections for minorities provided by equality rights (such as equal citizenship and nondiscrimination) have important advantages in protecting the full range of human liberties for their populations. Democracy and political participation, along with the rule of law and due process rights, help make a system of liberty secure and stable. So even if Griffin refuses to accept strong pluralism he might still be able to reach conclusions more friendly to rights to political participation.

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Replies

James Griffin

1. Neither possible nor necessary
   (Wellman, Tasioulas, Reidy).
2. The distinction between rights and interests
   (Tasioulas, Reidy)
3. Equality
   (Buchanan)
4. Pluralism of values and two concepts of ethics
   (Cruft, Crisp)
5. My fatal dilemma
   (Tasioulas, Reidy, Cruft, Buchanan)
6. Needs as the ground of human rights
   (Miller)
7. Consequentialism
   (Hooker)
8. Liberty
   (Nickel)

There are so many meaty matters in these papers that I cannot discuss them all. I can, however, express my gratitude to the authors and attend, as well as I can, to their most important points.

We have all sometimes misunderstood authors we have read, even read carefully. I certainly have, and so have my critics here. My making no objection to a critic's interpretation of my book does not mean that I have none.

An author's reply to critics is generally a dreary literary genre. Philosophy contains the best questions there are. It would be good for us to return to the authorial conventions of two centuries, and more, ago: little or no use of persons' names. It is hard, though, to follow that admirable injunction when replying to one's critics, but I shall, as much as I can, direct my attention to good philosophical questions.

1. Neither possible nor necessary (Wellman, Tasioulas, Reidy)

Carl Wellman's initial aspiration was to begin his study of rights by developing a *general* theory of value, then developing a theory of rights *in general*; developing next theories of *legal* rights and *moral* rights (taking legal rights as his paradigm because there are more uncontested cases of legal rights than of moral rights); and finally formulating a theory of moral *human* rights. This is a huge ambition, considering that we do not yet have any of these topics in a satisfactory state.

Wellman accurately describes my approach like this. Griffin, he says, goes directly to an account of moral human rights and concentrates on how the word 'human' is to be understood there. The interpretation that Griffin proposes is that we should take the word 'human' to mark an especially valuable state, namely, our status as normative agents.

However, two points in Wellman's interpretation of my views need correction. First, I do not believe that the background theory of value for rights is utilitarian. To my mind it is neither utilitarian nor consequentialist. It is true that I think that it is some kind of teleology, and utilitarianism and consequentialism are also forms of teleology. I think that moral norms rest ultimately, in some possibly quite indirect or qualified way, on the values of a good life, but not in the direct way of utilitarianism and consequentialism. They hold that we are to promote those values, as reason demands—that is, by maximizing or satisficing or possibly some other form of promotion that rationality might be thought to require. I think, in contrast, that the route from the values of a good life to moral norms is usually much more complicated—for example, it involves much more than a combination of consequential values and highly abstract requirements of rationality.

The second correction is this. Griffin thinks, Wellman says, that the essential function of any moral right is to protect some value. I do not.

For instance, the right arising from a promise—a moral but not a human right—need not in any direct way protect some value of a good life. It is true that there is a human good an ample distance behind the whole institution of promising, indeed of ethics generally: namely, to make human life go better than it otherwise would. But the *function* of my right against you resulting from your promise is not to protect *that* value. Its function is, rather, to give me a specific power over your future action in virtue of your having given me an especially binding form of undertaking.

How did the notion of 'a right' in fact appear in ethical discourse? When the Glossators in Bologna in the twelfth or thirteenth century first used the noun 'right' in our modern sense, it was, early on, seen as a *natural* right and derived from an idea predominant in Christian theology, namely, natural law. As we know, the adjective 'natural' in the term 'natural right' eventually gave way to the adjective 'human', partly because Grotius and Pufendorf, though committed Christians, argued that understanding the idea of a 'right' did not require the idea of God but was accessible to a purely secular reason. The Glossators did not first have the notion of the genus 'right' and then introduce a differentia to produce the species 'natural right'. 'Natural right' was the class they started with. What is faulty with the meaning of the term 'natural right', as they developed it? It is true that there were several vaguenesses in it: natural laws, which were the ground of natural rights, were often hard to identify, and there was even greater indeterminacy in the sense of the successor term 'human right', after the seventeenth and eighteenth centuries had largely secularized it. But if one were able to make the sense of the term 'human right' satisfactorily determinate ('satisfactorily' not to be confused with 'fully'), then what more do we need? Nothing, I am inclined to say. So why not be content with the piecemeal way I have followed?

Is Wellman's approach too ambitious to be possible? It would have us start with a theory of value in general and then go on to a theory of rights simpliciter. The few explanations of the term 'rights' simpliciter that philosophers have so far produced seem to me failures. The one I have thought most about, and thought most of, is Joseph Raz's and I have explained in my book why I think it fails.[1] Besides that, I am

[1] *On Human Rights* (hereafter *OHR*), Oxford: Oxford University Press, 2008, pp. 54–56.

persuaded by Wittgenstein that many terms resist verbal definition (his example is the noun 'game').[2] Is the noun 'right' any more promising a subject for verbal definition than the noun 'game'? A definition and an explanation are different things (Raz, for instance, was not attempting a verbal *definition*), but they are still close enough to one another for Wittgenstein's scepticism to be a worry about certain attempts at a quite full verbal explanation. One can, of course, call in the lexicographers to write a full dictionary entry for the noun 'right', but a dictionary entry will nearly always leave one a long way short of the meaning of 'rights' simpliciter, as Wellman intends it.

In a way the fact that we seem not to have a satisfactory account of 'right' simpliciter does not matter. One can arrive at a tolerably determinate account of the term 'human right' in a different way. I suspect—I cannot claim more than this—that Wellman's highly ambitious method of explaining 'human rights' is, in the end, not possible. But it is also not necessary.

Is the same true of John Tasioulas' and David Reidy's method? They do not start quite at Wellman's very high level of abstraction but they start at a high level compared to the Glossators of Bologna. They start with the notion of 'rights' simpliciter and against that background build up a picture of 'moral rights'. Moral rights, they say, are sources of obligation. These obligations are not to be seen merely as reasons to do or to help. They are, rather, categorical (i.e. apply to an agent regardless of the agent's motivation), exclusionary, and justificatory of certain moral responses to failures to discharge. Second, moral rights have an individualistic grounding. And, third, they have a directed character; that is they are held by an identifiable individual (in contrast to imperfect duties). We can characterize moral rights, they think, by characterizing the nature of their correlative obligations.

However, when we touch on various of the components of this explanation, they start to crumble. Their (and Raz's) account of 'rights' simpliciter, I have argued in my book,[3] fails. Moral rights are, Tasioulas says, categorical and exclusionary. But 'categorical obligations' cover a great deal of morality, far more than just moral rights. 'Exclusionary' is

[2] Ludwig Wittgenstein, *Philosophical Investigations*, Oxford: Blackwell, 1953, sects 65–83.

[3] See n. 1.

an incompletely developed idea; we can see how it works in the case of promises, but once beyond that single defining example it becomes unclear how, or even whether, the idea applies at all. The notions of 'appropriateness of moral response to failures to discharge' and 'directed character' also apply to far more than just moral rights. And this is true of these properties not just individually but also collectively. Tasioulas' account of moral rights, which Reidy seems substantially to share, does not put us even within shouting distance of the concept we are after.

Tasioulas admits that his account of moral rights is 'rudimentary and incomplete'. Fair enough; he is in the midst now of developing his thoughts. But I am pessimistic about the prospects of the quite abstract theory that he is aspiring to. We have the notion of a 'moral human right'. To think that it is made up of the notion of a 'right' simpliciter plus the notions of 'human' and 'moral' is to have a most implausible idea of how language works. Do all things correctly called 'rights' have a common nature? Lexicographers have supplied us with near-exhaustive accounts of the uses of the noun 'right', but there is no reason to think that in the lexicographer's report we shall find something that can be called 'the common nature'. Tasioulas accuses me of 'taking rights out of human rights'. But one could not take them *out* unless they were originally *in*. I doubt that rights simpliciter, in the sense that Tasioulas and Reidy use the term, were ever in.

I doubt too that the sort of account of human rights that Tasioulas aims to give is possible. As before in the case of Wellman, I cannot put my conclusion any stronger than that. But Tasioulas' sort of account is also not necessary. The thirteenth, fourteenth, seventeenth, eighteenth, and twentieth centuries had all the potential for a satisfactorily determinate notion of a moral human right without resort to these highly abstract and dubious theories.

2. The distinction between rights and interest (Tasioulas, Reidy)

According to Tasioulas, Griffin has 'a tendency to elide the distinction between personhood interests and human rights' or, worse still, 'to *identify* human rights with (a certain class of) prudential values' (my italics). According to Reidy, Griffin 'aims to account for human rights as

rights totally in terms of the good'. How have they managed to so misunderstand me? It is hard to say: they give no argument, nor even an example. They sink to lofty assertion.

I have, in fact, repeatedly spelled out the difference between norms and interests.[4] Human rights, I say, may be seen as *protections* of certain key human interests. They are protections in virtue of imposing obligations on others to do or to forbear. Human interests may sometimes give rise to norms, but they do not themselves have normative force. By itself, a prudential value issues no command and prescribes no action. It is thus impossible to violate or disobey a prudential value. Human rights, of course, have normative force. The move from human interests to obligations is usually complex. How might normativity appear? A familiar possibility is that one might sometimes move from the recognition of a personal prudential value to a prudential value for persons generally, though not necessarily universally, to a form of equal respect for persons. This would, I think, often be our actual psychological movement in developing our moral norms—often but not always. I describe this and other forms of the transition in my book.[5]

It is true that when we weigh one human right against another, we sometimes weigh the interests at stake. For example, would it be justified to round up expected terrorists, which would no doubt mean detaining some innocent persons along with actually dangerous ones, to prevent a terrorist's killing thousands of innocent people? What largely we should want to do in order to decide is to weigh the innocent detainees' losing their liberty for, say, six months, against the thousands losing their lives. Other cases would be still more complex. May a surgeon kill one patient, if he can do so undetected, to save five others? The patient killed would have a right to life, and part of the normative force of the right, I should say, is a prohibition of deliberately killing the innocent, unless the case fits one of the rule's established exceptions. But the surgeon's behaviour would not fit any established exception. The surgeon's case cannot be

[4] 'On the Winding Road from Good to Right', in R. Frey and C. Morris (eds), *Value, Welfare, and Morality*, Cambridge: Cambridge University Press, 1993; *Well-Being*, Oxford: Oxford University Press, 1986, ch. IV sect. 4; 'How Morality Fits into Prudence', ch. VIII; 'From Prudence to Morality'; *Value Judgement*, Oxford: Oxford University Press, 1996, ch. V sect. 2; 'The Line Between Prudence and Morality', ch. VII sect. 1, 'Where Do Moral Norms Come From'.

[5] *OHR*, ch. 6.

assessed simply by weighing human interests: say, one life against five. It cannot because there is a prohibition at work, one of a kind that, given what human moral life must be like, we have just to respect. I say all of this clearly in my book.[6]

3. Equality (Buchanan)

Buchanan thinks that I cannot account for either the idea of equal status or the human rights against discrimination grounded in it. Reidy regrets that I reject 'the pluralist approach to the justification of human rights that proceed from multiple values'—among others, equality. Tasioulas is disappointed by my 'failure to explore . . . the generative powers of the principle' of equal respect. I wish I could explore them, but I find it very hard to see what the principle of equal respect is. We will not get much out of the ideas of equal status, or equal respect, unless we can put more clarity into them.

During the late Middle Ages and Early Modern period the idea of equality became for many the essence of ethics; seeing people equally, in a sense of 'equal' being hard to pin down, became the moral point of view itself.

Equality of *civil rights*, or of *human rights*, or of *well-being*, or of *opportunity*, or of *income*, or of *resources* are all intelligible ideas, but none of them is abstract enough to be plausible as the foundational principle of equality. Take, for instance, equality of human rights. This could not be the foundational principle, if, as I think, human rights cover part of the moral domain but not the whole of it. They cover what is needed to ensure that normal human beings can function as normative agents. When it comes to resources, normative agency can be ensured at a fairly low level, considerably lower than the level at which most of us in the developed world now live. However, most of us take the foundational principle of equality as also requiring certain equalities above that minimum. A foundational principle of equality is one thing, a principle of human rights quite another.

When trying to express the foundational principle of equality, writers reach for abstract expressions such as equality of *status* or of *respect* or of

[6] *OHR*, ch. 6 esp. sect. 4.

consideration or of *treatment*. But there are problems here too. These ideas are commonly thought to require impartiality between people. But it is almost universally accepted that a flourishing life consists of such things as relations of love and friendship, commitments to worthwhile causes, and so on, and that many of these typically require deep partiality. If we *homo sapiens* cannot do a certain thing, in the sense of 'can' that is meant in the principle that 'ought' implies 'can', whatever that sense turns out to be, then it is not the case that we ought to do it. Such actions do not even enter the domain of moral obligation. I have discussed this elsewhere.[7] Is the foundational principle of equality a principle of equal *treatment*? No, because I do not have to treat strangers equally to my own children. Is it a principle of equal *concern*? No, because concern has to do with giving attention, caring, and even motivation and action to help, and I do not have to be as much concerned in this way with strangers as with my own children. Is it that we all *matter* equally? If this is merely equal concern, as just explained, then again no.

None the less, there is also a sense in which we do indeed all matter equally. Although I favour my children over yours, I do not think that my children are more valuable than yours. We are all born equal; that is, all normal infant *homo sapiens* are potential normative agents. We are equal in that crucial dignity. What implications does this undeniable equal status have for ethics? Most of us would say that it requires at least respect for a person's normative agency. For example, it prohibits slavery, arbitrary imprisonment, brainwashing, torture, and many other forms of degrading treatment or treatment as an inferior. But the norm, 'Do not deny a person normative agency', though immensely important, has only limited consequences for ethics. It constitutes no challenge to my partiality to those to whom I stand in certain close relations. It does not require, for instance, equality of welfare or resources or life prospects. It requires equal human rights, but that is not the foundational equality we are after. The partiality that lies outside ethics includes partiality to one's children. But this does not allow the enormous partiality that parents in the developed world now commonly lavish on them. One can have very much more concern for the poverty-stricken children of the world than most of us now have without at all sacrificing one's

[7] '"Ought" Implies "Can"', Lindley Lecture, Department of Philosophy, University of Kansas, 2010.

valuable relations with one's own children. So we do not escape the question: what is a better balance between our concern for our own children and for strangers than the one we have so far struck?

I am not suggesting that there are no principles of equality. There is a miscellany of them, each of narrower scope than the hypothesized foundational principle that we have just been trying, but failed, to formulate.

This is T. M. Scanlon's conclusion.[8] He decides that the elimination of inequalities may be morally required for five reasons: (first) in order to 'relieve suffering or severe deprivation' (to narrow or eliminate 'the gap between rich and poor . . . [as] a way of reducing the suffering of some without causing others to suffer a similar fate'); (second) to 'prevent stigmatizing differences in status' (to narrow or eliminate the gap in order to produce a society in which all regard one another as equals); (third) to 'avoid unacceptable forms of power or domination' (to prevent an unacceptable degree of control over the lives of others); (fourth) to 'preserve the equality of starting places which is required by procedural fairness'; and (fifth) 'procedural fairness sometimes supports a case for equality of outcomes'.

One can see the case for considering these five, anyway, to be principles of equality. Scanlon thinks that there is, in addition, a fundamental principle of equality:

> A . . . formal notion of equal consideration, as stated for example in the principle that comparable claims of each person deserve equal respect and should be given equal weight. This is an important principle. Its general acceptance represents an important moral advance, and it provides a fruitful – even essential – starting point for moral argument.

This formal notion of equality is like what Isaiah Berlin had in mind when he proposed that the 'irreducible minimum of the ideal of equality' is captured by the formula 'every man to count for one and no one to count for more than one'—a formula, he says, not uniquely connected with any one philosophical system.[9] But it is connected historically, in any case, with one particular philosophical system, utilitarianism, where

[8] T. M. Scanlon, 'The Diversity of Objections to Inequality', Lindley Lecture, 1996, repr. in his *The Difficulty of Tolerance*, Cambridge: Cambridge University Press, 2003.

[9] Isaiah Berlin, 'Equality', in his *Concepts and Categories*, London: Hogarth Press; paperback; Oxford: Oxford University Press, p. 81.

it is conjoined to a *summum bonum*—pleasure, happiness, utility, well-being. 'Maximize well-being, counting each person's well-being equally' is a relatively clear instruction. But the formal principle alone without utilitarian or other substantive evaluative addition—for example, the meagre instructions 'count persons equally' or 'show equal respect for persons'—is close to empty.

Perhaps it does not matter that they are; perhaps we have two foundational principles, one formal and the other substantive, and when conjoined each guides filling out the sense of the other. But is that so?

There is a challenge to the very existence of this formal principle of equality that comes from the principle that 'ought' implies 'can'. The formal principle is inconsistent with the forms of partiality that fall outside ethics; there is no moral requirement, as we saw earlier, to treat all persons equally. If we try to avoid this inconsistency by raising the abstraction of the value occupying the variable place in the phrase 'equality of x', the threat changes to emptiness: for example, the emptiness of the expressions 'equality of respect' or 'equality of consideration'. What behaviour constitutes treating someone with *equal respect* or as having *equal status*? No one knows.

One reply to my question might be this. Let us accept that we are not required to treat all persons equally (for example, our own children and complete strangers). I say that we arrive at this conclusion for reasons that lie outside of morality, namely, in empirical considerations about the extent of human motivational capacities.[10] But most philosophers who would agree with my conclusion would not agree with my premises. The true justification of these inequalities, they say, comes entirely from within an egalitarian ethics: there may be reasons of equality for allowing certain inequalities. The world is better off, all things considered, they say, if parents are allowed to be largely guided by their natural attachments to their own children. But how could they know that? There are many different degrees of bias that parents might show. There are many different degrees and kinds of improvement that First World parents might make in the lives of the millions of starving children in the Third World. A parent can reliably enough know that lavishing less on one's own children and instead increasing one's donations to Oxfam can

[10] See n. 7.

produce great benefits at relatively modest cost. But the calculations needed for us to conclude that the world is better off, all things considered, if parents are allowed to follow their natural attachments to their children are beyond us, at least to a degree of probability on which we would be willing to act. Not only does human motivation have its limits; human understanding does too.

The widespread view that we are not required to treat all persons equally cannot, then, be justified within a fundamentally egalitarian ethics. It is based, rather, on the empirical observation of the limits of certain human capacities and the principle that 'ought' implies 'can'. That principle needs much more said about it, far too much for me to be able to say here. I have said what I can about it in a recent paper.[11]

Nowadays much of our concern about promoting equality is expressed in terms of prohibiting discrimination. Some groups of people are treated as inferior: a certain race or gender or class or caste. They are in fact equal in morally relevant ways, we believe, so they should be treated equally. However, just as not all inequality is morally objectionable, not all discrimination is either. A critic with fine discrimination is exactly what we want. Even discrimination that harms its object is not therefore objectionable, as in the case of an author whose reputation is much reduced by a critic with fine discrimination. Discrimination can even be damaging to a person's life prospects without being morally objectionable, as when a top university turns one down because one is of inferior ability. Finally, treating people as superior—awards and honours—can be entirely welcome discrimination.

What forms of discrimination, then, are morally objectionable? Suppose men have the vote but not women. Treating men and women differently is not in itself objectionable. But having a vote—that is, having a say in the laws to which one will be subject—is a human right. Human rights are rights that we have simply in virtue of being human, which in this morally relevant sense women are. Denying them the vote is objectionable because it violates their autonomy and denies them this civic equality. Again, suppose that two top executives of a multi-national firm, equally competent and with equal responsibilities, both paid very well indeed, are paid different amounts only because one of them is the boss's

[11] See n. 7.

child. There is no violation of a right here, I should say, and at this high level of wealth we are unlikely to get greatly upset by this particular case of inequality. But there may still be something wrong about it—namely, unfairness.

Suppose a society does not allow same-sex couples to marry. This seems to me a major violation of their liberty.[12] Liberty, as I think we should use the term here, is a matter of one's not being stopped from pursuing the life that seems to one worthwhile. Being able to form a stable, socially recognized relation to a person one loves, within which one may also choose to raise children, is at the heart of what, for many, is the worthwhile life. Preventing same-sex couples from living this form of life is what makes it an especially gross violation of their liberty. This is by no means the only objection to it. It may also be demeaning to the same-sex couples involved.

Another objection is failure of rationality. Different-sex couples have a human right to liberty because of their status as normative agents. But same-sex couples are normative agents too. To treat them differently in this case is not only unfair but also irrational.

These successful objections to discrimination are based on unfairness, illiberality, insult, and irrationality. Are they also based on inequality? Suppose a society made housing for its members more equal as a way of reducing the harmfully low esteem in which the poor in that society are held. Equality is relevant to morality when, for example, it has this sort of causal connection to something valenced itself: for instance, harm to the poor. Equality, however, is not in itself a substantive value; it is, rather, a state of the world and in itself neither good nor bad. It becomes relevant to morality only by having the right sort of connection to something else that is substantively valuable. For example, human beings are characteristically normative agents; it is that status—normative agency—that is a substantive value. It constitutes, as the United Nations puts it, 'the inherent dignity of the human person', and this dignity-bestowing status must be protected.[13] We are all equally featherless bipeds, but that particular status carries no normative punch.

[12] *OHR*, ch. 9, esp. sect. 3.

[13] See the United Nations 'Universal Declaration of Human Rights' (1948), Preamble, and the two 'Protocols' (1966), Preambles.

The overall aim of my book is to make the sense of the term 'human rights' tolerably determinate. Terms certainly do not need *highly* determinate senses in order to be useful to thought. So why not get on with the highly indeterminate term 'human right' as it was before I tried to add greater determinacy? Of course, we should; we have no alternative. And think of how much good was accomplished during the twentieth century with the idea of 'human rights' despite its considerable indeterminacy of sense. But that a term can still be of some use in thought despite a certain degree of indeterminacy does not mean that it can provide the services that we need to have: for example, we need to know the existence conditions for a human right, and to have a satisfactory way of establishing its content, and to have a tolerably rational procedure for resolving conflicts of human rights. Look again at the putative universal principle 'equal respect for persons'. In the present state of the ethical term 'equality' how are we able to answer the most central questions about it? When indeterminacy is great, rationality itself is at stake. Is the foundational principle of equality empty?

The indeterminacy of the supposed foundational idea of 'equality' is far greater than that in the idea of 'human rights'. The indeterminacy of foundational 'equality' is so great that it has distorted the whole of ethics. It has led us to adopt, with none of the scepticism that it deserves, an undefendable egalitarian framework for ethics (e.g. consequentialism, Kant's ethics).

This is a sweeping conclusion that I have just announced; it needs much more justification, which I shall try to supply in a book I am writing now.

4. Pluralism of values and two concepts of ethics (Cruft, Crisp)

A potent and predictable criticism of my book is that human rights cannot be based on anything as slim as my notion of normative agency. Rowan Cruft complains that 'while Griffin is correct to ground human rights in normative agency, he conceives this too narrowly'. Roger Crisp complains that Griffin 'should be prepared to extend the ground of human rights beyond normative agency'. They are both friendly critics; they want to show how, without drastic revision, I can avoid many

counter-intuitive consequences, such as that infants, people in a persistent vegetative state, those deep in dementia, not being normative agents, do not have human rights. If babies do not have human rights, is it then all right to kill them?

Of course not. There are weighty prohibitions on deliberately killing the innocent. It is just that they are not all based on human rights. Human rights do not do all the heavy lifting in ethics.

My particular aim in making the term 'human right' tolerably determinate fixes how I am to approach the job. One major constraint on me is ethical. I want to clarify the idea of a human right that would appear in the most acceptable ethics that one can devise. So there are the constraints imposed by its having to fit into that demanding context. But the idea of human rights that I am interested in also appears in an ongoing public discourse used by a certain heterogeneous linguistic community, and that role generates certain practical constraints. There have been strong inflationary pressures on the term 'human rights' in the past, and they are still at work. My belief is that we have a better chance of improving the discourse of human rights if we stipulate that only human normative agents bear human rights—no exceptions: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on, though we have considerable moral obligations to all of them. For the discourse to be improved, the criteria for correct and incorrect use of the term must be fairly widely agreed. They would not have to be anything like universally agreed, but there would have to be fairly wide agreement among those central to the discourse: philosophers, international lawyers, and so forth. If a good number of the members of those groups come to agree on the criteria, the rest of the members would be likely in time to follow and the general public would themselves to some extent eventually fall in line.

That sequence of events is what we should need for an appreciable improvement in the discourse. What, then, should we need to set off that favourable sequence of events? The start would be the appearance of an evaluatively substantive account of human rights—some not too complicated, fairly sharp-edged normative intension for the term—which would commend itself to a growing number of those central to the discourse. There is no mechanism available that would be likely to lead us to agree to a very few, but not more, exceptions to the proposed new intension. Even if there were, the inflationary pressures are still with us

and are still very strong; there would soon be too many exceptions for the criteria of correct and incorrect use to remain sharp-edged enough to produce the needed practical improvement.

There are several feasible alternatives to the personhood account. For example, there is the personhood account expanded to include certain potential persons such as infants, there is the basic need account, there is a more pluralistic account than mine that includes other goods in addition to those of normative agency, and so on. Any of these competing accounts could be adopted, though, I am claiming, with less benefit. I may not simply insist that human rights are derived solely from normative agency; that belief would need justification. Although some of the alternative accounts (e.g. the need account) can be faulted, I believe, for not adequately explaining human rights, others of them (the account that includes certain potential persons or the more pluralist account) cannot be. The objection to them is largely practical: they do not give us the beneficial determinacy of sense we greatly need. That is why the sort of stipulation I am making is not arbitrary. It has to be justified.

My aim is, in part, a certain practical outcome: change in a public discourse. One practical constraint on my project is that my proposed more determinate sense for the term 'human right' has a fighting chance of being adopted by the members of the many groups who make up its central linguistic community. Another constraint is that the proposed more determinate sense has a reasonable chance of enduring, that any proposed more determinate sense not be so complicated that the criteria for correct and incorrect use would in time become muddled and confused and eventually slack and the greater determinacy of sense would thereby be undone. And that is not a far-fetched fear: the inflationary pressures on the term are all with us still. Call these, respectively, the constraints of *uptake* and of *durability*. I say all of this clearly in my book.[14] Not all who write about human rights share my project, so their work may well not be subject to these constraints. But very many writers do share my project, and they are then subject to them.

These practical constraints are an important part of my motivation for wanting a fairly tight and sharp-edged sense for the term 'human rights'

[14] *OHR*, ch. 4, sect. 6.

and for my preferring my less pluralist approach to Cruft's, Crisp's, Tasioulas', etc. considerably more pluralist ones. If they want to criticize me, they should criticize the constraints of uptake and endurance or the implications I draw from them. The alternative criteria for correct and incorrect use that my critics propose are, even in their present incomplete state, of a complexity and ethical contentiousness that makes them unlikely to meet these constraints. My critics may, of course, not share my aim; it is quite unclear what their aim is. It cannot be anything so simple as to find the truth about what human rights are. There is no one truth to find.

Moral philosophers have diverse aims. Most European moral philosophers in the eighteenth century, though not Kant, wanted to explain how human beings in fact arrive at their moral judgements. Their aim was an empirical explanation, a natural science, specifically a moral psychology. Kant, on the other hand, aimed at reducing our complex and heterogeneous moral thought to one *a priori* principle or to a small set of such principles. Moral philosophers today are generally neither naturalizers nor *apriorists*, but most of them are systematizers. Their aim is to establish an abstract ethical theory: consequentialism, Kant's ethics, virtue ethics, etc.

Other moral philosophers have a different aim, namely, the regulation of conduct: what people may or may not, must or must not, do. What I have been calling 'practicalities' have necessarily to be incorporated into their ethics—practicalities such as the limits of the human will and of human knowledge, the need for certain agreed policies in ethics, the need also to secure the uptake and endurance of moral norms, and so on.

Incorporating practicalities into ethics, as the second sort of moral philosophers do, undermines various generalizations about ethics. If ethics incorporates the limits of motivation, we must give up our assumption that all intentional human action is subject to moral regulation. If it incorporates the limits of knowledge, we must abandon the idea that all calculations of the consequences of our actions can be reliably enough done for the purposes of ethics. It seems that we cannot come up with a foundational principle of equality, so our prospects of creating a normative ethics by building upon such a foundation are dim. For a normative ethics to be highly systematic requires its reduction to a small set of principles of great scope—the kind of reduction that at first glance

a principle of equality holds out hope of providing, but at second glance looks as if it cannot.

I think, for reasons I gave earlier, that the plausibility of consequentialism is low: too many of its key calculations are simply beyond us. What of Kant's ethics? The fundamental formal principle of morality, Kant concludes, is universal—that is, formulable without reference to particular persons, places, etc. It is also *a priori*—that is, independent of empirical data. And, finally, it is necessary—that is, true in all possible worlds.

Thus Kant decisively excludes practicalities, as I am using the term, from the determinants of moral imperatives. He thereby leaves ethics, to my mind, seriously incomplete. Ethical thought often comes up with important but indeterminate norms—for example, 'Don't deliberately kill the innocent'. There clearly are exceptions to that rule, though they are hard indeed to formulate fully enough. Many societies have long struggled to formulate exceptions to them, for instance, for euthanasia. An obvious problem with allowing certain kinds of euthanasia is the threat of slippery slopes. To allow *any* euthanasia might encourage too much. It might often be possible for us to spell out a norm identifying the sorts of deliberate killings that would be wrong. But it is also likely that in many cases we shall not be able to do so. What should a society then do? A common form of thought, not always fully conscious, is for a society to be moved by the immense value of human life to become highly conservative in making exceptions. A society might decide to allow no exceptions to the rule against killing the innocent unless they are especially clearly formulable and especially strongly justified. Sometimes we might eventually satisfy these stringent requirements, as perhaps we have recently with some kinds of euthanasia. But perhaps in other cases we never shall. Should we not then carry on with the policy of conservatism? A policy like that is neither *a priori* nor *necessary*.

I just mentioned two kinds of moral philosophers: theorists and regulators. We must at least be regulators. Theorists usually leave out too much to be able to answer the question: How should one live? Ethics must incorporate its related practicalities: limits of the will, limits of knowledge, adoption of policies, uptake and endurance, and so on. Much of what moves me to these conclusions I have either set out elsewhere[15]

[15] See n. 7.

or hope to set out soon.[16] Still, what I say here helps me at least to answer my critics.

We must acquire existence conditions for human rights, be able to establish their content, know how to resolve their conflicts. How would Cruft and Crisp allow us to do so? Cruft says that we must use the idea of 'normative agent' in 'a broad sense that we can only fully understand by thinking further about what it is to make reason govern our will'. He makes the idea far too broad to enable us to solve the problems of indeterminacy. Crisp thinks my conception of 'normative agent' is too narrow: why do I not include infants as holders of human rights? I have now given my answer: uptake and endurance. Griffin, he says, is much closer to Kant and Mill than he thinks, and acknowledging that fact would gain Griffin support. However, my rejection of consequentialism and Kant's ethics would soon alienate the support. I think that the accounts of Tasioulas and Reidy will not solve those problems either. The best conception of ethics, I now believe, is unlike any that we are yet familiar with.

5. My fatal dilemma (Tasioulas, Reidy, Cruft, Buchanan)

One might interpret my key notion of 'personhood' austerely as consisting in the bare capacity for intentional action together with some degree of successful exercise. But if that is the interpretation one adopts, my critics plausibly say, even a slave's life can realize it. So that sense of personhood is too weak. Instead, one might understand 'personhood' as requiring a diverse array of genuinely valuable options along with 'enough liberty and material wherewithal to make one's choice effective'. But now indeterminacy threatens, my critics say, because no sufficiently determinate threshold has been specified. So that sense of personhood is too vague. So my key notion of personhood is either too weak or too vague.

This constitutes a dilemma only if these two interpretations are exhaustive. One of my critics, Tasioulas, refers to a criticism of me made

[16] In a book I am now writing, provisionally entitled *What Can Philosophy Contribute to Ethics?*

recently by Joseph Raz.[17] The threshold at which the values at stake can support a human right, Raz rightly observes, must be higher than the bare capacity for intentional action. For personhood, I want to say, one also generally needs basic education, some leisure, certain freedom to exchange ideas, freedom from certain interferences, and so on. But Raz thinks that, once I thus raise the threshold, I have no way to stop it at any particular point: again, the problem of vagueness. Raz says that the higher threshold I describe is the level at which one as an agent has 'a good chance . . . of achieving one's goals'.[18] And the more education, the more resources, the more freedoms that one has, the better one's chances of achieving one's goals. The conclusion is: I have not fixed any threshold at all.

But this grossly misunderstands me. My account of the threshold is neither of the ones that constitute Raz's supposed dilemma. Human rights, I propose, are rights to what allows one merely to act as a normative agent, not as a normative agent, as Raz would have it, with 'a good chance . . . of achieving one's goals'. I never use that phrase in describing the threshold and would not accept it. That phrase does indeed introduce considerable vagueness, but it is Raz's vagueness, not mine. Once above the threshold, remaining differences in material resources, in practical rationality, or in executive skill—all of which there undoubtedly would be—do not matter to one's possession of that status. Take the human right to basic education. Cannot an illiterate peasant with no education still count as an agent in the sense I mean? Surely. What the peasant would need is a sense of the major possibilities in life, enough leisure to assess them, and liberty and leisure to pursue the preferred life. One does not have to be literate to be able to do that, though general literacy would certainly greatly increase the number of people who could manage it. And more and more education—a bachelor's degree, a doctorate—has very little correlation with a good nose for what matters in life. A far more sensitive nose and a larger dose of *savoir faire*, on the other hand, would indeed tend to make one a yet more successful agent. But the threshold value that we attach to the status simply of being a normative agent does not require anything like being so fortunate. So we

[17] Joseph Raz, 'Human Rights without Foundations', in *The Philosophy of International Law*, Samantha Besson and John Tasioulas (eds), Oxford: Clarendon Press, 2010.
[18] Op. cit., p. 327.

can identify both states below normative agency (e.g. a life entirely consumed in a desperate struggle to keep body and soul together) and states above it (e.g. especially well endowed with practical wisdom and material resources). And in drawing the dividing line, a society should consider the general run of people. It must identify what is necessary to ensure that this general run of people will be above the threshold.

Is the threshold line sharp? Of course not. That is why it is not enough simply to object that the threshold I define is 'vague'. Most terms are vague, if only at the edges. The degree of vagueness is what is crucial. What matters here is whether the vagueness is so great that it cripples important thought. Will a society have to do work to make the threshold sharper? Yes. Will contingent matters such as the wealth of a society influence the placing of the line? They need not, but they well might. Have societies dealt with comparable threshold problems before? Often.

Why adopt personhood as the threshold? We have too few agreed criteria for determining when the term 'human right' is used correctly and when incorrectly for the discourse to be satisfactorily rational. When during the seventeenth and eighteenth centuries, the background notion of 'natural law' along with its context in Christian metaphysics was often dropped as inessential, nothing was put in its place. The term 'natural law' continued in fairly common use, but by then it usually meant no more than a moral principle independent of law, custom, or convention. It is not that there were no criteria for correct and incorrect use; there was still the idea of a right that we have simply in virtue of being human. And we do not need to have a fully determinate sense of the term, merely a sufficiently or tolerably determinate sense—a sense that will give us existence conditions for a 'human right', will supply grounds for deciding the content of particular 'human rights', and will indicate how in general to go about trying to resolve conflicts of human rights. In short, we need a sense determinate enough to allow us to make these quite basic rational moves with the term—moves that we are unable to make at present.

But the term 'human right' used where? I think that the most important use of the term is that in the ongoing public discourse of human rights that emerged from the tradition that I sketched. It is the term 'human rights' used now by philosophers, political theorists, international lawyers, jurisprudents, civil servants, politicians, and human rights activists. In any case, that is the use that I am concerned about in my book.

I spend a large part of the book, the whole of Part III, working out the consequences of applying my notion of normative agency to many central potential rights: life, health, autonomy, liberty, welfare, privacy, and democracy. I meant that exercise as a test of adequacy: does my idea of normative agency yield satisfactory outcomes in these central cases? I think that my idea of normative agency along with the incorporation of practicalities give us human rights with the needed determinacy of sense. It is regrettable that my critics show no interest in these tests which are, after all, tests of the supposed fatal dilemma they urge against me. Instead, they merely asseverate, which gets us nowhere.

6. Needs as the ground of human rights (Miller)

My strong hunch is that human needs are the wrong kind of thing to serve as the ground of human rights. Needs are certainly the ground of some of our weightiest obligations, and needs are part of the ground for some human rights. But it seems to me a category mistake to treat needs as their ground. The preamble of the Universal Declaration of Human Rights (1948) cites 'the inherent dignity . . . of all members of the human family' as 'the foundation of freedom, justice and peace in the world'. The preambles of the two International Covenants on Human Rights (1966) begin by 'recognising that these [i.e. human] rights derive from the inherent dignity of the human person'. Human dignity must be a high value inhering in human status, and it would be odd to think this high value could be that human beings are needy. That is on the wrong track. Needs are neither a *dignity* nor a feature *unique* to persons.

Recall the tradition out of which human rights emerged in the twelfth and thirteenth centuries. Human beings, it was accepted then, are unique. They alone in Creation are made in God's image (Genesis 1.27). God, we are assured, is not needy. William of Ockham (*ca.* 1285–1349), following a tradition going back to the early canonists, saw human rights as giving us dignity. Pico Della Mirandola, who studied canon law in Bologna in 1477, gave a highly influential account of the link between our freedom and the dignity of our human status; his influence survives until today. God fixed the nature of all other things, but left man alone free to determine his own nature. In this he is God-

like. This freedom constitutes, as it is put in the title of Pico's best-known work, 'the dignity of man'. I go into this history more fully in my book.[19] I cite it here because it is highly suggestive. I admit it is not conclusive.

Miller finds several off-putting features in my personhood approach, but none seem to me serious objections, or sometimes even objections. 'Griffin sees human rights as playing a central role within our *ethical reasoning*', while 'their main use' is in '*political argument*' (his italics). Yes: their main use is in political argument, not individual affairs; their political use is by far the larger. For Miller's and my purposes, nothing important follows from that. A second 'disagreement concerns whether human rights need to be justified cross-culturally'. Yes: of course they do. Human rights are meant to apply universally, and are fast being accepted outside Western cultures. The problem of the ethnocentricity of human rights is, I say, hugely exaggerated. Miller demurs: to avoid the suspicion outside the West that human rights 'are a Trojan horse whose purpose is to smuggle liberal values into societies whose political ethos is of a different kind . . . it would be better if we could ground human rights on features whose significance is universally recognized'. Yes: of course it would ease the dissemination of human rights if their ground were widely accepted. But ease of dissemination is only a bonus; it is no part of the ethical case for the need account.

Miller's major criticism is of what, according to him, I make of the concept of autonomy. Griffin's notion of personhood, he rightly says, has three parts: liberty, minimum provision, and autonomy, but Miller chooses to discuss only the last—autonomy. Griffin uses a new and narrow concept of autonomy; post-Kantian, Miller calls it. I am not sure that I quite understand what the post-Kantian autonomy is. Griffin's idea of autonomy, he says, 'only acquired its present sense in the second half of the twentieth century, escaping its origins in the philosophy of Kant'. Its origins are much earlier than Kant. The emergence of post-Kantian autonomy, he goes on, 'signalled a transformation of values whereby the idea of "a good life" was replaced by the idea of "a self-chosen life". The loss of the notion of "a good life" makes Griffin's idea of autonomy narrowly modern and Western. It is the close internal link between the [post-Kantian] idea of autonomy and the conditions of life in latter-day liberal societies.' Miller concludes, 'that . . . my [Miller's]

[19] *OHR*, ch. 2, esp. sect. 2.

view disqualifies [Griffin's notion of] autonomy as a ground of human rights. It is a sectarian value that can reasonably be rejected . . . '

This puzzles me. Even if I had used a post-Kantian idea of autonomy, even if it were a highly sectarian value of latter-day liberal societies, neither fact would show, individually or jointly, that my account of human rights is wrong. In any case, I do *not* use the post-Kantian concept of autonomy. I use a historical concept of personhood that appeared with the medieval monks of Bologna, Pico Della Mirandola, etc. I suggest in my book that their notion of personhood should be taken to constitute 'the dignity of the human person' and from that 'dignity' human rights should be seen to derive.

I am flabbergasted by Miller's argument. He wants to criticize my notion of personhood. Griffin says that his notion of personhood has three parts, but Miller announces that he will discuss it as if it had only one: namely, autonomy. Even the form of argument here is odd: take only one part of a tripartite idea and then complain that the idea lacks something. Griffin's idea of personhood, Miller says, has lost the traditional doctrine of 'the good life'. How has Miller established that it has lost it? Maybe it survives in one or other of the two ignored parts of normative agency. In my view, being a self-chooser is only one element of 'personhood' among several. A person exercises a capacity to decide what is good in life and what bad, on a domestic scale or cosmic; a person has the basic wherewithal to live a life, and is not blocked from pursuing those goods. Most persons do not choose a whole plan of life; indeed, almost all persons would be ill-advised to try to live by a 'plan of life'. Most persons do not deliberate about the goods of life in something on the scale of a Socratic dialogue; some people just have a good moral nose; those are the people in my life, seldom moral philosophers, to whom I go for advice. The unexamined life *can be* worth living. Self-choice is in that picture; the good life runs all through it.

A last point. Griffin's picture of human agency, Miller says, 'appears to deny that human beings can live perfectly good lives according to some inherited pattern that they have not chosen for themselves'. Of course they can live perfectly good lives that way; again, self-choice is only one among many good-making features. I argue this in my book.[20] Miller

[20] *OHR*, pp. 45–46.

was obviously not impressed by my argument the first time. I am, all too predictably, still impressed by it myself.

7. Consequentialism (Hooker)

Hooker supplies that rare thing: an accurate account of his subject's argument. Then he issues a challenge to it. 'If our account of human rights is teleological', he asks, 'why wouldn't we be willing to 'trade off' human rights whenever complying with them would not maximize good?' I reply: Because ethics is meant to regulate the behaviour of *homo sapiens*, with all their limits.

I said earlier that the best form of consequentialism fails certain basic feasibility tests. But Griffin does not use what is really the *best* form, Hooker replies. The best form, he thinks, is the one that he formulates in his well-known book *Ideal Code, Real World*:[21] namely, 'incrementalist, cosmopolitan rule-consequentialism'. 'Incrementalist' because 'we should abide by the policies in the currently accepted morality unless and until we can calculate to a reliable degree of probability which changes to this morality would result in a net increase in value in the long run'; 'cosmopolitan' because it 'assesses possible moral rules and policies in terms of the expected value of their acceptance (not just by one individual or one society but) by *all societies* simultaneously' (Hooker's italics).

One problem with Hooker's form of consequentialism is the difficulty of identifying the norms of 'the currently accepted morality'. The 'accepted morality' of whom? If of my own society, nearly each norm has its contrary in the same society. May one drop bombs on innocent civilians to help shorten a war? G. W. Bush, R. Cheney, D. Rumsfeld, and a large portion of the population say an emphatic *Yes*; a large portion says *No*. Even if there are generally agreed norms, are there enough of them to constitute something approaching a complete set? Or are there only a few—nothing like a complete set? If the second, would we have anything remotely like an adequately comprehensive ethics with which to carry on our lives? Most unlikely. And how does one individuate 'societies' or 'cultures' in modern conditions?

[21] Brad Hooker, *Ideal Code, Real World*, Oxford: Clarendon Press, 2000.

A second problem with Hooker's version of consequentialism, to my mind, is that it still fails basic feasibility tests. Probably the most demanding calculation of consequences that I cited in my book was this: What set of norms and dispositions, if it were dominant in our society, would yield best consequences in the society as a whole and in the long run? This huge-scale calculation, I say, is permanently beyond us. But Hooker's incrementalism is meant to sidestep this objection. It recommends a more modest-scale calculation: the consequences not of our adopting a whole moral structure, but merely changing a part of our society's already functioning ethics.

One of the most widely accepted moral norms is: Don't deliberately kill the innocent, except when . . . There is, of course, dispute over the exceptions. Suppose we ask, in the spirit of incrementalism: Would we be justified in making an exception by deliberately killing innocent civilians in time of war if deaths overall would thereby be reduced? What would be the consequences of all societies simultaneously adopting this exception? I ask here about not a whole morality but merely a part of one—specifically, one possible exception to one ethical norm. It seems to me still that we cannot do *this* calculation to a degree of probability on which we would be willing to rely. The incrementalist feature of Hooker's consequentialism reduces the burden of calculation somewhat, though I believe still not enough, but the cosmopolitan feature raises the burden hugely.

Finally, a problem that all forms of consequentialism must face. Why does Hooker give his consequentialism the features he does? The incrementalist feature, he can say, is simply where we actually are. We do not ever choose a whole morality; we choose simply to amend one part or other of the morality that our culture has left us. There is, as I have said, the problem of identifying what our cultural morality is. But put that aside. Why does Hooker choose the cosmopolitan feature? The choice cannot be arbitrary. He must choose it because he judges it to yield better consequences than any other form of morality open to us would do. Surely *here* is a calculation that is well beyond us.

8. Liberty (Nickel)

Nickel announces that his paper 'focuses on human rights to liberty'. In fact, it is about much more, namely, the justification of human rights and

the role in it played by fairness and equality, as well as liberty. Nickel's discussion of liberty is substantial and thought-provoking. It is not, though, an objection to me.

Let us start with liberty. Human rights, I say, are protections of normative agency, which has stages, which I describe in my book thus.[22]

> The first stage consists in our assessing options and thereby forming a conception of a worthwhile life, where . . . the sort of 'conception' I have in mind is not a map of the whole of a good life, which is of doubtful value, but characteristically piecemeal and incomplete ideas about what makes life better or worse. That is what I have been calling 'autonomy'. To form and then pursue that conception, we need various kinds of support: life itself of course, a certain level of health, certain physical and mental capacities, a certain amount of education, and so on. I have been calling these 'minimum provision'. [And they are not enough for agency] if others then stop us; we must also be free to pursue that conception. I have been calling this 'liberty'.[23]

Critics should not rush for their pens to register objections based on brief introductory sketches. I devote a chapter to the explanation of each of them. Agency is highly complex; I think that distinguishing 'autonomy' and 'liberty', which are two distinct values, helps clarity a bit.

Nickel says that 'a major thesis of Griffin's book is that human rights can be made clearer . . . by tying them . . . to autonomy or normative agency'. I do not use 'autonomy' and 'normative agency' synonymously. Griffin's theory, Nickel claims, 'ties all human rights to autonomy'. It does not; it ties human rights to normative agency, of which autonomy is only one of three components. Griffin believes that liberty 'is not just a matter of choosing and revising a conception of a worthwhile life'. I do not believe that liberty is that at all; choosing and revising come under my idea of 'autonomy'. I say that same-sex marriage is a matter of liberty. It is, because, for many people, though not all, a certain sort of union between two persons in which they may also have and raise children is clearly a component of a good life—*clearly* because for many people it is one of the *most important* components of a good life. That is, it is highly qualified to be a matter of liberty. Nickel concludes that, 'as this illustrates, Griffin's fundamental test of whether free access to an option is required by human rights is . . . whether denying access to it seriously impairs access to the most important components of a good life'. It is not.

[22] *OHR*, ch. 8, sect. 1. [23] *OHR*, ch. 8, sect. 1.

And Nickel's argument is a non sequitur: 'over-qualified' is not the same as 'qualified'. I shall stop cataloguing misinterpretations; it is unedifying.

Nickel's larger interest, I have said, is to show that normative agency is too slim an idea to provide the ground for human rights. Nickel speaks of Griffin's 'failure to recognize the great difficulties in providing a justification of the nondiscriminatory and equal enjoyment by everyone of human rights without having an independent principle of fairness or equality as part of one's justificatory framework'. I believe that, at this point in the development of our subject, we shall not get much out of the idea of fairness or equality until we bring greater clarity to them. Nickel's point here overlaps substantially with Buchanan's criticism of me.[24] We certainly shall not get much out of the cloudy foundational principle of equality until we can dispel some of the cloud, which neither Nickel nor Buchanan begins to do. I have tried my hand at it in that earlier discussion, which shows how I think equality and human rights are related. My discussion of Buchanan will serve as my reply to Nickel's present objection.

A last point, and then I shall ever after hold my peace. Griffin's failure to recognize the importance of 'an independent principle of fairness or equality', Nickel says, leads Griffin to conclude 'that democracy is not a requirement of human rights'. I do not conclude this. Instead, the right to democratic participation, I say, is a derived human right.[25] 'Derived' does not mean 'inferior' or 'less weighty' or 'less important' or 'not really'.

[24] Above, sect. 3. [25] *OHR*, ch. 14, sect. 5.

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