

PAVLOS | **Human Rights for**
 ELEFThERiADiS | **Liberals**

**James Griffin, *On Human Rights*,
 Oxford: Oxford University Press, 2008.**

The Oxford philosopher James Griffin has for many years written thoughtful and original essays on the morality of rights. In this wide-ranging book he has brought together some of his previously published essays alongside a great deal of new work. The result is a comprehensive discussion of many aspects of human rights. Nevertheless, a defining feature of this book is its self-proclaimed lack of system. Griffin presents a ‘common sense’ or ‘bottom up’ theory of human rights. As a result, the theory is also ‘ethnocentric’ in that it starts from the moral intuitions of a western liberal moral horizon. The result is that the book lacks a general theory or general argument. It is full of good sense and careful suggestions. But it is not a general theory of human rights.

Griffin’s starting point is that human rights are a form of moral rights that emerged in the philosophical thought of the Enlightenment. By the idea of an ‘Enlightenment project on human rights’ Griffin means the secularization of the doctrines of natural law and natural rights, the loss of the metaphysical and epistemological worldview of natural law and the political developments of the American and French Revolutions. The main idea that the Enlightenment established was, for Griffin, that we have human rights purely in virtue of being human (p. 13).

Nevertheless, Griffin believes that this basic foundational idea is so abstract as to be virtually ‘criterionless’ (p. 14):

We must be able to settle some hard cases by extrapolation from [...] paradigm cases. The few criteria attaching to the term ‘human rights’ would still leave very many cases of its use, far more than borderline cases, undetermined. And the paradigms on which we agree are all civil and political rights, which would leave us with too many unanswered questions (p. 16).

The philosophical arguments that Griffin offers have this practical aim. This is an urgent intellectual and political task: ‘The runaway growth of the extension of the term in our time make having some grasp of its intension the more urgent, and its intension is what is so especially thin’ (p. 17). So the job of ‘philosophers and

jurisprudents and political theorists in our time' is to remedy this indeterminateness and thereby 'do what the Enlightenment failed to do' (p. 18).

The way in which Griffin proposes to construct a more determinate idea of human rights is, as he freely and courageously admits, 'ethnocentric'. The idea is that we put 'the case for human rights as best we can construct it from resources of the Western tradition, and hope that non-Westerners will look into the case and be attracted by what they find' (p. 137). And the way to do this is by 'pursuing the liberal understanding of human rights or in developing an ethically substantive account by grounding them directly in values' (p. 27). In this sense the book is offered as a study of human rights for liberals, or just prospective liberals.

Nevertheless, Griffin's argument does not proceed from a general liberal moral theory. He rejects the theoretically ambitious systems of J.S. Mill and Immanuel Kant, who he says sought to 'commandeer' the concept of rights for their own purposes (p. 3). He proceeds, instead, from what he terms 'the bottom-up', that is, from current usages of the relevant term in particular contexts (pp. 29-30). The method would seem to many readers analogous to the ordinary language method pursued elsewhere in analytical philosophy.

The aim of the 'bottom-up' approach is to solve political problems in a way that is realistic and feasible. But why limit our discussion in this way? What is the authority of any common sense view? There is certainly a great deal we learn from the moral practices dominant in our communities. But Griffin goes further. He believes that 'we have no choice but to take a highly practical turn in ethics, not just to ensure that our abstract principles are adequate to our practice, but also to accommodate the ways in which our practice...determine[s] the content of our principles' (p. 74). Griffin seeks a moral theory that has no 'pretension or system'. The conclusion is that '[m]oral deliberation must then take place largely on the common-sense level at which it occurs in ordinary life (p 75). But no extended reasoning is offered why this should be the case. Moral philosophy often finds answers in abstract constructions and frameworks. Why reject this tradition? At one point Griffin admits that common sense views are actually of limited help. He states that his argument will be assessed 'by deciding whether it gives us human rights that fit into the best ethics overall' (p. 4). But the best ethics overall may turn out to be a highly abstract framework of ideas, as in Kant or Mill or Aristotle or an ideal of the cultivation of the self as in Socrates or Philo of Alexandria. This is a surprising and important gap in the general argument.

Nevertheless, the narrowness of aim and method give the book a transparent structure. Griffin does not once lose sight of the central argument, which he calls the 'personhood' account of human rights, backed by an account of 'practicalities'. The central idea derives from 'the largely Western-inspired discourse of human

rights'. Griffin notes that at the core of this discourse 'is the idea that human beings are unique, that we are made in God's image (Genesis 1:27), that we too are creators – creators of ourselves, and by our actions, of part of the world around us, on which we shall be judged' (p. 26). This personhood account starts from this general premise and is gradually built up in the progress of the book through the careful discussion of the particular implications of each possible answer for practice. The discussion is instructive at every step and establishes an account of human rights that sets itself apart both from what Griffin calls 'structural' theories, by which he has in mind the theories of Robert Nozick and Ronald Dworkin, as well as the 'interest' theories of rights.

The argument against 'structural theories' is unfortunately short (only three pages long). For Griffin, structural theories require that claims of rights rule out the balancing of interests or values. Nevertheless, the theories Griffin discusses cannot be termed 'structural' in any meaningful sense. What these theories emphasise is the peremptory character of rights (hence the expressions rights as 'side-constraints' or 'rights as trumps'). But Griffin does not reject the peremptory force of rights. He accepts that 'the more ethically substantive account that we need will itself have structural implications' (p. 22). So there is no real contrast between 'structural' theories and 'substantive' ones. In fact, all theories of human rights accept that rights organise our moral reasoning in some ways. It is a shame that Griffin does not deal with this group of theories as manifestations of a Kantian 'will theory' with substantive moral content. It would have been very instructive to compare his 'personhood' account with the account of rights as recognitions of moral status that we find in John Rawls, Thomas Nagel and Francis Kamm.

The argument against the interest theory of rights (Griffin concentrates on the work of Joseph Raz) is, by contrast, very effective. He notes that the interest theory argues that a human right arises when there are universal human interests sufficient to justify imposing the correlative duties on others (p. 54). But then it would be easy to identify interests that 'fill most of the domain of well-being' which may be taken to be of the highest importance. There is an important interest, for example, in there being an adequate array of options in life. But this interest may then justify imposing huge burdens on others to satisfy it. The benefits of a flourishing life lead, therefore, easily into a very demanding set of duties. Yet, this contradicts our assumption that rights to resources go only up to a certain level. The interest theory has no principled way of limiting the burdens imposed by rights. So Griffin's account is offered as an alternative to the interest theory. Human rights are not rights to anything that promotes human good or flourishing. They are rights only to what is needed for 'human status' (p. 34). The interest theory, by contrast, invites us to say that everyone has rights to all that is needed for a good

or happy life, which makes the idea of rights redundant. Griffin's arguments can in fact be read alongside Onora O'Neill's criticism against the proliferation of rights.¹

Readers of the book will make up their own minds about the effectiveness or ultimate persuasiveness of Griffin's 'personhood' account. Let me focus here on two potential problems for the personhood account. The first problem is its account of the preemptory nature of human rights. The second problem is the political character of human rights and their relation to democracy.

Griffin says relatively little on the preemptory character of rights. He discusses the conflict among rights themselves and between rights and other kinds of moral considerations in a typically subtle section (pp. 63-80). But the result is unclear. Dworkin has spoken of 'rights as trumps'; Rawls has said that rights (or a select set of basic liberties) have 'lexical priority' over the second principle of justice; and Scanlon has usefully distinguished between adjusting rights and balancing values. In all these cases a right signifies a very powerful claim on any agent. Griffin considers that such views are often too 'absolutist' about rights. Instead he proposes a form of 'teleology', which allows for calculations of the various values at stake. Rights resist trade-offs whenever their infringement requires an 'exceptional case' to be made for it. Here is an example:

Talk of an especially convincing case introduces an epistemic scale, not another moral one. It is the statement of a policy – an openly conservative policy – for what to do when something as important as a human life is at stake and our calculations of the goods at stake are altogether too shaky and incomplete and badly conceptualized for us to be willing to live by (p. 80).

But the force of rights is not based on epistemic certainty about consequences. It is a moral case, and Griffin's point seems an evasion. The turn to teleology leaves the 'personhood' theory of rights perilously close to consequentialist or interest theories. What is it that explains the preemptory force of rights? In Griffin's case, nothing. In fact, there is no such force. Each case depends on its merits, that is, on a balancing or weighing of interests, including the 'epistemic' plausibility of our calculations. So, to take an example from a later chapter, whether a human right to welfare exists is conditional on a number of factors. Griffin says: 'I think that sometimes it will prove impossible to make a clearly successful case for holding anyone in particular the appropriate duty-owner [of a human right to welfare]. Sometimes the identification will have elements of arbitrariness and convention in it. Sometimes it will be subject to negotiation in a particular place or time' (p. 103). But this leaves the theory of human rights indistinguishable from a general theory

1. See, for example, Onora O'Neill, 'The Dark Side of Human Rights' 81 *International Affairs* (2005) 427-439.

of value. Moreover, the personhood account appears to be lacking in determinacy, in exactly the same way that the original Enlightenment project did.

The same problem occurs in Griffin's discussion of a theory of liberty. It does not appear that liberty has any peremptory force whatsoever:

What I am offering is a *tu quoque* argument. It suggests that every proposed principle of liberty will have to leave some potentially dangerous decisions in the hands of society. Of course, the degree of danger matters, but the broad and narrow interpretations of liberty do not seem to be appreciably different in this respect. Liberal societies will establish liberal standards of 'harm' and 'openness to rational persuasion'; illiberal societies will adopt illiberal ones. Similarly, liberal societies will establish liberal standards for what can be seen as mattering to a worthwhile life; illiberal societies will adopt illiberal ones. One cannot make a formula full-proof or villain-proof just by adding more words. In the end one is bound to some extent to rely on an interpreter's good sense and good will (pp. 172-3).

But if there are such rights to liberty or to some liberties, then society does not enjoy unfettered discretion over their exercise and that is the whole point.

The second problem is directly related. The theories inspired by Kant have a very good explanation for the peremptory force of rights. The explanation derives from the nature of the social contract. Because the social contract is to be agreed upon once, it has to have clear and intelligible public rules addressed to everyone. Rawls tells us that the original position leads to an agreement on the basic terms of social cooperation, the elements of the basic structure of society. Rights are such elements and they are part of a general theory of justice for a political community. But rights appear also in the theory of international relations, which for the Kantians is a different domain of moral thinking. Here, human rights do not just apply to liberal political societies. They apply to every sovereign state in the world. The list of universal human rights for all states in the world is accordingly different from the list of liberal rights for the domestic case. Their justification cannot be ethnocentric.

There are, therefore, basic rights under domestic political justice and international human rights for international justice. Griffin fails to come to grips with this aspect of Rawls's arguments because he disconnects rights entirely from any theory of justice. He criticises Rawls for adopting a narrow list of human rights and he appears to take Rawls to be advocating tolerance of the illiberal (pp. 142-145). But Rawls does not advocate such tolerance. He puts forward principles of international justice, where liberal states are prevented from imposing by force

their view of the world on others. They can morally disapprove of the actions of other nations, but cannot turn this into an active foreign policy, except when foreign nations have signed international treaties protecting human rights (but then the ground for the criticism is not the theory of human rights but the principle of *'pacta sunt servanda'*). Griffin's account fails to deal with the argument that the content of rights may be different in the domestic and the international domains, for he takes rights to be exclusively inter-personal relations. The institutional dimensions of rights, essential in any social contract view, are for Griffin optional supplements.

Finally, the same narrow view of rights leads Griffin to reject the link between human rights and democracy. Democracy for Griffin appears to be just a technical decision procedure:

Human rights grew up to protect what we see as constituting human dignity: the life, autonomy, and liberty of the individual. Democratic institutions grew up in our need for a decision procedure for groups – a procedure that is stable, manages transfer of power well, appropriate to a society whose members are more or less equal in power or worth, reconciles losers in social decisions to the basic structures of the society, and tends to promote the commonweal – that is, order, justice, security and prosperity...One cannot derive a requirement of fair political procedures from human rights alone, though one may be able to derive it from morality as a whole (p. 249).

I am not sure this view of democracy is correct. Rights to participate in politics are essential elements of equal moral status and dignity.² All the major political philosophers speak of civil and political rights as the elementary ingredients of the rights canon. So it is very surprising to hear that respect for human rights does not necessarily require respect for democracy. Equal participation in decision-making is an essential component of moral status (and the history of the twentieth century shows that withholding political rights has been one of the most regular offences against human dignity). The whole point of political justice, Kant, Rawls, Dworkin and Nagel will say, is that the various components stand together in a single intellectual framework. For Griffin, human rights are narrowly focused on the horizon of individuals.

So this wide-ranging and richly rewarding book ends up defending an unusually narrow view of human rights. But the appeal of human rights is precisely in the thought that they are politically not just individually liberating. Griffin shuns this

2. See, for example, Jeremy Waldron, 'Participation: The Right of Rights' in Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), p. 232.

Kantian insight and offers an alternative that breaks free from politics. I suppose the reason for this narrowness of focus must be found in the emphasis on rights to our private space, which since Mill has become a central element of Western freedom. This makes the usual discourse of rights in the West less political than it is in places such as Iran or Russia. But a philosophy of human rights cannot just have the ambition of commenting or organising or sorting out what liberals in the leading western societies happen to believe. It needs to deal with the challenge of their universal scope and reach. Such a philosophy must speak to Western liberals, but also to those that suffer under dictatorships and to those who stand outside the liberal tradition altogether and do not appear to share its values. Here lies the appeal of the Kantian argument about rights as elements of both political and international justice. These arguments, in my view, will remain Griffin's main rival even after the arguments of this magisterial book are analysed and digested.

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