

RIGHTS-BASED ETHICS: A CRITIQUE AND REPLACEMENT

by
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A typology of normative ethical theories and normative political theories into goal-based, rights-based and duty-based theories is articulated and explained and the three types of theories are contrasted and critically compared. Rights-based theories, currently the dominant type, are critically examined. The importance they give to individual rights is explained as is their critique of utilitarianism. However, it is argued that there are key elements in morality that rights-based theories, even in their strongest forms, do not account for and that a more adequate theory would be goal-based or a mixed theory (partly goal-based and partly rights-based) defending a weak consequentialism in a way that avoids the errors of utilitarianism and arguably fits with our considered judgements in wide reflective equilibrium.

L'éthique basée sur les droits: une critique et une solution de rechange

Une typologie des théories normatives éthiques et politiques, les classant selon qu'elles sont basées sur les buts, les droits ou les devoirs, est articulée et expliquée, et les trois types de théories sont contrastés et comparés. Les théories basées sur les droits, qui prédominent aujourd'hui, font l'objet d'un examen critique. L'importance qu'elles accordent aux droits de la personne est expliquée, ainsi que leur critique de l'utilitarisme. Il est pourtant avancé que la moralité a des éléments clés que les théories basées sur les droits, même sous leurs formes les plus fortes, n'expliquent pas. Une théorie plus adéquate serait donc également ou plutôt basée sur les buts. Elle défendrait un conséquentialisme faible de manière à éviter les erreurs de l'utilitarisme et semble bien pouvoir s'accorder avec nos jugements mûrs dans un équilibre large et réfléchi.

Ronald Dworkin and J.L. Mackie, refining the traditional distinction between deontological and teleological ethical theories, have developed a typology that classifies normative ethical theories and political moralities into rights-based theories, duty-based theories and goal-based theories.¹ They proceed, Dworkin in considerable detail and Mackie briefly but incisively, to defend a rights-based theory. Their accounts are particularly

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¹ The work of Ronald Dworkin I shall be most centrally concerned with is his classic *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard U.P., 1979) and from there most centrally with his core arguments on 171-177. But also relevant are his *A Matter of Principle* (Cambridge, Massachusetts: Harvard U.P., 1985), particularly parts three and six, his *Law's Empire* (Cambridge, Massachusetts: Harvard U.P., 1986), 92-95, 152-53, 293-96, 382-92, and his "Foundations of Liberal Equality," *Tanner Lectures in Human Values* (Salt Lake City, Utah: Univ. of Utah P., 1990), 1-80. The work of J.L. Mackie that I shall be most centrally concerned with is his "Can There be a Rights Based Moral Theory?" (1978) *Midwest Studies in Philosophy* 3, 350-59. References to Dworkin's *Taking Rights Seriously* and Mackie's "Can There be a Rights Based Moral Theory?" will be given in the text as (D, followed by page number) and (M, followed by page number).

attractive because they jettison the ontological paraphernalia of traditional natural law and natural rights theories and even the doubtful meta-ethical paraphernalia of what, taking in others' dirty linen, has been called cognitivism. Mackie, seeing cognitivism as a myth with a pervasive influence in the history of ethics, rejects "objective prescriptivity" and Dworkin, favouring what he calls the "constructive model" over the "natural model," travels lightly, meta-ethically and ontologically. They develop their rights-based accounts against a conceptual background that will not offend the canons of modernity, or for that matter postmodernity, and, what many people take to be philosophical sophistication.

Principally playing the role of a second-sayer and critic, I want to query rights-based accounts. While I think Dworkin is justified in noting the pivotal importance of fundamental individual rights in political morality, I do not think that this should commit us to a rights-based theory or to individualistic liberalism or to the stress it places on individual rights. I shall argue that certain goal-based theories (teleological theories), theories of a *weak* consequentialism, are generally more adequate than both rights-based and other deontological theories. In particular they will provide a better defense for the very rights Dworkin rightly prizes.² I shall also not be concerned to deny, as Dworkin does, that there are collective rights that may on occasion override individual rights. Fundamentally, I shall argue that rights-based theories will not do as complete normative ethical theories or political moralities in the way some teleological theories and mixed theories do. In fact, rights-based accounts lack the resources to answer certain key moral questions that arise, including questions about our appeal to rights. These questions, I shall argue, can be answered by a goal-based theory. My claim here stands in stark contrast to Mackie's bold claim that "not only can there be a right-based moral theory, there cannot be an acceptable moral theory that is not right-based." (M, 355)

I

I need first to set the stage for my discussion. I shall in this section explain the typology and say something concerning its rationale. In the section following this one I shall try to say something minimal and

² See my "Rights and Consequences: It All Depends (Spring 1992) 1 *Can. J. Law and Society* 7, 63-92 and B. Barry, *Liberty and Justice* (Oxford: Clarendon Press, 1991), 40-77. Weak consequentialism is the doctrine that there are no acts that we can correctly just say should never be done without a consideration of their circumstances and consequences. It can be most usefully seen as a negative doctrine that denies 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. My weak consequentialism rejects Absolutism and asserts rather that it all depends. Acts of a kind which we are inclined to believe would always be wrong (everything considered wrong) might very well not be if the circumstances were altered and the consequences were very different than they usually are. Of course, very frequently the circumstances and consequences are very stable so that we have very good reasons for believing that certain acts are in fact always wrong. See also my *Naturalism Without Foundations* (Buffalo, N.Y.: Prometheus Books, 1996), Chapters VII-IX.

noncontroversial about the analysis of “rights” which will (I hope) be sufficient for the purposes of assessing the comparative merits of rights-based and goal-based theories.

Dworkin sets out the typology as follows: a goal-based theory is a theory which “would take some goal, like improving the general welfare, as fundamental.” (D, 171) By contrast, a rights-based theory would take a particular right, like the right of all men and women to the greatest possible overall liberty, or some set of rights, as fundamental. (D, 171) Finally, as a still further contrast, a duty-based theory would take “some duty, like the duty to obey God’s will as set forth in the Ten Commandments, as fundamental.” (D, 171-72).

In speaking of a “goal”, Dworkin is speaking of a state of affairs within a particular political theory or normative ethical theory which is such that people with a pro-attitude toward that state of affairs (actual or achievable) will tend to favour acts which will advance, preserve or achieve that state of affairs and will tend not to favour acts which retard or threaten it. (D, 169) To speak of a right, Dworkin maintains, is to speak of something possessed by individuals: “An individual has a *right* to a particular political act, within a political theory, if the failure to provide that act, when he calls for it, would be unjustified within that theory, even if the goals of the theory would, on the balance, be disserved by that act.” (D, 169) According to Dworkin, to speak of a duty where an individual is concerned, is to speak of something definite within a political theory or a normative ethical theory that an individual must do if a political or moral decision constraining such an “act is justified within that theory notwithstanding that no goal of the system would be served by that decision.” (D, 170)

Both the Ethics of Plato and Aristotle (versions of perfectionist ethics) and utilitarianism in its various forms are good examples of goal-based theories. Divine-command theories and Kant’s theory of good are examples of duty-based theories. The only examples Dworkin or Mackie give of a rights-based theory are Paine’s theory of revolution and Nozick’s theory of the minimal state, although Dworkin contends (and here Mackie follows him) that Rawls’ theory, when we become clear about its underlying foundations, is best understood as a rights-based theory. As it is formulated, however, it is not explicitly rights-based. Dworkin’s claim is that its deep underlying theory is rights-based. But that is a controversial claim about how best to understand Rawls — and that is not of moment here.

It would be useful, at the outset, to consider in a little more detail what it is to base a moral theory on goals, duties or rights. Mackie rightly observes that all moral theories with even a minimal claim to completeness provide accounts of goals, duties and rights. They talk, that is, “about what is good as an end, about what is obligatory or about what ought or ought not to be done or must or must not be done, and about what people are entitled to have or receive or do.” (M, 350) These differently based theories take one or another of these items as fundamental. Some utilitarians, for example, try to derive duties and rights from their basic goal of utility maximization. Certain things must be done, certain rights must be protected,

if utility is to be maximized.³ Similarly, goals and rights can be derived from duties. It may also be possible to derive goals and duties from rights. A theory that did this or set out to do it would still be a rights-based theory.

More specifically to say that a moral theory or political morality is X-based is to say at least one of the following things:

1. A moral theory is X-based if it forms a system in which some statements about Xs are taken as basic and the other statements in the theory are derived from them, perhaps with the help of non-moral, purely factual, premises. (M, 358)
2. A moral theory is X-based if it is a system such that “not merely formally but in its purpose, that the basic statements about Xs should be seen as capturing what gives point to the whole moral theory.” (M, 358)

Mackie rightly prefers the second vaguer statement. “Derivation” is, he claims, a much too narrow notion to capture what we are after. But the second characterization, with its focus on the underlying rationale or point of the theory, captures what I think might reasonably be sought by the claim that a theory has a certain base. If we can understand the underlying rationale of a theory, we will know what kind of ground, if any, its various statements have and we will have a good idea where, for that account, justification will come to an end. For example, we will understand the basis of a rights-based ethics when we understand its underlying rationale. Schematically, this, though, is only partially helpful, because we are using the term “base” in our schematization in an unexplicated way. We can characterize rights-based ethics as follows: such a moral theory is an account in which some rights are held as fundamental and other rights, as well as goals and duties, are derived from or are in some other way based on or are at least subordinate to these fundamental rights.

So, as Dworkin puts it, a rights-based theory is a “theory that takes the idea of rights so seriously as to make them fundamental in political morality.” (D, 176) To understand what this comes to we need to know in more detail how such a theory is different in character from goal-based and duty-based theories and what rights it takes to be fundamental and why.

We use concepts of duties, goals and rights in justifying or condemning certain actions, policies or decisions. But, putting aside whatever is taken to be fundamental within a given system of morality, we can, and sometimes do, ask whether, or at least why, a “particular goal, right or duty is itself justified.” (D, 170) The different theories will attempt to provide justifications by appealing to more basic duties, rights or goals. When a particular theory is coherently set out, the various goals, rights and duties will have a distinctive set of connections, a consistent set of internal weightings and rankings, a statement of which concepts with their associated claims and principles form the fundamental core of the theory and an account of which type of claim will be overriding and when.

3 L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987).

Rights-based theories and duty-based theories, in contrast with goal-based theories, “place the individual at the center, and take his decision or conduct as of fundamental importance.” (D, 172) Goal-based theories, as Dworkin characterizes them, have a different rationale. They “are concerned with the welfare of any particular individual only in so far as this contributes to some state of affairs stipulated as good quite apart from his choice of that state of affairs.” (D, 172) Where the goal-based theory is a utilitarian one, even where its concern is with individual welfare, individual interests and discrete political decisions are, directly or indirectly, merged into “overall totals or averages” and improvements of these totals or averages are taken to be “desirable quite apart from the decision of any individual that it is.” (D, 173) On such an account the well-being of all individuals is simply aggregated. The happiness of some can compensate for the misery (even the undeserved misery) of others. By contrast, with a rights-based theory, “individual rights must be served even at some cost to the general welfare.” (D, 173) While an Aristotelian goal-based theory, is committed to imposing “upon individuals an ideal of excellence”, the fundamental commitment of a rights-based theory is to human independence, to the right of all people to choose how they shall live. The value of individual thought and choice must, at all costs, be protected. This is the key priority of a rights-based account.

The crucial contrast between the two deontological type theories (rights-based theories and duty-based theories) is that while the former place the individual at the center and make the protection of her rights the crucial thing, the latter make conformity of the individual’s actions to the moral law to be the crucial thing. Duty-based theories treat moral codes, whether socially derived or of individual construction, as central to morality. By contrast, a rights-based theory, according to Dworkin, treats moral codes “as instruments, perhaps necessary to protect the rights of others, but [as] having no essential value in themselves.” (D, 172) The stress is rather on individuals with their rights, benefiting from the compliance of others, rather than on moral agents, with their stations and their duties, legislating moral laws for themselves and acting in accordance with these moral laws. Rights-based theory does not ignore the fact that *typically* rights create correlative duties. But still the stress remains on the individual and her rights. The thing that is crucial in a rights-based theory is that “individuals have interests that they are entitled to protect if they wish.” (D, 176) The central point of a rights-based moral theory is the protection of those individual rights.

It is also important to recognize, as Dworkin stresses, that these rights are *natural rights* in the innocuous sense “that they are not the product of any legislation, or convention, or hypothetical contract.” (D, 176) There are two things to be noticed about this. First, in contrast to the accounts of John Rawls, David Gauthier and Thomas Scanlon, although also constructivist, Dworkin’s account is non-contractarian. Secondly, this way of talking about natural rights avoids all the otiose metaphysical implications of natural rights talk which have made it so intellectually suspect. Such a theory need make no

metaphysical or natural law commitments at all. It does, however, involve, as Dworkin remarks, taking “the protection of certain individual choices as fundamental, and not properly subordinated to any goal or duty or combination of these.” (D 177) But such a position is no more *ontologically* or *metaphysically* committed than any other view about the fundamental concepts of morality. A rights-based theory, however, could hardly treat the rights it appeals to as products of deliberate legislation, convention, arbitrary decision or social custom. For we could, and often should, ask for a justification of all these things. Such customary or conventional rights could never be the fundamental grounds in a rights-based theory. In this way a rights-based theory must commit itself to a belief in natural rights. But this still stands at some distance from the traditional metaphysically and sometimes theologically encumbered natural law theories.⁴

II

Before I proceed to discuss the merits of such a theory and question the grounding of its appeal to rights, I would like to explain briefly how, on such accounts, “a right” is construed. What are we talking about when speaking of something being right and what are we talking about in speaking of rights? Here I shall follow Dworkin for he perspicuously develops an analysis of “right” and of “rights” in the context of articulating a rights-based theory.

Dworkin reasonably enough remarks that “the word ‘right’ has a different force in different contexts.” (D, 188) He correctly distinguishes between, on the one hand, something being the right or wrong thing to do and, on the other, someone having a right to do something. It may be the wrong thing for me to do in not giving to Amnesty International, but I have a right not to do so. And I have a right to overeat and neglect exercise even though that is the wrong thing for me to do. As Dworkin puts it, “Someone may have the right to do something that it is the wrong thing for him to do” and conversely “something may be the right thing for him to do and yet he may have no right to do it, in the sense that it would not be wrong from someone to interfere with his trying.” (D, 189) It may be the right thing for a civil disobedient to try to block entrance to a nuclear power station, but it need not be wrong for the State authorities in turn to try to prevent him from doing so. Plainly there is a difference, on the one hand, between claiming that someone has a right to do something and, on the other, claiming that what he did was the right thing to do or even asserting, or believing, that in doing what he had a right to do he still did something that would have been better for him not to have done.

After making that distinction and limiting his discussion to what we have a right to do, Dworkin distinguishes between a *strong sense* and a *weak sense* of the claim. (The strong sense is the more common usage.)

⁴ I have critically examined natural law theories in my *God and the Grounding of Morality* (Ottawa, Ontario: Univ. of Ottawa Press, 1991), 41-84 and in my *Ethics Without God*, rev. ed. (Buffalo, N.Y.: Prometheus Books, 1990), 9-50.

1. *Strong sense of "a right."* To say that someone has "a right" to do something is to "imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference." (D, 188)
2. *Weak sense of "a right."* To say that someone has "a right" to do something is "only to deny that it is the wrong thing for him to do." (D, 189)

The key difference between the strong sense and the weak sense is that to have a right in the strong sense obligates others, to not interfere with your doing it. It creates, that is, a correlative obligation, while in the weaker sense this is not so. It is this strong sense that gives me the right to vote in Canada and the right to speak my mind. In the same sense, it also gives me the right to run for office, to marry and to seek employment. In the weaker sense, it gives a captured soldier the right to try to escape. However, it is also true that the opposing army is not wrong in trying to stop him from escaping and they certainly have no correlative obligation to not interfere with his attempt to escape. A person may have a right to try to make a revolution but it does not follow that the State does wrong to interfere with this revolutionary activity if it can. In this weaker sense of "a right," we mean that someone can, without blame or censure, "proceed on his honest convictions, even though we disagree with these convictions, and even though, for policy or other reasons, we must force him to act contrary to them." (D, 189) Most of the rights we have and the rights that are most distinctively relevant to a rights-based ethics are of the *strong* kind. In the case of such a right we are not justified in interfering for policy reasons where the rationale for interfering with him is that by doing so the society will be somewhat better off than it otherwise would.

In saying what a right is I want also to distinguish a right from a goal more clearly than I have done hitherto. Freedom of speech is a right (in the strong sense) and diminishing and ultimately eradicating poverty is a goal. People are entitled to freedom of speech as a matter of political morality. It is — or so it might be argued — less evident that they are either entitled to be rich or poor. It is not even clear that talking in that way makes any straightforward sense. There are, however, at least three difficulties with that way of putting it: (1) it is not so evident what we are, and what we are not, entitled to; (2) the concept of entitlement, used in the above explanations, already contains the concept of a right; and (3) if, in speaking of a goal (supposedly distinct from a right), we would use, instead of the example of poverty, the diminishing or ending of child abuse, we would then have something that is plainly a goal. It is also perfectly natural to say that children are as much entitled not to be abused as we, and they, are entitled to free speech. They have a right, in the strong sense, not to be abused and yet the eradication of child abuse is a goal. Perhaps we should say the goal is the eradication of child abuse, and what they have a right to is to not be abused. However, this still leaves the distinction between rights and goals unclear.

We must see if we can find a reasonably clear way of drawing that distinction. Dworkin, while maintaining that there are natural rights, also maintains “that the character of a political aim — its standing as a right or goal — depends upon its place and function within a single political theory. The same phrase might describe a right within one theory and a goal within another.” (D, 92) Goals (typically at least) get articulated in policy statements, *e.g.*, “Our goal is to attain economic self-sufficiency by 1997” while rights are articulated in terms of principles, *e.g.*, “Every person has the right to worship or not worship as that person pleases.” Dworkin seeks to “distinguish rights from goals by fixing on the distributional character of claims about rights, and on the force of these claims, in political arguments, against competing claims of a different distributional character.” (D, 90)

In trying to clarify what he is claiming here, Dworkin distinguishes “a political right as an individuated political aim” from “a goal as a non-individuated political aim.” (D, 91) The key distributional difference is that the aim captured by the goal is not a state of affairs whose specification requires “any particular opportunity or resource or liberty for particular individuals.”⁵ (D, 91) Generally, the attaining of a state of affairs in a political theory is a *political aim*, whether that aim is a goal or a right, if it will be counted in favour of any political decision that it is likely to advance, protect or augment [that state of affairs], or against a decision that it will retard or endanger that state. Rights are individuated aims and goals are non-individuated aims.⁶ This is the crucial distinction, according to Dworkin, in their distributional character. By definition a right is something that cannot be outweighed by just any social goal. It is something that, in virtue of being a right, cannot be overridden by some appeal to routine administrative goals, but only, if at all, by goals with some very special urgency. Individual rights are the sort of thing which will have some threshold weight against goals generally, including collective goals at which a community may aim, such as economic efficiency or a more equal distribution of wealth. Rights give individuals a claim “to some opportunity or resource or liberty” even when their having it may serve no other political aim and indeed may even undermine, or at least work against, some other political aim or aims.

Dworkin sees individual rights as typically something which may come in conflict with collective goals, goals which “encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole.” (D, 91) A rights-based ethic will claim that there are individual rights that cannot, morally speaking, be overridden by simply pointing to collective goals which will, if that right is yielded, produce some overall benefit to the community. The distributional character of a collective goal is such that its “distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing

⁵ Is that, we may ask, to take rights seriously?

⁶ That just *assumes*, as Dworkin consistently but perhaps mistakenly does, that there are no collective rights.

that this will lead to a greater benefit overall.” (D, 91) This is not, and cannot be, the distributional character of a right, and a rights-based ethical theory cannot treat the rights of individuals as being subordinate in that way.

Indeed, Dworkin claims, a right, such as freedom of speech, may even be absolute in a given political theory, meaning that the theory “will recognize no reason for not securing the liberty it requires for every individual; no reason, that is, short of impossibility.” (D, 92) Not all rights, of course, are of that strong character, but some (or so the claim goes) are; and yet none of them, as we have also seen, can, on a rights-based ethic, simply be defeated by an appeal to the social goals of some administrative policy. And some, given such a conception of ethics, may stand in the face of any collective goals.

III

Before I examine whether we are justified in believing that any appeal to rights will always, or even ordinarily, prevail over the advancement of goals, I want first, very briefly, to indicate why one rights-based theorist, to wit J.L. Mackie, claims that, between the two deontological accounts, a rights-based ethic is superior to a duty-based one.

Mackie asks what advantages do rights have over duties as a ground and basis for morality. He thinks the answer to that is obvious. (M, 352) Rights, he notes, are something we may well want to have. Duties, by contrast, are irksome. Duty for duty’s sake is absurd or at least thoroughly problematic in the way rights for their own sake are not. (M, 352) If we believe in God and believe we must do what He commands and that our moral understanding is so corrupted or otherwise unreliable that we cannot rely on it but can find our only criterion for right and wrong in the inexplicable commands of God, then we would, in accepting what is in effect a Divine Command theory, be accepting a duty-based ethics. It is questionable whether the very concept of God, where “God” is construed non-anthropomorphically, is a coherent one. Even if it is coherent, there is very little reason to think that there is such a reality, and good reasons for thinking there isn’t. Moreover, we do not need, with a Pascalian syndrome, to postulate such a God to make sense of our lives or to find purpose in our lives. Even setting aside all that, that something is commanded, even by an all powerful and all knowing being, doesn’t make the doing of that thing the right thing to do, though it may make it prudent to do it. A morality, if there can be such, rooted in divine commands would give us a basis for a duty-based ethics. But it is plain that such a morality rests on a myth.⁷ Mackie contends that “if we reject this mythology and see morality as a human product we cannot intelligibly take duties as its starting point.” (M, 352) Quickly bypassing Kant, who also had a duty-based ethics, yet,

7 I have argued for that in some detail in my *Ethics Without God*, *supra* note 4, 25-30 and in my *God and the Grounding of Morality*, *supra* note 4, 41-84. See also the last chapter of my *Naturalism Without Foundations*, *supra* note 2.

vis-à-vis divine command ethics, was an autonomist, Mackie remarks that “giving laws to oneself is not in itself a rational procedure.” (M, 352) We need duties and obligations because we have rights and because there are certain goals that are through and through desirable. Identifying the underlying rationale of morality as the giving of laws to oneself, quite apart from whether they protect anyone’s rights, or are conducive to human well-being, is, Mackie has it, pointless and arbitrary. Codes specifying such duties and obligations have only instrumental value. A duty-based ethic is a non-starter.

Such a dismissal *may* in some ways be too abrupt. Usually more can be said for a philosophical position than what can be set aside with a few one-liners. This is no doubt the case here. I am, however, reasonably confident that after a more complicated argument the result would be the same. It is, of course, fair enough to remark that that would have to be established by argument. However, I shall not pursue that argument here. Putting aside duty-based theories, I would now like to turn to the main subject of the first part of this essay, namely, the claim for the greater adequacy of rights-based theories over goal-based theories. Dworkin definitely, at least for political morality, and Mackie more tentatively for a complete normative ethic (whatever exactly that is), argue for the comparative advantages of a rights-based theory over a goal-based theory. I shall question the soundness of these arguments and argue alternatively that the ground of rights, as well as for right itself, is to be found in a goal-based theory, or at least, in a mixed theory such as Thomas Scanlon’s.⁸

First I want to set out something of the case made by Dworkin and Mackie for a rights-based theory. Dworkin’s arguments are the more detailed and I shall give the most extensive attention to them. At various places in *Taking Rights Seriously* and elsewhere, Dworkin argues, appealing to our considered judgements, that if we are to take rights seriously we cannot defend them on the basis of utilitarianism. In thinking about what traditionally have been regarded as our basic liberties, Dworkin asks, “Why do citizens in a democracy have rights to any specific kind of liberty, like freedom of speech or religion or political activity?” (D, 271) He rejects a utilitarian answer on these grounds:

It is no answer to say that if individuals have these rights, then the community will be better off in the long run as a whole. This idea — that individual rights may lead to overall utility — may or may not be true, but it is irrelevant to the defence of rights as such, because when we say that someone has a right to speak his mind freely, in the relevant political sense, we mean that he is entitled to do so even if this would not be in the general interest. If we want to defend individual rights in the sense in which we claim them, then we must try to discover something beyond utility that argues for these rights. (D, 271)

⁸ T.M. Scanlon, “Rights, Goals and Fairness” in Stuart Hampshire, ed., *Public and Private Morality* (New York: Cambridge University P., 1978), 93-112. This is a powerful statement of a mixed theory.

It is not enough, Dworkin argues, to justify our depriving someone of such basic liberties to show that “the common interest would be served by doing so.” (D, 272) We can never justify the denial of such rights on the grounds that the community as a whole will be better off or more people will have more of what they, on reflection, want.

In his pivotal essay, “Taking Rights Seriously,” which is also the title of the volume most under discussion here, Dworkin develops those aspects of his critique of goal-based theories that I want to examine and critique. Dworkin argues powerfully that we have rights, in the strong sense of “rights,” against the state or against any totality when the right, such as the right to freedom of speech or worship, is a right necessary to protect our dignity and our right to be treated as equals. (Keep in mind here, Dworkin’s point that we must distinguish between, the right to be treated as equals and the right to equal treatment.) “The institution of rights,” he contends, rests on the conviction that “treating a man as less than a man, or as less worthy of concern than other men” is “a grave injustice and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it.” (D, 199) Basic liberties, such as freedom of speech, religion or political activity, are also basic rights in the strong sense. Even if situations arise where it is not in the interests of the state or some totality on some particular occasion or occasions to protect those liberties, it is still morally required of them to do so. It is particularly evident, where the benefits are small or the enhanced general well-being to be gained is only slight, that, utilitarian theory to the contrary, we are not justified in overriding those rights to gain that small advantage. What is important for Dworkin is that the appeal to rights be decisive in such cases. (D, 96) He rejects those theories “that unite rights and goals not causally but by making the force of a right contingent upon its power, as a right to promote some collective goal.” (D, 95) If a person makes a provocative political speech that may even result in violence, the “government is not entitled to make its first attack on that problem by denying that right.” (D, 203) That may be the convenient course, the less expensive course (it may even maximize satisfactions) but such rights cannot be overridden for *those* goal-based reasons. This is even more evident in the case of a fair trial for a member of a discriminated against group. Given the prejudices of the surrounding population, a discreet railroading of him might maximize satisfactions and perhaps even be in the interests of the society, but it still would be, everything considered, the wrong thing to do. A rights-based theory plainly explains why. In contrast, some goal-based theories appear at least to be committed if they are to be consistent, to approving of such actions — actions which, given our *considered* judgements (our reflective convictions), seem to us plainly wrong. Dworkin remarks that such utilitarian arguments “are ruled out by the concept of rights.” (D, 203) We are not justified in balancing the goods and ills, the benefits and burdens, between people such that a man must suffer palpable damage against the possibility, or even the virtual certainty, that the group’s risk of loss may be marginally reduced. (D, 202) The gain of the many cannot outweigh the distress of the few

whose rights have been trampled on. Showing that the vast majority of people would be better off by curtailing such fundamental rights as freedom of assembly, freedom of speech, freedom of worship — rights which protect our independence and human dignity — would not justify their curtailment.

However — and this will be important for the critique I shall make later — Dworkin makes a needed qualifying remark:

I must not overstate the point. Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit (though if he acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental). What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgement that its act is likely to produce, overall, a benefit to the community. (D, 194)

Moreover, these rights — rights in the strong sense — are rights against the government and they cannot be overridden by any appeal by the majority to a right to work its will. If the majority passes a law which violates fundamental rights, it cannot justify itself by appealing to a competing right of the majority to have its laws enforced even when they violate fundamental rights. The majority's right to do what it wants (if indeed there can be such collective rights) is not as strong a right, Dworkin claims, as the right to freedom of speech or assembly. The very existence of such fundamental rights against the government would be undermined, if the government were able to “defeat such a right by appealing to the right of a democratic majority to work its will. A right against the government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.” (D, 194) Societies do not have the right to do whatever is likely to benefit the majority. “The prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.” (D, 193)

IV

So far, so good — or so it seems to me. In defending a goal-based account, or at least a mixed account, I do not want to deny any of this.⁹ Dworkin, without appealing explicitly to anything so fancy as a moral methodology, has in the above arguments (displaying of considerations) assembled reminders which, if reflected on and taken to heart, will square

⁹ *Id.*, Scanlon, with his mixed theory, does not deny it either. So far we are on common ground.

with our considered convictions or at least many of them.¹⁰ Dworkin has made a very strong case for not accepting a goal-based theory that would subordinate fundamental rights to considerations of utility maximization, where that is understood as the claim that whenever there would be a greater aggregate of total satisfaction to be gained from overriding a right, then the right should be overridden. Dworkin's claim is, I believe, well-taken. But it is crucial not to over-generalize it. It should be understood within the range of claims he displays and as referring to the type of goal-based theories, rooted in the utilitarian reasoning, that he calls to our attention. It is also important not to forget that there is an implicit reliance here on our reflective moral sentiments (our considered judgements in reflective equilibrium). But within those quite legitimate boundaries, Dworkin's case is very strong indeed. Such positive utilitarianism, or anything bearing a close family resemblance to it, is plainly — if our considered judgements count strongly — a less adequate moral theory than a rights-based theory such as Dworkin's (or for that matter, Mackie's).

The confidence that I think we feel here, or at least I feel, rests, I believe, on our being willing to accept as an ultimate, or at least a quasi-ultimate, court of appeal in moral reasoning something like John Rawls's method of reflective equilibrium.¹¹ (It should be a very *wide* reflective equilibrium.) We shuttle back and forth. In the first stage of our shuttling, we move between, on the one hand, our considered convictions and, on the other, the moral principles meant to explain them and to test our less firm convictions and principles — principles which may generate new convictions as well. At a second stage of our shuttling, we move from our considered convictions and moral principles to normative ethical theories, theories of human nature, background social theories, conceptions of the social function of morality and factual considerations and back again to our considered convictions of which the firmest and the most deeply embedded will be crucial considerations in our moral thinking. We regard our account as justified when our convictions continue to remain firm in the face of this shuttling: when they are not extinguished or radically weakened when

10 K. Nielsen, "John Rawls' New Methodology: An Interpretive Account" (May 1990) 3 *McGill L.J.* 35, 572-600 and K. Nielsen, "Methods of Ethics: Wide Reflective Equilibrium and a Kind of Consequentialism" (1994) XIII *Windsor Yearb. Access Justice*, 202-216.

11 J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard Univ. P., 1971), 19-21, 48-51, 577-87; J. Rawls, "The Independence of Moral Theory" (1974/75) *Proceedings and Addresses of the American Philosophical Association* 47, 7-10; N. Daniels, "Wide Reflective Equilibrium and Theory Acceptance in Ethics" (1979) *J. Philosophy* 76; N. Daniels, "Reflective Equilibrium and Archimedean Points" in J.A. Corbett, ed., *Equality and Liberty* (London: Macmillan, 1992), 90-109; K. Nielsen, "On Sticking with Considered Judgments in Wide Reflective Equilibrium" (1985) XIII *Philosophia* 3-4 (Arhus, Denmark), 316-21; K. Nielsen, *After the Demise of the Tradition* (Boulder, CO: Westview Press, 1991), 195-248; K. Nielsen, "Rawls and the Socratic Ideal" (1991) 1 *Analyse & Kritik* 13, 67-93; K. Nielsen, "How to Proceed in Social Philosophy: Contextualist Justice and Wide Reflective Equilibrium" (1994) 1 *Queen's L.J.* 20, 89-135. I speak of "a quasi-ultimate appeal" for, on such a through and through coherentist account, talk of an ultimate appeal has not clear sense. Yet we do intend this as an account of what we reflectively do and what we also reflectively believe we have no coherent alternative to doing.

brought face to face with the above mentioned considerations. In such an equilibrium these convictions are usually the most decisive considerations affecting our decisions concerning what we believe to be right and wrong, good or bad. Once our considered convictions are pruned, we fix, for a time, an equilibrium point at a particular time and place. When our convictions are in such an equilibrium, they are the closest that we can get, to “a last court of appeal” — a quasi last court always for a particular time and place — in trying to decide what it is we ought to do and how society ought to be ordered. But even here, as elsewhere, they do not simply stand by themselves, for in engaging in justification we are always trying to maximize coherence. We have no foundational propositions — moral atoms — which must be accepted and that is the reason I twice made the qualification “usually” above. It is just built into a thoroughly coherentist model of justification.

I think Dworkin’s account has force because he adroitly, and I believe properly, appeals to such considered convictions. We see, by using this method, that a goal-based utilitarian theory, appealing to the considerations Dworkin displays, does not square with our considered judgements in the way Dworkin’s rights-based theory does. However, I think by appealing to another cluster of considered convictions, and by considering different situations, we will be led, using this very same method of wide reflective equilibrium, to acknowledge that Dworkin’s case is all the same one-sided and that there is a goal-based theory, or at least a mixed theory, which accommodates his cluster of considered convictions as well as others that he does not account for and may be unable to get into a coherent rights-based package. If this is so, then we have good grounds (methodological grounds Dworkin would accept) for believing that the goal-based or mixed theory represents a superior account to Dworkin’s rights-based theory.

I shall commence the argumentation for this claim by returning to the passage I referred to above in which Dworkin qualifies his thesis about the tramping of rights. This passage and others reveal the lacuna that I believe exists in Dworkin’s account which, when examined and when our considered judgements in reflective equilibrium are taken fully into account, should drive him to adopt a goal-based theory: to accept a certain kind of non-utilitarian consequentialism.

Dworkin acknowledges that under certain circumstances a government may be justified in overriding basic rights such as freedom of speech, assembly, religion and the like. (D, 191) Though citizens have a right to free speech, “the Government may override that right when necessary to protect the rights of others, or *to prevent a catastrophe....*” (D, 191, italics mine) Let us for the moment put aside the question of protecting the rights of others and stress the goal-directed and utilitarian *sounding* notion of preventing a catastrophe. I should first point out that this is not just an isolated passage. Elsewhere Dworkin says that when he is speaking of preventing catastrophes he has in mind “cases in which cause and effect are relatively clear, like the familiar example of a man falsely crying ‘Fire’ in a crowded theatre.” (D, 202) Yet, again, this seems very plainly to assent

to goal-based reasoning in justifying the overriding of a basic right, even an entrenched right. Similarly, he seems to allow such an overriding when it is plain — and not simply a matter of speculation — that to give it priority would destroy the community or threaten it with great harm. (D, 196) Finally, in a passage that he constructs as a conservative response to an argument of his own, the substance of which he accepts, he puts forth another argument which seems to support a goal-based ethic:

A government ... may be justified in abridging the personal rights of its citizens in an emergency, or when a very great loss may be prevented, or perhaps, when some major benefit can clearly be secured. If the nation is at war, a policy of censorship may be justified even though it invades the right to say what one thinks on matters of political controversy. But the emergency must be genuine. There must be what Oliver Wendell Holmes described as a clear and present danger, and the danger must be one of magnitude. (D, 195)

Dworkin, as I noted above, does not reject that argument but merely the special use conservatives often make of it. Dworkin reminds us again that before a right can be overridden the danger must be real and that it is not enough that the community would be only marginally better off. He sticks, quite rightly, with his earlier point that the “prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.” (D, 193) But where a catastrophe would result, where great harm would be done to the community or where its very existence as a distinct cultural unit is threatened, one can rightly override such basic rights.¹² (D, 196) It is neither rational nor right to be a Michael Kohlhaas and insist that rights cannot be overridden no matter what. As Henrick von Kleist dramatically portrayed, we should not stand on our rights come what may, indeed, though the heavens fall. To so stand on them — to be a Michael Kohlhaas — is fanaticism, not moral sensitivity, respect for persons or moral reasonableness.

It appears that by this very argument Dworkin has unwittingly shown that he has abandoned his rights-based ethic for a goal-based one or at least for a mixed account. Rights are strategic and important and any ethic that will not so regard them could hardly be adequate. Strong rights must not be abridged simply to maximize satisfactions. But where great harm and misery to a community will occur, if a particular right is exercised, then, morally speaking, it must be overridden. This seems accurately to characterize how most of us reflectively reason. It also squares with my considered judgements in reflective equilibrium and with Dworkin’s as well. But it also shows, I believe, that Dworkin takes, even his basic rights, to be subordinate to the goal of preventing misery and extensive harm to the

¹² This needs more careful qualification than Dworkin gives it. For what I think are the necessary qualifications, qualifications not given by Dworkin, see my “Le Fardeau de la Preuve” (1992) 2 *Philosophiques* XIX, 169-90 and my “On Secession: The Case of Quebec” (1993) *J. Applied Philosophy* 10, 29-43.

community, *i.e.*, to great numbers of people in some collectivity. Thus he shows, when push comes to shove, that his deep underlying morality is in reality, his theoretical claims to the contrary notwithstanding, goal-based and not rights-based. Rights are indeed to be taken seriously, but, as Dworkin in effect shows, they are subordinate to the goals of preventing extensive human harm and suffering and relieving great human misery. This is hardly surprising and should, I think, be regarded as a commonplace. But it is surprising coming from someone who is defending a rights-based ethics. This commonplace seems to have been thrown out with the utilitarian bathwater and forgotten with our current stress on rights. In reflecting on what should be done in such extreme situations it returns like the repressed.

Dworkin might try to evade the criticism by saying that in the situations I have in mind, where there is justification for overriding some basic right, such as the right to free speech, what we have in reality is not a goal overriding rights but clashing *competing rights*. I doubt if all such situations can be non-artificially described in such a way, but, even if they can, it is unclear how we should resolve such conflicts of competing rights without appealing to goals. Must we simply “see” or appreciate, in a determinate context, as H.A. Pritchard and W.D. Ross said we should, what is suitable to the situation? “Citizens have personal rights to the State’s protection as well as personal rights to be free from the State’s interference, and it may be necessary for the Government to choose between these two sorts of rights.” (D, 193) But how, according to Dworkin, does the government choose? When individual rights conflict in this way the government “protects the more important at the cost of the less.”¹³ (D, 194) The government is justified in limiting even such basic rights “if it plausibly believes that a competing right is more important.” (D, 194) Yet all this has a very utilitarian, or at least a consequentialist, ring, if perhaps only a negative utilitarian ring. What are the criteria for more important rights? It looks as if they are to be understood in terms of the well-being of the community or the lesser harm to the community or in terms of avoidance of human suffering and misery. But these are all goal-based conceptions.

Perhaps Dworkin could avoid this criticism, and the collapse of his rights-based ethic, by arguing that we decide which of these competing rights is the most important right by an appeal to a central *super-right*, namely, his principle of equal self-respect, to wit the principle, expressive of a right, namely, that everyone has a right to equal concern and respect. It will, of course, be very difficult in particular cases to decide whether the limiting of one or another of two conflicting rights will best further the principle of equal concern and respect. Will the harm caused by repressive

13 R.W. Miller, “Marx and Aristotle: A Kind of Consequentialism” in K. Nielsen & S.C. Patten, eds., *Marx and Morality* (Guelph, Ontario: Canadian Association for Publishing in Philosophy, 1981), 323-52; K. Nielsen, “Rights and Consequences: It All Depends”, *supra* note 2; and K. Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa, New Jersey: Rowman and Allanheld, 1985).

actions of the State to the self-respect of passionate rebels calling for a fundamental transformation of society be more damaging to that principle than the undermining of the security of the bourgeoisie by a less effective protection by the state? It is often very hard to say, and something like a utilitarian calculation seems to be working behind the scenes, indefinite and indecisive as it is. But that is not a difficulty *distinctive* to this general principle: the super-right; it is a problem for any abstract and fundamental principle or conception, whether goal-based, duty-based or rights-based. The application of such principles is often problematic. Dworkin could plausibly respond that he has stated “a highly abstract right” — the right to equal concern and respect — and it, of course, allows for there being different positions over what derivative rights or goals best achieve its satisfaction, *i.e.*, bring about the most extensive equal concern and respect. (Here this abstract right is also coming to sound very much like a goal.) Our underlying notion of justice as fairness — a notion he takes from Rawls but does not think emerges from any contract but is instead presupposed in Rawls’s very use of the contractarian method — “rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.” (D, 182) It is this fundamental underlying natural right that is appealed to in deciding between less fundamental competing rights. So after all, Dworkin could respond, we remain in a rights-based framework. Indeed when the rights of members of society conflict, balancing is appropriate. The government must choose “between competing claims of right — between the Southerner’s claim to freedom of association ... and the Black man’s claim to equal education.” (D, 181) In estimating the merits of the claim, in deciding in this situation which right is more important, the principle to appeal to in making such a judgement is the principle specifying the underlying natural right of all humans to equality of concern and respect.

Does this show that in spite of my criticisms, Dworkin has successfully maintained a rights-based theory that does not collapse into a goal-based theory? In answering this, we should first consider how the above arguments about an appeal to the principle of equal respect and concern relates to his, clearly, goal-based arguments about rights being overridden to avoid genuine catastrophes and extensive harm and misery. If we take, as Dworkin does, as our most basic moral assumption, the assumption that all humans “have a right to equal respect and concern in the design of political institutions,” what are we to do when some catastrophe threatens a community, say, a civil war in the form of a counter-revolution which will cause great suffering and the destruction of many institutions and the death of many people, including many totally innocent people? (D, 180) (Think of the French Revolution or the Russian Revolution.) What if the government can, in such a situation, lessen very considerably the misery of many but only by overriding the principle of equal respect and concern for all? In this case they can do it by not showing such respect, at least in any

obvious sense, for the counter-revolutionaries. Can we rightly trade off a limiting of the principle of equal concern and respect for less suffering? If the suffering we could avoid is very extensive indeed, would we not be justified in limiting or qualifying our principle of equal concern and respect? If we would be so justified, then would we not, after all, be subordinating, at least in certain circumstances, even our most fundamental rights-based conception to a goal-based conception? Moreover, is it not sometimes the case that we cannot show everyone equal respect and concern — at least in any straightforward sense? Sometimes that right just is not satisfiable. In such a situation, do we not reasonably and rightly use some goal-based criterion such as trying to achieve equal respect and concern for as many people as possible or for those who most need it or *perhaps* for those to whom it would give the greatest satisfaction? Doesn't this indicate that even this fundamental rights-based principle is, in a way and in certain circumstances, at least, subordinate to a goal-based principle?

In seeing what the point of the complex institution of rights against the State, the Church, the Capitalist order and the like are, we will come to see that it is fundamentally a matter of protecting human dignity and equality. It involves a recognition "that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community." (D, 199) As we have seen, we can and should agree with Dworkin that "we must treat violations of dignity and equality as special moral crimes, beyond the reach of ordinary utilitarian justification," while still recognizing that tragic situations sometimes obtain — for example, situations of revolution and counter-revolution — where, to avoid causing great misery and suffering, the embedded rights of some must be overridden. No doubt these situations are more atypical than some "romantics" believe. But it is, to put it minimally, plausible to believe that they exist. These situations need not be viewed on the model of balancing the public interest against personal claims, evoking what Mackie, along with Robert Nozick, would regard as the myth of a common good or of a general interest. They involve instead the more straightforward matter of weighing or balancing the suffering of a few against the suffering of many. Where suffering is unavoidable the humane thing for one to do seems to be to allow the suffering of the few, even when that "allowing" involves one's being an agent in the occurrence of that suffering. (It is evasive bad faith to be paralyzed by the problem of dirty hands.)¹⁴ Unless one hauls in God from the wings, something that Dworkin would hardly do, it seems to be required by morality and it appears to rest on goal-based rather than rights-based ethics.

A rights-based moralist might dig in her heels here. She might say that there is no right thing to do in such a circumstance. There is no reason for

14 Ted Honderich has been very perceptive here. See his *Three Essays on Political Violence* (Oxford: Blackwell, 1976) and his *Political Violence* (New York: Cornell Univ. Press, 1977). Paul Gombert's review of the latter is important as well. P. Gombert, "Review of Political Violence" (1979) *Philosophical Rev.*, 616-20. See also my *Naturalism Without Foundations*, Chapter IX, *supra* note 2.

choosing the suffering of the few over the suffering of the many. Anything we do in such a situation is arbitrary and “beyond” morality. But that stance itself appears to be Quixotic and arbitrary, a failure of nerve, a failure to face, and to morally respond to, what is both a horrible human situation and, for a rights-based ethic, a theoretical problem. The goal-based theorist has the sensible and morally correct rationale for such situations: *where there are unavoidable evils, and there is no God, we should, being on our own, always choose the lesser evil*. Moreover, it is also plain — and not a matter of “ordinary utilitarian reasoning” — that more suffering is a greater evil than less suffering. Again, this squares with our considered judgements in wide reflective equilibrium.

It is correct, as Rawls and Dworkin say, that a grave injustice has been done to those people who have been so sacrificed — whose dignity and equality have been unavoidably assaulted. But it is a mistake to claim that in all circumstances, and for all balancings, considerations of justice always override other moral considerations. Where a very great catastrophe or very great suffering could be avoided for a whole community, then such suffering should be avoided even at the cost of injustice. This is a *weak* consequentialist appeal of the sort defended by Brian Barry.¹⁵ However, it is misleading, because of certain connotations, to call the appeal here an appeal to utility. By utilizing a reading that avoids these unfortunate connotations, it is not the case that justice *always* overrides utility (weak consequentialism) or utility always overrides justice. Sometimes it goes one way and sometimes another. Ross, Rawls and Dworkin have convincingly called our attention to situations in which justice overrides utility, but there are also situations, such as those alluded to above, where utility overrides justice. We rightly say, in a stable society with an orderly legal process: “Better a great many guilty men go free than that one innocent man be punished.” In a society in transformation and turmoil where a social revolution has just been made, it is *not* correct to say: “Better that some counter revolutionaries go free even though the revolution suffers defeat” or even: “Better some perhaps innocent, but very likely very dangerous people, go free though the revolution suffers defeat.”

Might not Dworkin respond by reminding us that he has affirmed that a government acts rightly in overriding even such a clear cut basic right in certain circumstances. (D, 200) We must, however, be very careful about the circumstances. They are justified in doing it “only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based.” (D, 200) We cannot (that is, justifiably cannot) override or cut off (as Dworkin puts it) in such a manner that we show by our actions — the government shows by its policies — that it is “taking back the initial recognition of a right.” The sickening overriding in such revolutionary situations of some people’s rights needs its justification in a claim, properly established, that more freedom, dignity, respect for others and self-respect will ensue from the particular

¹⁵ See the references in *supra* note 2 on weak consequentialism.

overriding of rights. We are often rightly suspicious of such claims. But where they are well taken — and whether they are, is an empirical matter — they are justified on Dworkin's own rationale. But, that notwithstanding, it also is the case that something like utilitarian reasoning is going on here too. We are trading off a deprivation of some particular rights to strengthen the overall system of rights. But this is exactly Dworkin's (and Rawls') central objection to utilitarianism. Moreover, it is not very clear whether what is now being appealed to has a rights-based or a goal-based rationale or whether it is some strange amalgam. (Mackie admits that there can be mixed theories, partly rights-based and partly goal-based.) This prompts, in passing, worries about the adequacy of our original typology. It is clear enough, however, that Dworkin recognizes that situations might arise in which "the cost to the society" of protecting certain basic rights might be "great enough to justify whatever assault on dignity or equality might be involved." (D, 200) Dworkin, like the utilitarian, acknowledges that "some grave threat to society" can sometimes justify overriding even well-entrenched civil rights. (D, 201) Though here he speaks of balancing even the right to provocative free speech and to the right to be free from violence. But in deciding which of these competing rights is the more important, do we not use, in part at least, goal-based, negative utilitarian considerations? We are, among other things, plainly concerned with the saving of lives and with the number of lives saved. (D, 202) Moreover, Dworkin recognizes "that rights may be limited to protect other rights *or* to prevent a catastrophe," thus showing that goal-based considerations of a roughly utilitarian or otherwise consequentialist sort remain in play in a non-subordinate position. (D, 202)

V

In this section and the next two, I would like to do three things. First, I want to see whether, in Mackie's sketchier but more resolutely rights-based theory, there are resources to avoid the criticisms I have directed against Dworkin's account. This will be the topic of this section. Second, and in the next section, I shall consider a formulation of a goal-based theory of rights which would, as far as I can see, gain everything that Dworkin and Mackie want from a theory of rights — things that square well with our considered judgements — while avoiding the paradoxes of rights-based theories and gaining the putative strengths of a goal-based theory. Third, and finally, I shall consider the not implausible objection that the kind of situations in which entrenched rights would be justifiably overridden (set aside) are all desert-islandish and that a normative ethics or political morality which wishes to serve as a guide to conduct can reasonably ignore such desert-island examples. It is sufficient that the theory square with what we know to be the actual or reasonably foreseeable, feasibly possible, social world. I shall, without entering into a debate about the relevance of desert-island cases, seek to set out and examine some politically realistic examples which, along the lines brought out in the previous section, throw

into doubt the adequacy of rights-based moral theories. The case for my modulated (weak) consequentialism, I shall argue, need not rest on desert-island cases.

I turn now to an examination of Mackie's case for a rights-based ethic. One possible avoidance mechanism in Mackie's account flows from his understanding of the function of morality. He sees morality, any morality at all, "as a source of constraints on conduct." (M, 355) But if that is the object of morality, then morality will not, he claims, be based on comparative evaluations and an adequate morality will not, or need not, be a *purely* goal-based theory.¹⁶ To even identify the goal in any goal-based theory, we must recognize that: a) "the goal" must "belong to the category of activity"; b) "that there is not one goal but indefinitely many diverse goals"; and finally, c) "that they are the objects of progressive (not once-and-for-all or conclusive) choices." (M, 355) But when these factors are thoroughly integrated into our consciousness, then the theory we adopt to accommodate these things will, Mackie claims, be a rights-based theory, recognizing as crucial the very abstract yet central "right of persons progressively to choose how they shall live." (M, 355) In recognizing that from the moral point of view what matters most in human life is the chance for people to engage in diverse activities "determined by successive choices," we will *eo ipso* have identified what it is reasonable to take as the fundamental right, to wit, "the right of persons progressively to choose how they shall live." (M, 355) This, rather than any goal, is foundational for an adequate moral theory. Moreover, like Rawls and Dworkin, Mackie further claims that all persons are to have this right and that they are all to have it equally. (M, 356)

Mackie immediately turns to a key problem that exercised us in discussing Dworkin's views. "The rights," Mackie remarks, "we have assigned to all persons will in practice come into conflict with one another. One person's choice of how to live will constantly be interfering with the choices of others." (M, 356) He concludes from this that all fundamental rights are *prima facie* rights and that the actual rights people have "must result from compromises from their initially conflicting rights." (M, 356) These compromises, to be morally defensible, Mackie contends, must operate on the assumption of "the equality of the *prima facie* rights." (M, 356) This gives us the rationale for not allowing "the vital interests of any to be sacrificed for the advantage of others, to be outweighed by an aggregate of less vital interests." (M, 356) Where it is not a matter of a clash of equally vital interests, Mackie suggests the following solution:

We might think in terms of a model in which each person is represented by a point-center of force, and the forces (representing *prima facie* rights) obey an inverse square law, so that a right decreases in weight with the remoteness

¹⁶ This, I think, is in effect already to give up the ghost for it allows in, with the little qualifier "purely," mixed theories of the sort defended by Scanlon and thus we no longer have an exclusive appeal to a rights-based theory. We are no longer claiming that foundational grounding to be adequate must be rights-based.

of the matter on which it bears from the person whose right it is. There will be some matters so close to each person that, with respect to them, his rights will nearly always outweigh any aggregate of other rights, though admittedly it will sometimes happen that issues arise in which the equally vital interests of two or more people clash. (M, 356)

It is not clear to me how useful this analogy is. But that apart, as Mackie himself recognizes, the “model of point-centers of force seems to offer no solution at all to conflicts of equally vital interests.” (M, 358) For compromises to be acceptable, Mackie contends, they must reflect, in all cases, an equality of *prima facie* rights. In the case of conflicts of equally vital interests, Mackie’s account has not given us a basis for choosing between interests. To say, as Mackie does, that compromises are “worked out in practice” is no answer. What we need to know is how this can be done and whether it can be done justifiably without re-introducing goals.

To return to all people having a right — indeed their most fundamental right — “to choose how they shall live” is also of no help, for our original problem arose out of a situation in which people, sometimes with equally vital interests, choose conflicting things. This is similar to the problem we had with Dworkin concerning the appeal to equal concern and respect. It is unfortunately impossible to respect, sometimes at least in any straightforward way, the right to equal concern and respect of two individuals at the same time. On Mackie’s account, situations will arise in which individuals make conflicting choices, reflecting, as far as the individuals are concerned, equally vital interests, so that not everyone can, without constraint, choose how they shall live; or, they can choose, but the government no longer has a duty not to interfere with their choice and indeed does, justifiably, interfere with the choices of some and overrides their most fundamental right.

We may say in response, that we should favour, and the government should favour, those choices that will result in the most extensive freedom of choice for everyone. In doing so, we are moving to the goal-based criteria of a kind of consequentialist reasoning that was supposed to be rejected on a rights-based theory. The goal is: afford *as many people as possible* the greatest possible opportunity to choose how they shall live their lives. But plainly in many circumstances some get shut out here, that is to say, in certain concrete contexts of choice they will not be able to choose how to live their lives.

Our most fundamental objection to Dworkin’s account was that it was not consistently rights-based and could not be if it is to remain morally adequate. For he too, like the teleologist, claimed — and claimed rightly — that where great suffering would be caused to a community (to a vast majority of individuals in that community) by some Michael Kolhaas sticking by an entrenched basic right, insisting on exercising it in spite of the resultant suffering, the right would be rightly (justifiably) overridden. Such Kolhaasian moral justification must be resisted. The individual has a right that he cannot rightly exercise in that circumstance. That, as much as entrenched rights, is part of our commonsense morality. It, too, matches our

considered judgements in a wide reflective equilibrium. Mackie does nothing to show how a rights-based theory can meet this objection. Perhaps we could say, as Dworkin might, that in such situations people have the right to protection by the State and this right outweighs the right to freedom of speech. But why does it outweigh it? The answer to this seems at least to require an appeal to goal-based criteria. If we say that state protection is the more important right because it enables them, more effectively, to choose how they shall live, the answer will come back that this is so only for the vast majority. It will not enable those few to choose how they shall live, who, destructive though they be, would persist in exercising a basic right (say, free speech) which would have consequences destructive of the freedoms of the majority. A charismatic Jim Jones or David Koresh who urged their flocks effectively to mass suicide — children and all — should have been shut up, if that had been possible. But then one man — and perhaps a few others who felt likewise — would have had their rights to freedom of speech and to choose how they should live and die — overridden by a concern for the well-being and freedom of others. In this case literally to protect them from death. In such tight situations we count the many against the few. We make the tradeoffs that rights-based theories cannot allow while remaining consistently rights-based, and we choose between conflicting basic rights on goal-based principles. Better that more people can choose how they shall live than fewer.

If we say, as Mackie does, that the right to be treated in a certain way, even when that way is the right to be treated with equal respect and concern, “rests on a prior, even if somewhat indeterminate right to certain opportunities of living,” we still have the problem of what to do when the right of a certain A to these opportunities conflicts with the rights of B, C, D, E, F, and G. The reasonable thing to do — and seemingly at least the morally appropriate thing to do — where they all cannot be protected, and everything else is equal, is to protect the rights of the largest number of people all of whose rights can be protected. We protect the greatest number of rights compatible with such a distribution. That looks, and is, very utilitarian. (One need not, of course, be a utilitarian to sometimes reason in a utilitarian manner.) Furthermore, if we say, again as Mackie does, that we need to give special weight to “a person’s vital central interests,” we also say, as a memory of R.B. Perry’s theory attests, something which sounds at least goal-based and perhaps even utilitarian. In determining what our vital interests are, we need to invoke goal-based considerations and we still have on our hands our old problem of what to do when the vital central interests of A conflict with the equally vital central interests of B, C, D, E, F, and G. At some point it looks at least as if numbers count.

Both Dworkin and Mackie see their accounts as being individualistic in what they take to be a good sense, namely, as Mackie puts it: “one of its chief merits is that, unlike aggregate goal-based theories, it offers a persistent defense of some interests of each individual.” (M, 357) This stress, I think, is important and right-minded. But, as we have seen, it has its limitations. For when there are unavoidable conflicts between the vital

central interests of an individual and the equally vital central interests of many individuals, morality requires us, as utilitarians and others have repeatedly argued, to favour the interests of the many rather than the few. The individualistic stress here, recognizing the preciousness of individual rights, reminds us that sometimes the vital interests of everyone cannot be accommodated. Where we are quite sure that the vital interests of all cannot be accommodated, or are as sure as the circumstance allows us to be, then the morally conscientious thing to do is to bite the bullet and protect the vital central interests of the many at the expense of the few.

Mackie, as we have seen, believes that he can bypass these problems, at least in part, by contending that his rights-based theory “calls for compromises worked out in practice.” In so doing, his theory appeals, where there is a conflict in equally basic *prima facie* rights, “to the historical development of institutional rights as derivatives from and realizations of the *prima facie* rights.” (M, 358) By appealing as well to these more concrete historically developed institutional rights, we “may resolve what would be insoluble conflicts of claims,” if we only appealed to the conflicting abstract fundamental rights — rights which for Mackie are always *prima facie* rights. (M, 358)

It is not clear, at least not to me, how this is supposed to work. In one passage Mackie does try to clarify and defend this claim. Taking fundamental rights to be universal natural rights in the way that Mackie does (a way that we have seen to be meta-ethically and meta-physically innocuous), Mackie remarks of these rights, that they should be formulated only as *prima facie* rights. Presumably this is true even for *the* fundamental right, namely, “the right of persons progressively to choose how they shall live,” for, Mackie observes, that this fundamental universal and natural right is both *the* fundamental right and that “this fundamental right has to be formulated only as a *prima facie* right.” (M, 357) He then makes the argument which is most directly relevant to his attempted escape from the difficulties centering around the problem of conflicting rights:

Derived specific rights (which can be final, not merely *prima facie*) will be historically determined and contingent upon concrete circumstances and upon the interplay of the actual interests and preferences that people have. But the fact that something is an institutional right, recognized and defended by the laws and practices of a particular society, does not necessarily establish it as a moral right. It can be criticized from the moral point of view by considering how far the social interactions which have generated and maintain this institutional right express the fundamental right of persons progressively to choose how they shall live, interpreted along the lines of our model of centers of force, and to what extent they violate it. (M, 357)

These derived rights can indeed be final but only in a rather specific way and from a purely synchronic point of view. They can for Society S at time T1 be final, and thus, for a given culture at a given time. If there are no iconoclasts or cultural rebels around, they can be final for a given time and

place and *perhaps* in that Quixotic way solve the problem of competing rights. But in this way the difficulty is solved only at the cost of something perilously like ethnocentrism. We do not, remaining with Mackie's assumptions, take a diachronic view. Rather, we stick to a given culture or tradition at a given time. But that aside, we no longer have a purely rights-based theory, for, on Mackie's own admission, we appeal to "the interplay of the actual interests and preferences that people have." (M, 357) Moreover, these institutional rights, which *in a way* are final, are, Mackie claims, not necessarily established as *moral* rights and can be criticized and presumably overridden from the moral point of view. We do this by "considering how far the social interactions which have generated and maintain this institutional right express the fundamental right of persons progressively to choose how they shall live." (M, 357) But, at a minimum, this does not help us in those situations where it is not the case that this fundamental right of A can be honoured without overriding the same fundamental right of B, C, D, etc. We seem, as good consequentialists, to have to protect the rights of the many here by, though, of course, reluctantly, overriding the rights of the few. We can, indeed, reject institutional rights or choose between conflicting institutional rights, or sets of institutional rights in accordance with how well they realize the most fundamental natural right. However, we can have two competing institutional rights with two parallel abstract *prima facie* rights which are equally compatible with the fundamental right. Or, more likely, if one right was acted on rather than the other, we will get the situation, described above, of the fundamental rights for some being achieved by following the one course and the fundamental rights for others being achieved by following the other. Again we are forced back to goal-based considerations.

However, even if these difficulties can in some way be surmounted, it seems to me that what we have here is not a rights-based theory but a system which is partly goal-based and partly rights-based, with no clear sense of which part is the more decisive or fundamental. We have a mixed theory. Mackie acknowledges that we can have systems of this type and his own account here seems in fact to exemplify it, though that is surely not his intention. (M, 354) There are several moral elements in such an account, as there will be in all non-simplistic accounts, *i.e.*, mixed accounts. And while it provides the derivation of some goals and duties from these fundamental rights, it is by no means clear whether all goals, including our fundamental goals, can be so derived. More importantly, given Mackie's account of what an X-based theory is, it is not the case that rights, any more than goals or perhaps even duties, are the Xs which capture what gives point to the whole moral theory and reveals, crucially, the object of morality (the function of morality). While appealing to fundamental rights, and to institutional rights, it also appeals to the actual interests and preferences of people within an historically determinate community. What we ought to do and how we ought to design our institutions and what constitutes a good life for human beings will be rooted in all of these elements with goals (reflecting our preferences and what we take to be our vital interests) in no determinate

relation of subordination to rights. So we can hardly speak properly here of having a rights-based theory.

VI

I turn to my second point in which I want to examine the claim, now rendered more plausible, that there is a goal-based theory, or at least a mixed-theory with prominent goal-based elements, which would afford better protection to individual rights than rights-based theories at least of the sort articulated by Dworkin and Mackie. (It should be added, moreover, that their theories seem to be the best *rights-based* theories in town.) The claim is that it is not true that any goal-based theory necessarily places less importance on individual rights or affords less protection for individual rights, than, even the most adequate rights-based theory.¹⁷ Nanette Funk, in the course of developing a convincing argument for the importance of rights in socialism, an argument which shows how rights are better protected in a genuinely socialist system than under capitalism, sketches the framework of such a goal-based theory. She rightly remarks at the outset that “the distinction between two different theories, one in which rights are fundamental and one in which they are not, is not the same as a distinction between two theories, one in which rights are more important, more protected, and one in which they are less important, less protected. A goal-based theory, in other words, does not necessarily provide less protection for rights than a rights-based theory. It might in some circumstances, in fact, be reversed, depending on the particular nature of the goal-based and rights-based theories.” (F, 33)

She argues that a rights-based theory which takes a very few rights to be fundamental — say, such abstract things as the right to be free or the right to be treated as equals — might not, depending on the background social theories of the rights-based theory in question and the factual assumptions it makes, protect many concrete rights at all. It might not protect, or even regard as rights, the (putative) right to work, to have an abortion, to have free medical care or education, to have legal aid or to hold a job regardless of one’s political beliefs or sexual orientation. One would expect the latter concrete rights (putative rights) to be defended by anyone who thinks we have a right to be free or takes, as Mackie does, the most fundamental right to be the right as individuals to choose how they shall live. But the rights-based theorist might also be a rugged individualist who thinks that no one should have a right to have a job, and, as long as one is not interfered with in choosing one’s own way, no employer, who happens not to like you and your political views, has any obligation at all to hire you, even if you do meet the job qualifications perfectly. There are all sorts of ways of limiting and expanding freedom and this theorist (our rugged individualist) does not link the right to be free or to choose how one should live with such a right to work or to have an education. And, in so responding, depending

17 See N. Funk, “A Sketch of a Theory of Rights in Socialism” (1978) *Radical Philosophers’ Newsjournal* 10, 33. Future references to Funk will be given in the text.

on what background assumptions are made, such an individualist does not necessarily fail to treat those people as equals or with equal respect. The employer just does not want people working for him who have political views antithetical to his own. So it could be that a theory which takes rights as fundamental, which, as Dworkin puts it, "takes the idea of rights so seriously as to make them fundamental in political morality" might in practice have a rather constrained conception of rights and not in fact protect many concrete rights at all. (D, 169) This is not in fact true of Dworkin, who is a mildly Left-leaning social democratic type liberal with an expanded list of rights and a rationale for their expansion, but the point is that there is nothing in a rights-based theory *per se* which supports such a Left-liberal commitment. On Dworkin's particular account, with its stress on the natural right of everyone to an equality of concern and respect, there is a rationale for their expansion. But this is not a feature of a rights-based theory *per se*.

Funk sketches a goal-based theory which, she claims, acknowledges more rights and gives them a firmer theoretical protection than many rights-based theories. Suppose first, to put the matter very simply, the fundamental goal of the goal-based theory was "a full, rich life for all individuals" and that, following Marx, one would more fully characterize such a goal as the free and most extensive artistic, scientific, intellectual, physical and social development of people, so that individuals all over the world would become well-rounded persons developing the ensemble of the potentialities they possess. The goal is to achieve this for every human being or at least to approximate it as much as is reasonably possible. In this way there is a universal development of the individual, a full liberation of a greater range of her potentialities. Moreover, attached to this goal is the rider that "the goal is the full life of each individual where each has need for the development of all."¹⁸ (F, 34) Such a goal-based theory would be committed to an expanded list of rights and it would be impossible for such a theory, "whose goal is, in part, the development of individual capacities" to ignore individual rights. If the goal is the "universal development of the individual," where such a development for each individual requires the need for the development of all, it plainly would be quite inconsistent for this goal-based theory to ignore individual rights. (F, 34) The rationale of the theory is to meet them as fully as possible. It could hardly then function by running roughshod over individual rights or by ignoring them, though this particular goal-based theory would still have the same problem of competing rights that we found plagued Dworkin's and Mackie's rights-based theories. But it would have no additional problems in protecting rights and would provide a firm basis for an expanded list of rights which should provide for a flourishing of individuals that a rights-based ethic, with its tendency to be preoccupied with rights against the State, might very well ignore. Such a goal-based theory would naturally defend an extensive set of

18 K. Nielsen, *Marxism and the Moral Point of View* (Colorado: Westview Press, 1989); G. Brenkert, *Marx's Ethics of Freedom* (London: Routledge & Kegan Paul, 1983); Miller, "Marx and Aristotle: A Kind of Consequentialism," *supra* note 13.

rights and, with the commitment to the free and full development of individuals, would justify very few suspensions of these rights: they are overridden on certain occasions but not forfeited or alienated.¹⁹ (We have already seen that Dworkin's and Mackie's rights-based theories allow such suspensions or overrides as well. But it is not at all clear that they provide grounds for these few suspensions, grounds that such a goal-based theory supplies.)

Funk concludes a central segment of her defense of a goal-based theory by remarking: "Thus, if a theory is goal-based and it is argued that extensive kinds of individual rights are necessary and that very few conditions would justify exceptions, and if the goals argued for were the full, rich development of every individual, there would not *necessarily* be weak protection of individual rights." (F, 34) The individual on such a goal-based theory is not just regarded as having the *right* to a free, full, rich, many-sided development; the very *goal* of the theory is to bring about this state of affairs.

If it is said that the bringing about of this state of affairs is reprehensible because it is a forcing of people to be free, then the reply should be that this is just nonsense, for it is hardly coercion when to attain such a state of affairs is to attain liberation and independence. Something that liberates one and gives one independence is hardly something that coerces one. Freedom is not the license to do what you want, but the independence of individuals with capacities and opportunities to control their own lives. Such a goal would not take away from individuals what Mackie and Dworkin regard as their fundamental rights, namely, the right of persons progressively to a greater extent to choose how they shall live and to live as equals with mutual concern and respect. Rather, the goal of the theory is to bring about just this condition for everyone. However, what is clear is that the rights, which are instrumental for the achieving of this goal of self-development, crucial as they are, are not as fundamental as the goal. It is the goal of the free self-development of individuals which provides the underlying rationale for such rights. We can ask ourselves "Why are such rights important anyway?" The answer is that without them we would be impoverished as human beings; without them only a few of us in very privileged and protected positions would be able to achieve anything like those ideals of self-development. It is this that makes such rights important.

This account might be attacked in at least two ways, neither of which seem to me to be at all lethal. One attack might be to claim that this goal-based theory is in effect a variant of a self-realizationist or perfectionist theory of ethics and we all know that such an account is incoherent for we have no clear understanding of what it is to realize ourselves. Secondly, since we have so many potentialities (indeed, often conflicting potentialities) that can be realized, but not all of which can or should be realized, we need criteria to identify what is to count as self-realization and as human

19 K. Nielsen, *God and the Grounding of Morality*, Chapters 6 & 7; J. Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall, 1973), 88-94.

flourishing that do not simply refer to the actualization of those potentialities. We cannot sensibly talk about self-realization as simply the realization of our potentialities. We need to know which ones, if realized, will lead to self-realization.

I recognize that self-realizationist accounts are vague and even on some formulations incoherent. I have myself contributed to their critique. But it is anything but clear, as Richard Norman, Hilliard Aronovitch and Thomas Hurka have powerfully argued, that there are not demythologized versions of such accounts which are quite innocuous.²⁰ Human beings are complex creatures with a variety of needs and capacities; where within reason more of these come into play (think of Rawls' Aristotelian principle) a more satisfactory life will ensue — a life that anyone, with the experience of both, and not suffering from the conditions of imposed consciousness, would reflectively prefer. This is an empirical claim and it is a claim that history can in effect test. I am willing to rest this part of my account on a prediction about its approximate truth.

The second objection is a claim that Funk's (and, of course, Marx's) talk about the full life of *each* individual requiring the full development of *all* is either hyperbole or nonsense. Some individuals can and do fully develop without the full development of all or even of most other people. Indeed, so the argument could go, Nietzsche was probably right in stressing that the full development of a few individuals is only possible if the masses provide them with the conditions of leisure, etc. for their development.

Whatever may have been true in the past, this Nietzschean view in our technological age is an unrealistic and dangerously romantic view of the world and probably for many who hold it, or something like it, an unconscious rationalization for holding onto their own privileges — indeed itself showing that they are very far indeed from being fully developed individuals. But a more moderate non-Nietzschean elitist claim is more worrying. Has it not been true in the past and does it not remain true today that certain individuals are quite fully developed without anything like this Marxian condition obtaining? I am inclined to think that all of this is not played out yet. Against the Marxian, there is the worry that in the further argument she will "win" by a conventionalist sulk or by a *persuasive* definition of "full life" and "full development"; against the skeptic, there is the objection that she has not adequately considered what the liberating effects on us all would be in having a society of such people. The individual development of many more people would yield for all of us a more interesting, richer society. This is plainly not just rhetoric. Moreover, the skeptic has not considered the crippling effects of the sharp division between mental and manual labour that obtains in our societies.

However, as significant as these questions are, Funk does not need to

20 I once made such a critique of self-realizationist or perfectionist theories. See my "Alienation and Self-Realization" (1973) *Philosophy* 48, 21-33 and my *God and the Grounding of Morality*, 85-99. I am now inclined to think that more can be made of such notions than I thought when I wrote the above, if such conceptions are properly demythologized.

answer them to make her core case. The troubling statement can simply be set aside. We can articulate the goal of achieving a society in which there is the free, rich, and many-sided development of all individuals without alluding to that problematic proposition. We need not say anything about self-realization or about what it would be like to be fully developed. We can simply drop such perfectionist talk. And we can, in the way Funk does, proceed to argue that such a theory, even so reduced, would protect rights more adequately and would more readily support the extension of rights than would the alternative rights-based theories. Thus, minimally, we can see that Mackie is not justified in claiming “there cannot be an acceptable moral theory that is not rights-based.” (M, 355)

VII

I want now to consider the objection that the situations in which it is plausible to claim that entrenched basic rights, such as freedom of assembly, freedom of speech, freedom to immigrate, the right to vote and the like, could *justifiably* be overridden, cut off or set aside are all desert-islandish. It is then added that an adequate normative ethic or political morality can safely ignore desert-island examples. Such an ethic or morality does not have to square with all possible worlds but only with all actual and plausibly feasible possible worlds.

I am of two minds about that latter part of the claim, but fortunately I shall not have to consider it, for I shall try to show that there are some extremely significant non-desert islandish examples that actually divide, on the one hand, liberals and social democrats and, on the other, socialists. Worse still, sometimes socialists are divided over them. So in the real world we get such cases. Moreover, only a very partisan or uninformed person would claim that it is perfectly plain what the correct moral answer is in these circumstances. I shall not try to argue that it is evident, in some situations of the sort I shall describe, that these rights should be overridden. But I shall argue that such a view is not evidently wrong: plainly out of court with a view of morality that is in accord with our considered judgements in wide reflective equilibrium. (The “our” here refers to people now living in our modern societies.) This is enough, I believe, to show that there are plausible situations in which it is not evident that we should rely on a rights-based ethic.

I consider a situation, going back a bit in our contemporary history, in which a socialist revolution has just occurred or is in the making, for example, Cuba after the defeat of Batista or Yugoslavia after the partisans’ victories at the end of the Second World War. Now what should the attitude be toward dissidents in those countries *in those situations* — dissidents who are thinly disguised counter-revolutionaries (not just in the imagination of the working class or its leaders but in reality)? Should such “dissidents” (in reality counter-revolutionaries) be allowed in such circumstances to talk against the revolution? Should they be allowed to publish, lecture, give provocative political speeches? Here the socialist revolutionary seems, at

least, to be caught in a dilemma. A socialist society that suppresses the right of counter-revolutionaries (or anyone else) to speak in a certain way harms the underlying rationale of socialism, namely, the extension and enhancement of democracy and the furthering to the full of individual self-development and fulfillment. The goal is to achieve a society which allows for the fullest and richest life for all, with everyone controlling their own destiny. People — the great masses of people — for the first time in history are able to choose how to live and stand in the world as equals, with respect and concern for *all*. Recall here, the world George Orwell described in his *Homage to Catalonia*. And yet, in a way, that strikes against the very goals of socialism, some people (the counter-revolutionaries) are, to protect the revolution in its fragile initial stages, not allowed to speak, to express what for some are no doubt their sincere convictions. This suppression cuts against the grain. But, on the other hand, if they are allowed to speak in such a volatile situation, the socialist society may very well be destroyed and there will be no achieving of the goals of extended democracy and enriched human rights. Moreover, we know — or so let us suppose, for the sake of the argument at least — that such an extension of democracy will not happen under a restored capitalism. If the last horn of the dilemma is exaggerated and there is no serious threat to the new socialist institutions, the problem is easily resolved. The counter-revolutionaries should, indeed must, be allowed to express their dissent by publishing, speaking, lecturing, and the like. (That does not mean that independently of their qualifications we need to create jobs for them.) But, if the above dilemma tells it like it is (as it very likely does), and the new fragile socialist society is clearly threatened, then what should the socialist revolutionaries do? What should be the response of the working class?

Suppose the reply comes that in that situation that the rights of counter-revolutionaries to freedom of expression should be overridden and that furthermore in doing so the socialist society is not being any less democratic than liberal capitalist societies when they feel themselves seriously threatened. The justification for shutting them up is the same as it is for the liberals in capitalist societies (including Dworkin), namely, the doctrine of a clear and present danger. The very community — the newly emerged socialist community — is being threatened with destruction and with the suffering and misery that would follow in the wake of its destruction and with a capitalist restoration. The evil of this is heightened by the fact that this will happen so soon after terrible liberation struggles: struggles which essentially involve battles to overcome years of misery, exploitation and dehumanization.

The point I want to make is that here we have a realistic and telling example of a goal-based theory, or at least a mixed goal-based and rights-based theory, giving what appears to be the correct account of things in comparison to the account of a *purely* rights-based theory. We see that certain goals govern, and indeed should govern, whether we act on or, for a time, override certain fundamental rights. Socialists recognize the key importance of class divisions, imposed consciousness and the class struggle — which is, or should be, a virtual class war between the dominant and

dominated classes. They see that libertarian and welfarist impulses in our society are consistently distorted and frustrated by the existence of class divisions and struggle. Minimally, as described above, the socialist will believe that the dissidents' counter-revolutionary activity — her talking against the revolution — must, in clear and present danger situations, be forbidden. Though she might in addition make the rather more maximal claim that the socialist revolution is to be described as the revolution of one class against another in which the working class takes the power formerly used against it and uses it, in turn, to suppress the former exploiters. In this situation, the socialist society is repressive to people struggling against it. To say that, is merely to reiterate the familiar view that the socialist revolution is a major battle in, but not the end of, the class struggle. To so act against counter-revolutionaries is no different than what a capitalist society does in what it perceives to be similar circumstances. In both cases, repressive tactics are used to achieve, or try to achieve, goals taken to be moral. In the socialist case *the goal* is plainly, if the socialist empirical characterizations are on the mark, a desirable one (a goal worthy of achievement). It will maximally enhance the possibilities for the greatest number of people to gain control over their lives and to flourish. The socialist argument is that the means used are a *moral necessity*.

With the first more *minimal* socialist argument, and provided there was some measure of agreement on background beliefs (moral and nonmoral), there would, I believe, be some reasonable consensus about whether we would be justified in overriding rights *in those circumstances*. The less minimal case is not, I believe, so much more extreme, but the talk of class war and the need to suppress capitalist remnants, when they are genuinely threatening, will seem too strong to many, will stir historical memories (*e.g.*, Stalinism) and will not square with their considered judgements in reflective equilibrium. It will not seem so to others. What is relevant for our purposes is that we have non-desert-island situations with a genuine verisimilitude where a goal-based ethic will properly explain and justify our — or at least some of our — moral responses in a way a rights-based theory will not.

Even where your considered judgements do not cut in this way, try a moral thought experiment and see if, given certain background beliefs, you would not quite readily come to have such considered judgements. If I am right in thinking you could, and indeed typically would, come to have those considered moral judgements *if you had those background beliefs*, then I think the reason you do not (assuming you do not) is that we differ very considerably in our political sociology, *i.e.*, in key background beliefs about society and how it works and can change. I see classes and class antagonism, imposed consciousness and exploitation linked to the very system of capitalism.²¹ I see capitalism as a dehumanizing social instrument which has long outlived its earlier social usefulness. Moreover, I do not see any of these things as “just there in the nature of things” but as historically

21 I do not say, or give to understand, only capitalist societies. There is class antagonism and exploitation in other societies as well. For a perceptive discussion of this see A. Levine, *Arguing for Socialism* (London: Routledge & Kegan Paul, 1984).

contingent features of a distinct society or cluster of societies emergent and dominant in a particular historical era. They have features which can change and be replaced by a different but historically contiguous society, less destructive, more humane and with more liberating social structures. Those who think this picture is wildly utopian and who do not see the present situation in the bleak terms I do are more likely to be more content with the society of the present and hope for its piecemeal social reform. Others will also accept the *status quo* because they see the above conditions as inevitable features of industrial society and, in turn, and perfectly correctly, given that background belief, see no reasonable possibility of rejecting what they take to be industrial society. Their picture of society is at least as bleak as mine. Without hope, they accept the *status quo* as inevitable and remain stoical cultural pessimists.

The people with the non-bleak picture or, since bleakness admits of degrees, the not-so bleak picture, are likely to be liberals or neo-liberal conservatives. What I am saying is that if your political sociology bears a family resemblance to mine, I would predict that concerning such matters your considered judgements in reflective equilibrium would be rather like mine. Alternatively, if your political sociology is unlike mine, then your considered judgements over these matters will be unlike mine. I think the belief that there are no non-desert-islandish cases that undermine rights-based ethical theories rests, very often at least, on having what I have called a non-bleak political sociology, and in thinking that the political sociology I have given you, even when put in more sophisticated terms, is not to be taken seriously. This, in turn, leads — or tends to lead — to the acceptance of a rights-based theory, particularly when it comes in plausible and attractive forms such as Dworkin's or MacKie's. This turning away from a goal-based option, by such an easy rejection of that political sociology, is in turn rooted in, among many Anglo-American philosophers, a massive ignorance of, and indifference to, Marxism. Again we see how closely linked our normative ethical views are to our sociological views or, in some cases, our sociological innocence.²²

22 It is not unreasonable to object that, without recanting his stress on rights and the advocacy of a rights-based theory, Dworkin's conception of political morality has increasingly become animated by an abstract egalitarian principle not very different from the egalitarian principles and conceptions I defend. We are both concerned to give a compelling articulation and account of the belief that the interests of all the members of the community matter and matter equally. We are both concerned to provide the most perspicuous representation that can be mustered of the moral requirement that the interests of everyone be impartially considered. But with Dworkin the stress is on the claim that justice requires that individuals be treated as equals: that they have equal moral standing. That comes centrally, for him, to their having equal rights, while for me there is also a stress on the importance of a society being oriented to the equal meeting of the needs of everyone alike as far as that is possible. For Dworkin, individual rights remain central while for me they do not always have the priority he assigns to them. I discuss this egalitarian side of Dworkin's views and contrast it with my own defense of radical egalitarianism in the last chapter of my *Equality and Liberty*. For relevant references to Dworkin see note 1 and, as well, his "In Defense of Equality" (1983) 1 *Social Philosophy and Policy* 1, his "What is Equality? Parts I and II" (1981) 3 & 4 *Philosophy and Public Affairs* IV, and his "What is Equality? Part III" (1987) *Iowa L.Rev.* 73.