METHODS OF ETHICS: WIDE REFLECTIVE EQUILIBRIUM AND A KIND OF CONSEQUENTIALISM

by
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I argue for the indispensability in moral theory of an appeal to considered moral judgements against Hobbesians and utilitarians, and more generally against people utilizing rational choice theory. I argue that in making sense of morality, including justice, it is a mistake to try to set aside an appeal to considered judgements. It is both unreasonable and a moral error to trust theory against considered judgements set in wide reflective equilibrium. But such a coherentism is not even implicitly a defense of consentual morality. This is clearly seen in the non-utilitarian consequentialism articulated and defended with its rejection of any form of absolutism. It, while appealing to considered judgements, is still a critical morality.

Les méthodes de l'éthique: le large équilibre réfléchi et une sorte de conséquentialisme

J'affirme qu'en théorie morale, il est indispensable de faire appel aux jugements moraux pondérés contre les Hobbesiens et les utilitaristes, et plus généralement contre ceux qui appliquent la théorie du choix rationnel. Je prétends que pour celui qui veut trouver un sens à la moralité, y compris la justice, c'est une erreur que de vouloir écarter un appel aux jugements pondérés. Il est à la fois déraisonnable et une erreur morale que de se fier à la théorie plutôt qu'aux jugements pondérés, replacés dans un large équilibre réfléchi. Un tel cohérentisme ne constitue cependant pas, même implicitement, une défense de la moralité consensuelle. Je démontre l'affirmation précédente en rejetant toute forme d'absolutisme et en articulant et défendant le conquéquentialisme non utilitaire. Cette dernière théorie, tout en faisant appel à des jugements pondérés, reste une morale critique.

I

In thinking about morality, including justice, we cannot avoid starting with considered judgments, including those very centrally and pervasively considered as moral. Many (perhaps most) of such judgments are independent of any moral theory we might be trying to articulate and defend. Instead, the theory in question must assume those very judgments as a "given to".[1] If someone does not acknowledge that it

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1 I take the notion of a "given to" from E. W. Hall. It should not be confused with an appeal to "the given," as in C.I. Lewis, R. Chisholm, or A.J. Ayer. It is the idea that any philosophical account or philosophical system can never be self-

is a bad thing for there to be a society of superstitious, ill-fed, mistrustful people living in conditions of squalor, I do not know how to find feet with him. Any reasons I could give for saying those things are bad would be no stronger (no better established) than the judgment itself. If I am a good philosopher, I might be able to show how this considered judgment could fit into a pattern of coherence that has been called wide reflective equilibrium. I could perhaps show someone who professed to doubt such considered judgment that given other things he also believes that he could not, if he wants to be consistent, fail to take these things to be bad. But if someone claims not to believe or accept any such considered judgments, such moral truisms, there is little to be said to him except that he has a rather precarious grasp on what it is for something to be bad.

There is no standing free of considered judgments, including considered moral judgments, while still making sense of morality. If this be intuitionism, make the most of it, but it does not carry with it any of the epistemological and ontological baggage of what John Rawls

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contained and will at some point, as R. Carnap recognized when he spoke of considerations and questions external to the framework, appeal, either explicitly or more typically, implicitly, to some external ground or basis of judgment for the philosophical account. Russell's appeal to logic, Moore's appeal to common sense, Malcolm's appeal to ordinary language are cases in point. What is "given to" is what philosophers, in assessing their own accounts, or the accounts of others, finally appeal to or rely on. **Philosophy, in fine, is not self-contained, yielding its own warrant.** E.W. Hall, *Philosophical Systems: A Categorial Analysis* (Chicago, IL: University of Chicago Press, 1960) at 138-64. See also K. Nielsen, "On There Being Philosophical Knowledge" (1990) 3 *Theoria* LVI, at 193-225. However, even here, someone influenced by a Davidsonian holism, with its rejecting of the third dogma of empiricism (the scheme/content dichotomy), will worry about (1) this internal/external division, (2) any talk about what is "finally appealed to" (as if we had any understanding of what it would be like, in any more than a pragmatic sense, to have the last word), and (3) will recognize that it is in the very nature of the philosophical game that any external perspective can be legitimately challenged — there being no premises that just must be accepted in philosophy. Perhaps it should be responded that there is at least a kind of historicized fallibilistic given to: something which is always in principle at least challengeable but often for a time unchallenged. Russell and Carnap accept the authority of logic, Patricia Churchland & Paul Churchland the authority of science, C. Peirce & J. Dewey the authority of scientific method, T. Reid & G.E. Moore the authority of common sense, G. Ryle & N. Malcolm the authority of ordinary language. For these authors, as in the practice of other philosophers, philosophical claims which are not in accordance with their particular given to are rejected as mistaken. (Sometimes, to complicate matters, philosophers, particularly when they do not realize they have a given to, have more than one given to and no pecking order between them or specification of different domains where these different given to apply.) But they all recognize, if they have a reasonably sensitive philosophical understanding, that there is something self-reflexive here, for philosophy allows — and as a matter of philosophy — that there is no permanent and unquestionable Archimedean point or squarification base for philosophy. But, all that notwithstanding, there can be, for a time and for a certain culture, certain resting places that are deemed more plausible than others. There is no escaping a thorough-going historicism. But historicism is one thing; relativism or an attitude of "anything goes" is another.

calls *rational* intuitionism with its commitment to moral realism and a realm of moral truth.[2] Indeed it is not intuitionism in the sense that has come down to us in the history of moral philosophy. One could be a non-cognitivist in metaethics or an error theorist and accept all of what I have just said.

Similarly, if I kill someone simply to gain the few dollars she has in her wallet or beat up someone because I do not like his looks, lie to someone when I want to and think I can get away with it or break my promises whenever it is convenient, I have done things that are morally wrong and anyone who does not acknowledge this just does not know what moral wrongness is. Again, considered judgments are central. They do not require intuitionism or natural law, though they are compatible with such doctrines. But to make such an appeal to considered judgements we do not have to go in for such arcane forms of epistemology and moral metaphysics, *e.g.*, moral realism.

Again, similar things should be said for the distinctive moral wrongs that are injustices. Plain injustices exist where, it is acknowledged that there is no morally relevant difference between blacks and whites, but the law mandates the death penalty for a black murderer and long term imprisonment for a white murderer; or, where it is acknowledged that there is no morally relevant difference between men and women, yet men are allowed to go to public bars unaccompanied while women are not; or, where it is acknowledged that there is no morally relevant difference between Jews and Catholics but the former are required to privately finance religious schools while the latter have their schools financed from state funds. Any theory of justice which did not recognize that these things are injustices would itself be mistaken. We have more reason to be confident in accepting and sticking with these considered judgments than of accepting *any* moral theory which purports to show that they are not to be accepted, or even that they are problematic, and that there is no wrongness or injustice if these things are done. Again we see the centrality, in taking morality seriously, of considered moral judgments.

We can analyze why these morally objectionable things are wrong in an attempt to explicate or articulate their wrongness by finding its underlying rationale as opposed to trying to prove they are wrong, or to justify a belief in their wrongness. As we do this analysis we come, most obviously in the injustice cases, to the idea that morality requires impartiality and that justice is very centrally impartial. Justice, that is, requires the equal consideration of the interests and needs of everyone alike. It is this consideration that we aspire to when structuring a system of just institutions.

We do not have justice, whether or not we can correctly view society as a cooperative venture or whether the resolutions of conflicts of interest involved in the justice-claim are to the mutual advantage of everyone involved, if the interests of **all** involved are **not** equally and impartially considered in that each person's needs and well-being is

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2 J. Rawls, "Kantian Constructivism in Moral Theory: The Dewey Lectures" (1980) 77 *Journal of Philosophy* 515; and K. Nielsen, "John Rawls's New Methodology: An Interpretive Account" (1990) 35 *McGill L.J.*, 572.

given at least *prima facie* equal weight. Even if the resolution of conflicts of interest are to the mutual advantage of the parties involved, we do not have justice if the interests of all parties to the dispute are not given at least *prima facie* equal consideration. I am not claiming this is how justice has been conceived throughout history, but I am claiming that this is how we construe justice in modernizing societies such as our own. Such a general consideration itself is one of our considered judgments.

To translate this into the concrete, consider a group of capitalists who have possessed unshakeable power for an extended period of time and a group of workers who have grown very dependent on them. If the capitalists use their considerable power to drive home a harsh bargain that the workers will accept — indeed, will **rationally** accept — because they recognize that it is the best they can get, given their unequal bargaining position, then the workers are not being treated justly, even though, as things stand, the bargain struck is mutually advantageous, *i.e.*, each gets the best they can get given the unequal baseline from which they start. Agreements for mutual advantage will be just agreements only if certain background conditions obtain. Perhaps the most important one is that the agents stand in roughly equal conditions of power. Here again, considered moral judgments or convictions play a central role in what I have just claimed.

II

Officially, David Gauthier, in contrast with what I have been claiming, eschews any appeal to considered judgments.[3] He develops an intricate, carefully reasoned and philosophically sophisticated form of neo-Hobbesianism where justice is construed as mutual advantage. Brian Barry, utilizing examples, though not only examples, and in effect appealing to considered judgments, thinks he can show that Gauthier's theory is plainly inadequate.[4] He points to the deeply counter-intuitive conclusions of Gauthier's account of justice.[5] To highlight this, Barry cites two passages from Gauthier's *Morals by Agreement*. First: "the rich man may feast on caviar and champagne, while the poor woman starves at the gate. And she may not even take the crumbs from his table, if that would deprive him of his pleasure in feeding them to his birds."[6] Second: "Animals, the unborn, the congenitally handicapped and defective fall beyond the pale of a morality tied to mutuality. The disposition to comply with moral constraints ... may be rationally defended **only** within the scope of expected benefit."[7] Such utterly vulnerable people, have, on that account, no rights

3 D. Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986) 217, 268; D. Gauthier, *Moral Dealing* (Ithaca, NY: Cornell Univ. Press, 1990), 168, 270.

4 B. Barry, *Theories of Justice: A Treatise on Social Justice*, Vol. I (Berkeley, CA: Univ. of California Press, 1989), 249, 295, 362.

5 A. Buchanan, "Justice as Reciprocity versus Subject-Centered Justice" (1990) 19 *Philosophy and Public Affairs* 31 at 227-52. Barry and Buchanan have both argued in a broadly similar fashion.

6 *Supra* note 3, *Morals by Agreement*, 218.

7 *Id.* at 268 (emphasis added).

— there being no human or natural rights on such an account — and thus they have no moral standing. No rights accrue to people by virtue of being human; there are no contraints that must be maintained toward them simply because they are human beings. We can, without doing anything morally untoward, do with them what we will. We wouldn't be very charitable if we let them starve; or nice people if we bronzed them. Still, **on such an account** — on a morality tied to mutuality — we would not, if people capable of mutually advantageous bargaining did not just happen to dislike such behaviour, violate the constraints of morality by so acting because such vulnerable people have no moral standing.[8] A has moral standing only if A is capable of entering into relations of **mutual benefit** with some other person B.

These are not just quirky judgments on Gauthier's part or the result of moral blindness. They are, as Barry shows, conclusions that Gauthier **should** draw given his **own moral theory**. In drawing them he is simply being consistent and non-evasive. He is being a good Hobbesian. Gauthier, again consistently, will have no truck with appealing to considered judgments, though, his official theory to the contrary notwithstanding, the subterrainian pressure of considered judgments reveals itself in his remark that he finds such situations — the cases Barry cites and those that I have just referred to — distressing.[9] That, however, is common sense mistakenly (by his lights) insinuating itself. **Given his theory**, Gauthier should not find them distressing. Moreover, he rationalistically, trusts theory over intuition.

David Gauthier begins Chapter IX of his *Morals by Agreement* by quoting John Locke's remark that "a Hobbesist will not easily admit a great many duties of morality."[10] Gauthier, in a very general sense, sees himself as, and indeed is, a Hobbesian and is willing to bite Locke's bullet and to accept the repugnant conclusions of his own theory. He is willing to set aside, as irrational, those aspects of morality that conflict with his **theory**. They are, not infrequently, central elements of what Locke calls morality, full stop; and what Gauthier conveniently rebaptizes "conventional morality." When aspects of what he calls "conventional morality" conflict with his theory, he rejects

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8 Gauthier's account is generally and powerfully Hobbesian. Yet, in describing the state of nature and in appealing to the Lockean proviso, Gauthier falls from Hobbesian grace and, more like J. Locke & R. Nozick, gets, in effect, very intuitionistic and distant from his usual tough-minded Hobbesianism. I stick here with the Hobbesian Gauthier rather than the tender-minded Lockean one of the proviso. A good expression of his Hobbesian attitude is the following: "We are not concerned with reflective equilibrium. Although it would be surprising, did no commonly recognized moral constraints relate to mutually beneficial co-operation, yet traditional morality as such may be no more than a ragbag of views lacking any single coherent rationale. My account of morality does not attempt to refute our ordinary views, but rather to provide constraint with a firm foundation in rational choice." *Supra* note 3, *Moral Dealing* at 270. For a critique of Gauthier's appeal to the Lockean Proviso, see M. Milde, *Gauthier, Rawls and the Social Contract in Contemporary Political Philosophy* (Doctoral dissertation, Univ. of Calgary, 1992), Chapter 4 [unpublished].

9 *Supra* note 3, *Morals by Agreement* at 218.

10 *Id.* at 268.

them. In an extremely important and revealing methodological remark Gauthier says:

> We shall find no simple fit, or lack of fit, between our theory and the supposedly "plain duties" of conventional morality. **Trusting theory rather than intuition**, we should advocate the view of social relationships sketched in this chapter without regard to the intellectual fashions of the moment. If the reader is tempted to object to some part of this view, on the ground that his moral intuitions are violated, then he should ask what weight such an objection can have, if morality is to fit within the domain of rational choice. We should emphasize the radical difference between our approach, in which we ask what view of social relationships should rationally be accepted *ex ante* by individuals concerned to maximize their utilities, from that of moral coherentists and defenders of "reflective equilibrium," who allow initial weight to our considered judgments.[11]

In a footnote linked with this passage, Gauthier cites a passage from Thomas Nagel's *Mortal Questions* as an able articulation of a view flatly contrary to the view underlying *Morals by Agreement*. He says, of Nagel's methodological stance, I believe somewhat exaggeratedly, that there is no better account of such a contrary view.[12]

Let us see what this view looks like. Nagel remarks:

> I believe one should trust problems over solutions, intuitions over arguments, and pluralistic discord over systematic harmony. Simplicity and elegance are never reasons to think a philosophical theory is true: on the contrary, they are usually grounds for thinking it false."[13]

I am one of those moral coherentists and defenders of reflective equilibrium that Gauthier refers to and aside from the fact that I do not think that any **philosophical** theory is likely to even get in the ball park of being true or for that matter false, I otherwise agree with the thrust of Nagel's passage. I trust intuitions (considered judgments) over theories, **when they clash or even appear to clash**. Elegance and simplicity in moral theory are very good reasons for suspecting the theory. Gauthier's remark, *vis-a-vis* the passage from Nagel, "Why should philosophy differ from science?", commits the fallacy of the complex question. We should for Kuhnian reasons be a little leery of thinking that science is so different. Still, and that aside, I think a reasonable case could be made for trusting theory in the hard sciences, *e.g.*, chemistry, biology and the like, but, given the controversy, the lack of progress, the absence of universally accepted paradigms, the culturally dependent parades of shifting fashion etc., and **perhaps** for deeper conceptual reasons as well, there are good reasons for thinking that philosophy, moral theory, and perhaps even the human sciences, are different from science, that is, hard science. We should, like Nagel, place more trust in such domains in intuition (reflective deeply embedded considered convictions) than in theory.[14]

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11 *Id.* [emphasis mine].

12 *Id.* at 269.

13 T. Nagel, *Mortal Questions* (Cambridge: Cambridge Univ. Press, 1979) at x.

14 For some of the deeper, putatively conceptual reasons, see P. Winch, *The Idea of a Social Science* (London: Routledge & Kegan Paul, 1958) and C. Taylor, *Philosophical Papers* Vol. II (Cambridge: Cambridge Univ. Press, 1985) at 15-151.

However, for coherentists like John Rawls, Norman Daniels and myself, reflective equilibrium is not just a replay of commonsense morality. It leaves room for both social theory and critique. But, *pace* Gauthier, there is no bypassing considered moral convictions or judgments.[15] A moral theory or an account of morality which massively overrides them must be mistaken. A theory which said that people who can make no contribution have no moral standing and that we can do with such people what we will without doing anything wrong must be mistaken. Our judgment that such treatment is evil far outweighs any theory, no matter how elegant and seemingly well argued it may be, which claims or attempts to support the premise that the treatment is not evil. We know, if that is the repugnant conclusion our theory drives us to, that we have to go back to the drawing board and rework our theory. If it entails these repugnant conclusions it cannot be sound, and must be rejected, unless it can be revised without resorting to repugnant conclusions which deny our firmest considered moral convictions.

III

Gauthier, on Hendrik Hart's, Barry Allen's and perhaps even Wesley Cragg's typology, is a rationalist.[16] I am not. My trust in our deepest convictions and my skepticism about theory should make this plain. Hart remarks: "His [Nielsen's] favourite appeal to considered judgments strikes me as a willingness to allow other than rational factors into the rational arena for rational consideration, but not a preparedness to submit rational criteria to the constraints of these considered judgments."[17] But that is exactly what I do. As demonstrated earlier, I put, as does Nagel, the allegedly rational criteria to the test of being in accordance with considered judgments. Where a theory is out of sync with a considerable number of our considered judgments and where these considered judgments are consistent with each other and with whatever else we firmly know, then it is the theory which must be abandoned or at least modified until it is compatible with those

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15 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard Univ. Press, 1971), 19, 48, 577; J. Rawls, "The Independence of Moral Theory" (1974/5) XLVII *Proceedings and Addresses of the American Phil. Assoc.*, 7; N. Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics" (1979) 76 *J. of Philosophy*, 256; N. Daniels, "Reflective Equilibrium and Archimedean Points" (1980) 10 *Can. J. of Philosophy*, 83; N. Daniels, "Two Approaches to Theory Acceptance in Ethics" in D. Copp & D. Zimmerman, eds., *Morality, Reason and Truth* (Totowa, NJ: Rowman and Allanheld, 1985); and K. Nielsen, *After the Demise of the Tradition* (Boulder, CO: Westview Press, 1991), Chapters 9-11, K. Nielsen, "Philosophy Within the Limits of Wide Reflective Equilibrium Alone" (1994) 43 *Iyyun*.

16 H. Hart, "Whither Reason and Religion?" in K. Nielsen & H. Hart, eds., *Search for Community in a Withering Tradition* (Lanham, NY: Univ. Press of America, 1990), 148; B. Allen, "Atheism, Relativism, and Critical Theory" and W. Cragg, "Reflections on *Search for Community in a Withering Tradition*" (both in a symposium of the Canadian Philosophical Association, Charlottetown, Prince Edward Island, 25 May 1993).

17 *Id.*, Hart at 159.

judgments. (Here it is very important that our consistent pattern be in a **wide** reflective equilibrium.)

For Gauthier, if our considered judgments clash with rational choice theory then so much the worse for our considered judgments. As we have seen, Gauthier believes that rational choice theory yields a mutual advantage theory of justice and that in turn entails that persons who cannot at least potentially contribute, or have no defenders who can contribute, have no moral standing and thus they have no rights, and without rights they stand outside the scope of justice and thus we owe them nothing. If someone is so irredeemably enfeebled that he neither has contributed nor can contribute in any cooperative scheme and who has no defenders who can so contribute, then we do nothing wrong, if we have no considered anti-attitudes toward doing so, if we torture him, bronze him or let him starve on the streets.[18] Gauthier thinks (whether correctly or incorrectly, I do not pretend to judge) that that is a consequence of rational choice theory and, thus, wishing to adhere to this theory, he bites the bullet. Counter-intuitive as it is to him, and to us, we do nothing wrong if we do these things. We should trust our theory, not our intuitions. That is a clear giving pride of place to reason, if anything is. It is a clear case of being a rationalist in Hart's sense.

In contrast to Gauthier, I, like Nagel and Rawls, when faced with such a circumstance, would stick with such intuitions (considered judgements). Here it is crucial to see that what we are adhering to is not just an isolated intuition or cluster of isolated intuitions but a cluster of deeply embedded intuitions integrally linked with a critical mass of other intuitions and beliefs. If, in the grip of a philosophical theory,

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18 Considered pro and con attitudes are the dispositional form of Gauthier's considered preferences. It might be said that there is not such a great distance between considered preferences, on the one hand, and considered judgments or considered convictions on the other. If someone doesn't have certain attitudes, certain preferences, there is in certain contexts no definitive showing him to be mistaken in moral matters, just as (it might be claimed) if someone does not have certain considered convictions there is no definitive showing him wrong in certain contexts in moral matters. Both Rawls and Gauthier appeal to certain, logically speaking, contingent non-rational but not irrational factors in moral reasoning. Why, then, is it legitimate for Rawls to appeal to considered judgments or convictions but not for Gauthier to appeal to considered preferences? One important difference is that convictions or judgments are not just matters of feeling or dispositions to feel, as are preferences and attitudes. Rawls is not appealing to what people on reflection like or dislike. What we like and dislike may be irrelevant to what is right and wrong. But this **may** be an illusion, as the long tradition of subjectivism and non-cognitivism in ethics has argued. It is, for example, not so obvious that what we approve of and disapprove of are not in the same boat as what we like or dislike. On attitudes, see P.H. Nowell-Smith, *Ethics* (London: Penguin Books, 1954) and C.L. Stevenson's much misunderstood, undervalued and often caricatured account of their role, C.L. Stevenson, *Ethics and Language* (New Haven, CT: Yale Univ. Press, 1944); his "Ethical Fallibility" in R.T. De George, ed., *Ethics and Society* (Garden City, NY: Anchor Books, 1966), 197; and his "The Scientist's Role and the Aims of Education" in I. Scheffler, ed., *Philosophy and Education* (Boston, MA: Allyn and Bacon, 1958), 43.

we jettison this as merely "conventional morality," then we reject a lot of what is very central to our morality in order to keep faith with a particular reading of rational choice theory. **If** such a rationalism is the consequence of accepting rational choice theory, then it is plainly time to go back to square one and revise rational choice theory until it is formulated in such a way that it does not have such repugnant conclusions or, reject rational choice theory in these domains if it cannot be so revised.

I am willing to say, given the deep counter-intuitiveness of rational choice theory, that we should go on to look for, or, if necessary, to construct, another theory, perhaps a radically different kind of theory, a theory which in the traditional sense may not even be a **philosophical** theory at all. However, even without a theory we can, and we should, rely on such a critical mass of our considered convictions. We may have reasons, indeed perhaps even good reasons, to trust **both** theory and intuition, but where theory extensively conflicts with very firmly embedded intuitions, then the greater trust should go to the intuitions (considered convictions). Nagel's methodological instincts here are more reasonable and more plausible than Gauthier's. Sometimes, at least, it is reasonable not to be a rationalist.

In different contexts I have, again and again, said things bearing some family resemblance to this, though not in the course of discussing Gauthier's method, and this surely shows that I am prepared (*pace* Hart) "to submit rational criteria to the constraints of...considered judgments."[19] Gauthier is a rationalist in Hart's sense and so perhaps is Brian Barry, but I plainly am not.[20] I am even less of a rationalist than Thomas Nagel because I am far more skeptical of the truth tracking capacity of philosophy than Nagel is. It seems that my elective affinities are with Wittgenstein and Rorty and historically speaking with Hume — or, at least Hume as Strawson reads him.[21] I am in this respect, worlds apart from Hobbes, d'Holbach and the tradition of enlightenment **rationalism** as I am from contemporary utilitarians such as J.J.C. Smart, R.M. Hare, P. Singer, and R. Brandt and rational choice theorists like D. Gauthier, J. Elster and J. Roemer. All of them reject considered judgments, coherentism and the reliance on context and history which I believe are requirements of an adequate articulated understanding of morality.

It is perhaps fair enough to say that one important thing that a moral theory would do, including, of course, a theory of justice, is give us a model to use in coming to an understanding of morality, but on the other hand it would have to be an adequate model of something we could **antecedently** recognize to be morality. A model, in certain re-

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19 See K.Nielsen, *After the Demise of the Tradition* (Boulder, CO: Westview Press, 1991); "On there being Philosophical Knowledge" (1990) LVI *Theoria* 3, 193-225; "Can there be Justified Philosophical Beliefs?" (1991) 40 *Iyyun*, 235; and in K.Nielsen, *Getting Straight About Philosophy* (Boulder, CO: Westview Press, forthcoming).

20 See how Barry waffles on considered judgments in Barry, *supra* note 6 at 271-92.

21 P.F. Strawson, *Skepticism and Naturalism* (London: Methuen, 1985), 10-30. See also D. Pears, *Hume's System* (Oxford: Oxford Univ. Press, 1990).

spects, is like a map. (I say "in certain respects," for in other respects, not relevant to what I argue here, they are importantly different.) A map of (say) Prince Edward Island, which did not enable us to recognize where the sea starts and the land ends, denote the bays and rivers, provide distinguishable markings for the terrain, and indicate where the cities, towns and villages are located would be a very inadequate map indeed. Different maps constructed for different purposes would latch on to different features of Prince Edward Island, but a map which failed to delineate any of the salient features of the island, features that were recognizable and identifiable independently, would not be just a bad map, but no map at all!

Similarly, a model of morality that represented no salient features of morality, independently recognized and identified as such, would not be a bad model of morality, it would be no model of morality at all. Considered judgments locate salient features of morality, including some of the things which are just and some of the rights we have. To bypass them is simply to bypass morality. A model that does so, whatever else it models, does not model morality. *Pace* Gauthier, it is rational choice theory, not coherentism and the appeal to considered judgments, which is held captive "to the intellectual fashions of the moment."[22] Wide-reflective equilibrium sticks with the often messy, thickly textured, reality of morality. It tries clearly to display it, and to show how we should proceed in both explaining the rationale and in articulating the justificatory basis of basic moral structures. It seeks to display morality's underlying rationale, as well as its dissonances. By its use, moral structures can be clearly seen, if you will, clearly modeled.

IV

Wide reflective equilibrium is (*pace* Gauthier), not a defense of conventional morality. This can be seen in the work of Rawls, Scanlon, Daniels, and Barry and in my work, including my "Rights and Consequences: It All Depends."[23] All of these accounts appeal (some more explicitly than others) to a coherentist method, which, at least in effect, more specifically, utilizes what has been called an appeal to considered judgments in wide reflective equilibrium. The consequentialism of my "Rights and Consequences: It All Depends" utilizes considered judgments as an integral element. This might be thought to be a jarring element in such a picture for most contemporary consequentialists (Hare, Smart, Singer and Brandt) will have no more truck with considered judgments than Gauthier. Such an appeal to considered judgements might, of course, have led me to drop consequentialism, but in fact, led me to accept it and utilize a version of it.

Unlike Rawls, I do not give justice **absolute** priority over other moral considerations even if it is, as Rawls puts it, the first virtue of institutions, and I believe that this position fits better with our considered judgments in wide reflective equilibrium than does Rawls's ac-

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22 *Supra* note 3, *Morals by Agreement* at 269.

23 See K. Nielsen, "Rights and Consequences: It All Depends" (1992) 1 *The Canadian J. Law and Society* 7.

count. We, in short, use the same method with different results, but there is nothing unusual or untoward in that. In this context I will say a little about my "Rights and Consequences: It All Depends." I will attempt to show, while relying on considered judgments and a coherentism, how it articulates a critical morality.

My essay was directed against Absolutism, particularly against a rights-based Absolutism that would assert that actions are just right or wrong according to their nature.[24] Moreover, such an Absolutism would deny permission, in certain circumstances, even to act to secure, everything considered, what was plainly the lesser evil. There are certain things, Absolutism has it, that we must never do no matter what the consequences are of not doing these things. Absolutism will forbid the doing of certain kinds of actions even if these forbidden actions produce less overall harm than the other alternatives. Considering everything, my **weak** consequentialism, by contrast, neither affirms nor denies that sometimes an individual may rightly refrain from doing that which will have, or may reasonably be expected to have, the best overall consequences. I do not (*pace* G.E. Moore) argue that we have a duty to try to produce or secure the greatest overall good; I do not argue that we have a duty or an obligation to do our best in an effort to achieve either the greatest average utility in the world or the greatest total utility. I refrain, as contemporary utilitarians do not, from making such strong claims.[25]

I advocate, rather, a **weak** consequentialism. Weak consequentialism is most usefully seen as a **negative** doctrine that denies (*pace* Elizabeth Anscombe and Alan Donagan) that it is possible to specify a list of act-descriptions which in terms of their very descriptions can be recognized to be the wrong thing to do, where the wrong in question is an everything considered wrong.[26] My weak consequentialism rejects such Absolutism and asserts that it all depends. Acts of a kind which we are inclined to believe would always be wrong (wrong, everything considered) might very well not be if the circumstances were altered and the consequences were very different than they usually are. Therefore, before considering the circumstances in which an act arises and the consequences flowing from the act, it cannot be definitively said that an act should never be done.

Brian Barry, who has a similar conception, puts the matter well:

> Weak consequentialism holds that there is no class of cases, definable in

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24 See also K. Nielsen, "Against Moral Conservatism" (1972) 82 *Ethics*, 219-31 and K. Nielsen, *Ethics Without God*, (rev.ed.) (Buffalo, NY: Prometheus Press, 1990), 128-62.

25 J.J.C. Smart, "Utilitarianism and Its Applications" in J. DeMarco & R.M. Fox, eds., *New Directions in Ethics* (London: Routledge & Kegan Paul, 1986), 24-41; "An Outline of a System of Utilitarian Ethics" in J.J.C. Smart & B. Williams, eds., *Utilitarianism: For and Against* (Cambridge: Cambridge Univ. Press, 1973), 3-76; J.J.C. Smart, "Distributive Justice and Utilitarianism" and R.M. Hare, "Justice and Equality" both in J. Arthur & W.H. Shaw, eds., *Justice and Economic Distribution*, (2d ed.) (Englewood Cliffs, NJ: Prentice-Hall, 1989), 103-115 (Smart) and 116-131 (Hare).

26 See *supra* note 23, and B. Barry, *Liberty and Justice* (Oxford: Clarendon Press, 1991), 40-77.

> advance, such that the consequences are never relevant to the question of what is the right thing to do.[27]

By contrast, "strong consequentialism holds that there is at all times a duty to act so as to maximize the amount of good" in the world.[28] In order for consequentialism to have a sufficiently broad characterization, to cover both weak and strong consequentialism, it should be conceptualized as follows: the morality of any action is to be judged by its consequences, or in part, by it consequences, and not just, or perhaps even at all, by what the action is apart from its consequences. Weak consequentialism takes the two weaker alternatives; strong consequentialism the stronger alternatives. Both deny that there are any actions, by virtue of what they are, apart from considering their consequences, their circumstances and their relations to other actions, which must be done or avoided *sans phrase*. What, for anything at all, is the greater or lesser evil cannot be determined without reference to the consequences. And, *pace* Absolutism, there can be no justified categorical denials of permission to act to avoid the lesser evil. There are no such **categorical** prescriptivities which are justified.[29]

I do not say, as a result, or even at all, that talk of natural rights or human rights is, as Bentham put it, nonsense in stilts, or, indeed, any kind of nonsense. I do not say, with the Scandinavian legal realists (positivists), that they are ficticious and I do not say with the Hobbesians that only those who can contribute to the cooperative surplus, and therefore engage in mutually advantageous bargains, have moral standing and thus have rights. I will say instead with John Rawls and Ronald Dworkin, both staunch constructivists, that there are moral rights — rights that we have whether or not they are also a part of a legal system — which are ours, simply by virtue of the fact that we are human beings.[30] But to *pace moral* realists (who are very different from **legal** realists) and epistemological foundationalists, these rights have no arcane metaphysical or epistemological status or at least none is claimed for them. They are not natural laws or anything like natural laws and they are not synthetic *a priori* truths. I do not even claim that they are any kind of truths at all.

They are rights that for the most part came to have extensive acceptance in conditions of modernity. They are by now among the most deeply embedded considered convictions we moderns — we children of the Enlightenment — have, but they can be shown, by the method of wide reflective equilibrium, to be more than just convictions we moderns have. They have a much more extensive scope and acceptance. Moreover, they would be even more generally accepted if people were to carefully attend to how the world is (including the social world); their considered convictions and the relations between them;

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27 *Id.* at 76.

28 *Id.*

29 J.L. Mackie, *Ethics: Inventing Right and Wrong* (N.Y.: Penguin Books, 1977); *Hume's Moral Theory* (London: Routledge & Kegan Paul, 1980), 44-75, 145-56; *Persons and Values* (Oxford: Clarendon Press, 1985), 77-90, 206-219.

30 R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard Univ. Press, 1977), 150-205.

the various extant accounts of moral theory and of the function of morality; and then reflect upon and carefully consider all of that material with a goal of representing it perspicuously in a coherent pattern.[31] If this were done diligently and extensively, these beliefs would come, I confidently predict, to have a much wider appeal than they now have. They are certainly not just the ideological convictions of social democratic liberals.

Absolutism would, I believe, wither away if people would resolutely use that method. We must, of course, start by seeing things by our own lights. We start in moral domains with, among other things, our moral judgments (convictions). Yet we need not, and indeed should not, rest there or end there. We are not held captive to any particular considered judgment or limited cluster of considered judgments; none are unquestionable, at least in principle, and none are foundational. The method of wide reflective equilibrium with its commitment to maximize coherence is itself self-correcting. In this respect, it is similar to Charles Peirce's and John Dewey's conception of scientific method.[32]

By using this method we can show that none of the considered convictions should be given an Absolutist reading because there could be some rights-claims which could never, even in principle, be rightly overridden. Rights, of course, cannot be routinely overridden, or they would not be rights, but in extreme situations, where not overriding them would cause extensive harm, they can be rightly overridden. However, in being overridden, they are not thereby forfeited and they will remain inalienable, particularly if they are human rights.[33]

By way of illustration; I have a right to privacy and a right to free speech, but in certain circumstances, in wartime for example, a censor may justifiably open my mail and read it and censure my letters. The security of the nation outweighs my rights during wartime. Similarly, I have a right, at least in societies such as ours, to the exclusive use of my personal property (I do not speak of the private ownership of productive property), but after an earthquake that devastated most of the houses in my city, while leaving mine standing, I may, my wishes to the contrary notwithstanding, be rightly forced by city officials to billet people in my house.

Again, and even more importantly, people have a right to a fair trial and the right not to be killed. Yet, consider the situation of a remnant of an army desperately and rapidly trying to escape from behind the lines of an enemy army that will, if they are caught, slaughter all of them. If that remnant comes upon a civilian of that country, who cannot be taken with them, but, who, if left behind, may very well inform

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31 C. Taylor does not appeal to considered judgments or utilize reflective equilibrium, but his way of correcting for ethnocentrism fits very well with that method and the point I am making here. See his essay "Understanding and Ethnocentricity" in Taylor, *supra* note 12 at 116-33.

32 See K.Nielsen, "Peirce, Pragmatism and the Challenge of Postmodernism" (1993) *Transactions of the Peirce Society.*

33 J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton Univ. Press, 1980), 143-55.

on them with the result that they will all be killed, then in such an extreme situation, the commander of the retreating army may rightly order the civilian's execution even though it overrides his right to a fair trial and (even more centrally) his right not to be killed when he may very well be innocent of any wrongdoing or intended wrongdoing. He may have no intention of betraying the retreating soldiers, but there is no time, or way of knowing in such a circumstance, how to ascertain that. In fine, and to generalize, there are no unconditional, non-overrideable natural or human rights or indeed any other kind of rights.

Even very general rights principles, as long as they remain substantive, can, on occasion, be overridden without being forfeited or alienated.[34] Dworkin's claim, central to his way of thinking, that "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them" could be rightly overridden.[35] We may in warfare, where the war is plainly just, destroy a munitions factory, the destruction of which would save a very considerable number of lives, but would predictably kill a small group of innocent civilians (including children). We, that is, in such circumstances, rightly bomb the munitions factory even though innocent children are killed. In such a circumstance the innocent (*pace* Dworkin) are not being shown an equal concern and respect as is shown to those who will be saved because they are, in such circumstances, expendable.

Further suppose, to avoid some pointless objections, the territory being bombed was your own territory, having previously been captured by the enemy, and the innocent killed were civilians of your country. There can be impartial treatment here, for were any other persons, equally innocent, in that position, they would also be rightly bombed. Still the innocent civilians, in this situation, are also not being shown equal concern and respect in the administration of the political institutions that govern them. They are expendable; they are treated as a means. People in positions of responsibility in political institutions order, and rightly so, the army to carry out such bombings. The civilians' rights in such a circumstance are rightly overridden but not forfeited or alienated. It would, of course, be wildly and inexcusably wrong to kill them if it were not necessary. Unfortunately it is necessary. And, whether it is necessary or not, whether it is the wrong action or not, cannot be determined without reference to the circumstances and consequences.

These are, to generalize again, moral rights (natural rights or human rights) both specific and very general, but they are not **unconditional** rights. Whether they are, on a particular occasion, to be respected —

34 See K. Nielsen, "Equality of Condition and Self-Ownership" in G. Lafrance, ed., *Ethics and Basic Rights* (Ottawa, Ont.: Univ. of Ottawa Press, 1989), 83-99; and K. Nielsen, *God and the Grounding of Morality* (Ottawa, Ont.: Univ. of Ottawa Press, 1991), 101-76.

35 Dworkin, *Taking Rights Seriously*, 180 and K. Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa, NJ: Rowman and Allanheld, 1985), 13-44.

that is, whether we are to act in accordance with them on that occasion — depends on the circumstances and the consequences. But the recognition of this does not at all depend, *à la* Bentham, J.J.C. Smart or Gauthier, on the setting aside of an appeal to considered judgments, but goes with the very coherentism and accepting of such judgements that Gauthier wrongly identifies with, the acceptance of, and the sticking with, conventional morality. However, in my use of wide reflective equilibrium there is no such sticking with conventional morality. Such an anti-Absolutism and weak consequentialism goes with the careful employment of the method of wide reflective equilibrium. We start with central elements of our commonsense moral beliefs — if you will, the moral intuitions of our tribe — but, in maximizing coherence until we achieve wide reflective equilibrium, we pass to a **critical** morality that sets aside the Absolutism of **commonsense** morality (if indeed that is **commonsense** morality) without embracing relativism.[36] No one of our considered convictions must be acted on come what may, none have a categorical prescriptivity, but many, for all of that, are reliable norms and, as such, reasonable guides for action. Appeal to considered moral judgments, the coherentism of wide reflective equilibrium, weak consequentialism and critical morality go together like hand and glove.

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36 See all the following by K. Nielsen: "John Rawls's New Methodology: An Interpretive Account" (1990) 35 *McGill Law J.* 3, 573-601; "Rawls Revising Himself: A Political Conception of Justice" (1990) 76 *Archiv für Rechts und Socialphilosophie*, 439-56; "Rawls and the Socratic Ideal" (1991) 13 *Analyse & Kritik* 1, 67-93; *After the Demise of the Tradition* (Boulder, CO: Westview Press, 1991), 195-248; and see Nielsen *supra* note 15.