The Egalitarianism of Human Rights

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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 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

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 (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).

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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 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

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.

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 includes the idea that appeals to human rights serve to constrain the sovereignty 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

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 John Tasioulas, "Human Rights, Moral Not Political" (unpublished paper, Faculty of Philosophy, Oxford University, 2010).

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 recon-

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 dissi-

struction 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 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

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pates, the conviction that the practice itself contains inadequate normative resources for its own defense and that philosophical analysis is needed.

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).

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]
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

8. Cf. articles 7, 9, 11 of the International Covenant on Economic, Social, and Cultural Rights (hereafter ICESCR); articles 7, 10–14 of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW); articles 4, 24, 26–29 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.

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.

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 for 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 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 noncontributor, 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

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

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).

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 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 for 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 has usually been justified by appeal to beliefs about supposed natural

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.

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 IHR 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, 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

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 IHR. 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.

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 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

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.

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 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,

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.

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 saltwater.

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 thorough-going analysis of the role of equal status in IHR, which I do not pretend to provide here, would

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.

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

have to address the question of whether inequality of status is to be understood as referring exclusively to natural inequality.

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

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 IHR and show that 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 (i) reflect 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

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.

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 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]

So, according to Griffin, all human rights are either one or the other of these three highest-level rights or are derived from them. The

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

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 desideratum 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 project of critical reconstruction, Griffin must show either 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 on other desiderata compensate 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

28. Ibid., 152.

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 they 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 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

29. Ibid., 33.
30. Ibid., 183.
31. Ibid., 149.

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 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

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.

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

(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 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

34. Griffin thanks Nickel for comments on a draft of his book. The index of Griffin's book contains only 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.

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]

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

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).

37. Ibid., 62.

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]

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 treat-

38. Ibid., 70.

39. Shue, *Basic Rights*, 17.

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

ment 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 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 IHR 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 IHR 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 say that, as a matter of nonideal 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

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.

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 desideratum 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 thorough-going 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 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

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

43. Griffin made this reply at a conference at Rutgers Law School in October of 2008.

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 notion 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 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

44. Griffin, *On Human Rights*, 42.

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

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.

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, that standard should reflect a richer, more social notion of dignity than either Griffin or Nickel provide. 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 marshalling 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 it was coupled with an independent commitment to promoting the good of the individual or at least protecting it against major threats. (A world

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.

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 thorough-going 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-egalitarianism 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.