

Rights and Consequences: It All Depends

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We can imagine extreme cases where killing an innocent person may save a whole nation. In such cases it seems fanatical to maintain the absoluteness of the judgments to do right even if the heavens will in fact fall.— Charles Fried, *Right and Wrong*, p. 10

The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.—Robert Nozick, *Anarchy, State and Utopia*, p. 30

Abstract — It is argued that there are no moral or legal rights that may never rightly be overridden no matter what the consequences. There are human rights which are inalienable while still being rightly overrideable in certain circumstances. Even rights-based constructivist accounts of human rights do not provide a grounding for morality that escapes consequentialist critique. But the proper form of consequentialism is a weak form of consequentialism which is distinguished from utilitarian consequentialism.

Résumé — Le présent article soutient qu'il n'y a pas de droit moral ou légal qui de temps à autre ne peut être appelé à céder devant d'autres exigences, peu importe les conséquences. Il existe des droits humains qui sont inaliénables tout en étant sujets à cette possibilité dans certaines circonstances. Même des explications constructivistes des droits humains qui se basent dans les droits ne peuvent soutenir la moralité de façon à échapper à une critique conséquentialiste. Cependant, la forme convenable du conséquentialisme est plutôt faible et se distingue du conséquentialisme utilitaire.

I

Are there any moral rights that must be respected come what may: that must, to disambiguate a bit, never be overridden no matter what the circumstances or consequences? In speaking of moral rights (if indeed there are any), I am speaking of rights which are not merely legal. Our grounds for them, if we have any, are moral.

They do not cease to be rights if they are not embedded in some legal system. In that way we have them on moral, not legal, grounds. I principally have in mind here those moral rights that were in earlier centuries called natural rights and in the twentieth century came to be called human rights, i.e., rights possessed by human beings simply by virtue of being human beings.¹ "The idea of a human right," as Peter Jones puts it, "remains that of a right which is 'natural' in that it is conceived as a moral entitlement which human beings possess in their natural capacity as humans, and not in virtue of any special arrangement into which they have entered or any particular system of law under whose jurisdiction they fall."²

It is possible, of course, on epistemological grounds or logical grounds to be skeptical about or even dismissive of the very idea of moral rights, either human rights or more particular moral rights rooted in specific entitlements. Jeremy Bentham thought the only real rights were legal rights, remarking that "right is the child of law; from real laws come real rights, but from imaginary laws, from 'laws of nature', come imaginary rights. . . . Natural rights is simple nonsense."³ There is plainly a fact of the matter that establishes the truth or the falsity of "A has a legal right to x" but there is no fact of the matter that establishes the moral claim that "A has a human right to x." The mistake that the natural law tradition and the natural rights tradition of Locke make is that of believing that natural rights or natural moral laws are as much a fact of the matter as the existence of legal rights. Matters are not improved if we say, with John Locke and Thomas Aquinas, that God's natural law establishes that no one ought to harm another in her life, health, liberty or possessions and that God's law could be said to give everyone a natural right to their life, liberty and property and a natural duty to respect the lives, liberties and properties of others. The traditional thinking goes as if the existence of God and the existence of His natural moral law were additional facts that we could just come to know. However, these, if they are even *possible* facts, are very arcane facts indeed. They are not conceptually unproblematic facts, if facts at all, that we can plausibly say we can just know as we can know that there are amendments to the American Constitution or what the rule of recognition is in the legal system of the United Kingdom.

The central skeptical claim about such natural laws and natural rights is that we have no reason at all to believe that there are any facts of the matter which would either constitute or establish such rights. Moreover, if we go non-naturalist and assert that these natural rights are self-evident synthetic *a priori* truths concerning some

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1. M. Cranston, *What are Human Rights?* (London: Bodley Head, 1973). I. Brownlie has assembled some of the basic documents in his *Basic Documents on Human Rights*, 2nd ed. (Oxford: Clarendon, 1981).
 2. P. Jones, "Human Rights" in D. Miller et al., eds., *The Blackwell Encyclopedia of Political Thought* (Oxford: Basil Blackwell, 1987) at 223.
 3. J. Bentham, "Anarchical Fallacies" in A. Melden, ed., *Human Rights* (Belmont, Calif.: Wadsworth, 1970).

mysterious non-natural and noumenal realm of which we are just directly and intuitively aware, we say something that is at the very least equally obscure. Indeed what we do is pile obscurity on obscurity. We have (to put it minimally) no clear sense of what it is for there to be such a non-natural realm or for a norm to be true, or, even waiving that, we have no agreed-on criteria for establishing the truth of such a claim. We do not even understand how to proceed to gain criteria for establishing the truth or the falsity of such putative truth claims.

This skeptical challenge was pushed even more deeply by the Scandinavian legal realists and meta-ethical non-cognitivists, Axel Hägerström, Karl Olivecrona, Ingemar Hedenius, and Alf Ross.⁴ Their accounts not only set aside natural rights but legal rights as well construed as Hans Kelsen and Wesley Hohfeld construed them as a world of legal relations—another noumenal realm—to be contrasted with a world of natural relations such that we Platonistically could conceive of a world of moral relations, legal relations and natural relations existing side by side.

The Scandinavian realists, as thoroughgoing positivists, denied the existence of such a metaphysical world contending, mixing an error theory with non-cognitivism, that rights and duties (both moral and legal) are purely fictitious or imaginary powers or bonds existing only in the minds of human beings. We can form true or false beliefs (beliefs of a sociological sort) about whether people hold such beliefs in rights but their “beliefs” (if that is the right word for them) themselves are neither true nor false and cannot be warrantably asserted. I think both that such skeptical claims concerning the ontology of norms and non-cognitivist or error theorist readings of their logical status are much harder to refute than has usually been thought since the demise of positivism. (People have used the demise of positivism as an excuse for slackness over such matters.) I have argued for that elsewhere,⁵ but I shall set aside such considerations here for I think some rights-based theories avoid such problems by being constructivist accounts. While being constructivist accounts, they also take rights seriously. John Rawls’s, Ronald Dworkin’s, and Thomas Scanlon’s accounts are such accounts. They have given plausible articulations of rights which rightly, I believe, take no position at all on such ontological and metaethical issues. Following what Rawls calls the method of avoidance, such accounts avoid such controversial issues.⁶ Instead, travelling light philosophically, they stay with considered judgments about first-order moral rights-claims without ever taking any controversial philosophical stance including taking any position at all about whether moral beliefs

4. A. Hägerström, *Inquiries Into the Nature of Law and Morals*, trans. C. D. Broad (Stockholm: Almqvist & Wiksells, 1953); K. Olivecrona, *Law as Fact* (London: H. Milford, Oxford University Press, 1939); I. Hedenius, *Om Rätt och Moral* (Stockholm: Wahlström & Widstrand, 1941); and A. Ross, *On Law and Justice* (Berkeley, Calif.: University of California Press, 1959).

5. Kai Nielsen, *Equality and Liberty: A Defense of Radical Egalitarianism* (Totowa, N.J.: Rowman and Allenheld, 1985), c. 2; and Kai Nielsen, *God and the Grounding of Morality* (Ottawa: University of Ottawa Press, 1991), c. 8 and 9.

could be either true or false. Without taking any such controversial and perplexing philosophical positions at all, we can know what moral rights we have and how they differ from merely legal rights, from goals, from goods, from obligations, from virtues, from mere preferences and how what we have a right to do is not necessarily something that is the right thing to do. (Rights and right should not be confused.) We can very well know these and related things, including knowing that the overriding of a right takes very special justification and that rights can be overridden without being forfeited, without knowing or even having a view about what is the correct *analysis* of rights or the most perspicuous conception of rights just as we can know what a chair is or what power is and, as well, know a good deal about chairs and the way power is exercised without having any views at all about the correct or incorrect analysis of what it is for something to be a chair or to be an exercise of power.⁷ The same goes for rights.

I shall, like Rawls, use the method of avoidance, and eschew (if I plausibly can) in considering my question taking any stance at all on such ontological, epistemological and metaethical issues.⁸ I shall also avoid, if I can, taking a position on the various contending theories of rights or conceptions of our at least supposedly common concept of rights. The main contenders for theories of rights are the Benefit Theory, where to have a right is to be the intended beneficiary of someone else's duty, where—or so this theory has it—the relation between rights

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6. J. Rawls, "Justice as Fairness: Political Not Metaphysical" (1985) 14:3 *Philosophy and Public Affairs* at 223–51; "The Idea of an Overlapping Consensus" (1987) 7 *Oxford Journal of Legal Studies* at 1–25; "The Domain of the Political and Overlapping Consensus" (1968) 64:2 *New York University Law Review* at 233–55. These later views of Rawls, by contrast with his earlier views, have not been very well received. For two trenchant critiques, but I believe all the same largely mistaken critiques, see J. Hampton, "Should Political Philosophy be Done Without Metaphysics?" (1989) 99:4 *Ethics*; and J. Raz, "Facing Diversity: The Case of Epistemic Abstinence" (1990) 19:1 *Philosophy and Public Affairs* at 3–46. I, by contrast, think there is a very considerable plausibility and importance in the later work of Rawls. I seek to show this in my "John Rawls's New Methodology: An Interpretive Account" (1990) 30:3 *McGill Law Journal* at 573–601; "Rawls Revising Himself: A Political Conception of Justice" (1990) 76:4 *Archiv für Rechts und Sozialphilosophie* at 1–17; and "Rawls and the Socratic Ideal" (Fall 1991) *Kritik & Analyze*. R. Rorty, in a swashbuckling but very perceptive way, brings out some of the importance of Rawls's later work in his *Objectivity, Relativism, and Truth* (New York: Cambridge University Press, 1991) at 175–96.
 7. Barrington Moore, Jr., shows this adeptly for power in his "Authority and Inequality under Capitalism/ and Socialism" in S. McMurrin, ed., *The Tanner Lectures on Human Values VII* (Cambridge: Cambridge University Press, 1986) at 103–244.
 8. I try more generally to show the virtue of such avoidance in my *After the Demise of the Tradition: Rorty, Critical Theory, and the Fate of Philosophy* (Boulder, Colo.: Westview, 1991).

and duties is expressed in the idea of correlativity: A's right to some good is just another way of talking about B's duty to provide that good for A. To be contrasted with the Benefit Theory is the once very popular Choice Theory of rights where A may be said to have a right only if B's duty is owed to A in the sense that A has the power to waive it if she wishes or chooses to. The third contender is the Interest Theory of rights which contends that a person (an individual) is correctly said to have a right whenever an interest of hers is regarded as sufficiently important to justify holding others (including the State) to be under a duty to promote or at least protect that interest in some way. The claim is not, absurdly, that every interest is the subject of a right but that only when that interest is a sufficiently important interest and that interest can be so protected is that interest a right. Rights are such protected interests and they *generate* duties.

All of these accounts have well-known difficulties, but they all in their nuanced forms, and over certain considerations relevant to taking rights seriously, also have at least some initial appeal. If I were in the business of opting for a theory of rights I would be inclined to go the route of some form of the Interest Theory. But it is my hunch and working hypothesis that we can reasonably resolve many (perhaps all) substantive moral and political problems about the justification of rights and their proper role in morals and politics without any such theory choice at all.

II

Let us see if this is so of my question, and let us further see if we can, travelling light philosophically, plausibly answer it in a reasonably decisive manner. My question was, are there any human rights that must be respected and whose claims can never be overridden in any circumstance and no matter what the consequences? (Remember a right may be overridden without being forfeited.)⁹

In morality, as by now familiar and widely accepted criticisms of Kant and Kantianism, Utilitarianism and Perfectionism have made evident, it is very questionable indeed whether there are any tolerably specific norms or values which are actually unconditionally or absolutely justified in all conceivable circumstances. That this holds for rights along with other norms should not be surprising. But it is also the case that we (reflective moral agents in societies such as ours) are prone to feel and sometimes to believe that there are certain things we have a right to expect or a right to do or to have, and that others (including the State) must not interfere with us here and in some instances must actively protect our rights in such circumstances. There are situations, we are inclined to believe, where this holds unconditionally.

9. A. I. Melden, *Rights and Right Conduct* (Oxford: Basil Blackwell, 1959) and *Rights and Persons* (Oxford: Basil Blackwell, 1977); J. Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton, N.J.: Princeton University Press, 1980) at 131–55 and *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, 1973) at 88–94.

Skeptics about human rights will argue either or both (a) there is no appeal to fact and/or rational principles or rationality that, independently of what happens to be the considered convictions of a given people, will establish or show that there is anything that any person in any circumstance and anywhere has a right to do or to be protected from having happen to her or (b)—and I think more interestingly—that there are no such rights to do or to be protected from having happen to one that are not rightly overrideable in some particular circumstance. Moreover, the claim goes, their overrideability in those circumstances will be acknowledged by reflective moral agents with the typical considered convictions of moral agents in societies such as ours when the agents are adequately informed, not conceptually confused and in other appropriate ways have their considered judgments in wide reflective equilibrium.¹⁰ My question is whether either (a) or (b) is so.

I will argue that it is at least in principle (theoretically) possible that any substantive human rights claim might rightly (justifiably) be overridden in certain circumstances. I will also argue that sometimes we cannot reasonably avoid in considering what are at least putatively conflicting rights-claims an appeal to consequences and to human interests and needs. I think this supports some weak form of consequentialism against the Absolutism of the currently fashionable rights-based, duty-based, and virtue-based normative ethical theories and normative theories of politics. (What this *weak* consequentialism comes to will be explicated in the last section of this essay.) For now, following David Lyons and Brian Barry, I want to make it clear that this *weak* consequentialism is not what in contemporary times has been called utilitarianism (e.g., by Bernard Williams and Charles Fried among others) and widely believed to be utilitarianism and even defended as utilitarianism by J. J. C. Smart and Peter Singer, among others. It is not, however, as Lyons and Barry show, the classical utilitarianism of Bentham and the Mills.¹¹ Those views are closer to what I call *weak* consequentialism.

10. Nielsen, *Equality and Liberty*, *supra*, note 5, c. 2; *God and the Grounding of Morality*, *supra*, note 5, c. 3–9; and “Reason and Sentiment” in T. Geraets, ed., *Rationality Today* (Ottawa: University of Ottawa Press, 1979).

11. D. Lyons, “Human Rights and the General Welfare” (1977) 6:2 *Philosophy and Public Affairs* at 113–29; B. Barry, *Liberty and Justice* (Oxford: Clarendon, 1991) at 40–77; and B. Williams, “A Critique of Utilitarianism” in J.J.C. Smart and B. Williams, eds., *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) and Smart’s defense in the same volume. See also J.J.C. Smart, “Distributive Justice and Utilitarianism” in J. Arthur and W. Shaw, eds., *Justice and Economic Distribution*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1991) at 106–17; C. Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978). For two volumes of essays that bring out something of the range of anti-utilitarianism and anti-consequentialist arguments now current see A. Sen and B. Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982) and H. Miller and W. Williams, eds.,

III

In looking for a right that can never justifiably be overridden let us start with the rights that have characteristically been thought to be human rights and, as at least rhetoric has it, are in some sense, not infrequently, thought to be inalienable, inprescriptable, indefeasible, and unforfeitable. John Locke summarized some of them as the right to life, liberty and property. Some later human rights advocates would balk at property but perhaps not at (to make a reasonable reduction) personal property (as distinct from private ownership of the means of production) and certainly not at the right to self-ownership. The right to liberty must at the very least be the right to do what there was no rule or moral reason against doing. The right to liberty or to freedom was typically taken to devolve into the right to freedom of thought and expression, the right to freedom of association, the right to freedom of movement including the right to emigrate and the right not to be subject to arbitrary arrest and imprisonment.

There are, however, circumstances where the consequences are of a certain sort such that all of those very fundamental, and generally acknowledged human rights—acknowledged to be human rights if anything is—could—or so I shall argue—rightly be overridden. A.I. Melden and Joel Feinberg are right in saying that though they are rightly overridden they are not forfeited.¹² If, to translate into the concrete, my right not to have my mail read without my permission is overridden, as it was during the Second World War, due to censorship restrictions designed to protect a nation at war, my right not to have my mail censored or read, remains there in place when the emergency is at an end. I do not lose my right because it is on occasion overridden. It remains there fully in force in the standard situations. But it is widely believed by many, even in Western constitutional democracies, that this right can in certain circumstances be rightly overridden as (for example) in wartime circumstances because of the grave threat to security it possesses. But, if it becomes routinely overrideable, it is not a right at all. People so reasoning recognize that, while freedom of expression and privacy are very important to them, they all the same believe in the justifiability of censorship in such a circumstance. They recognize that it is one of their considered judgments and indeed a judgment that would remain a considered judgment even when they get their judgments into wide reflective equilibrium. They do not, that is, believe this it to be a considered judgment that would be extinguished by such a winnowing. Perhaps they are mistaken about this but that they are is anything but evident. This

The Limits of Utilitarianism (Minneapolis, Minn.: University of Minnesota Press, 1982). See also S. Scheffler, ed., *Consequentialism and Its Critics* (New York: Oxford University Press, 1988).

12. Melden, *Rights and Right Conduct* and *Rights and Persons*, *supra*, note 9; Feinberg, *Rights, Justice and the Bounds of Liberty and Social Philosophy*, *supra*, note 9.

being so, we are hardly on safe ground in claiming that freedom of expression is a right that can never be rightly overridden.

Freedom of thought, more in control of one's will and more private, is harder to control, and the justifiability of its control (where it can be had) is even more questionable, but if a man thinks he should kill his quite innocent neighbors because they irritate him and there is a pill that we could give him to erase that particular thought, it is anything but clear that the pill should not be smuggled into his food. Similar considerations, even more obviously, apply to right of freedom of association, movement and emigration. Normally the right to emigrate should not be challenged but if a person is a general or a weapons systems expert in country A on the verge of going to war with country B, where country B is a dangerously aggressive and expansionist nation and A is not, it is again anything but clear that the general or the weapons systems expert should be allowed to emigrate to country B. What is plainly an unforfeitable human right is rightly overrideable in those circumstances.

Admittedly these are extreme circumstances and normally there can be no legitimate question of overriding these rights. But an examination of such extreme situations does show that whether such rights—really fundamental and paradigmatic human rights—can rightly be overridden depends at least in part on the consequences of overriding them. Trading on an ambiguity in “respected” and even more evidently in “unconditional,” it is not sufficient to respond that, though in some extreme situations they are rightly overrideable, they are still not forfeited, or perhaps even forfeitable, and that that shows, the claim continues, that these human rights are still being respected and thus remain unconditionally in force. I shall comment on the latter ambiguity only, for it is crucial for my case. There is a respect for rights in that they are not forfeited and can only in the gravest of circumstances rightly be overridden. In that weak sense human rights are unconditionally held—meaning that such a right is not something that we can ever rightly disregard; however, in a still plainer sense of “unconditional,” it is, in being rightly overridden, not unconditionally held, for allowing the exercise of that right, no matter what the circumstances or what the consequences, is not something that is always and quite categorically and unconditionally to be done. Moreover, it is not generally thought that this is anything that *should* be unconditional, let alone *must* be unconditional. Thus in that very plain and important sense those human rights are not unconditional.

Let us consider another cluster of paradigmatic or (in some instances) arguably paradigmatic human rights: the right to protection by one's government (or by the society in which one lives, so as to cover stateless societies), the right to a fair trial, the right to due process, the right to protection of the law, the right to be free from arbitrary arrest, the right to personal property, and the right to self-ownership. Consider the last two first. If in the town in which I live there is a devastating earthquake and my house is one of the few houses remaining intact, I may rightly be required by the city officials, my wishes to the contrary notwithstanding, to

billet people during the emergency. My right to the exclusive use of my personal property is rightly overridden in such circumstances as it is, less dramatically, in situations where there is a pressing need to construct a highway that runs through my property. The right of *eminent domain* is a well established legal right that is, in some of its applications, morally unproblematic.

The right of self-ownership lies even deeper than the right to own property but even there my right (my right to self-ownership) may in extreme circumstances rightly be overridden. Suppose I do not want to give blood transfusions but I have a very rare blood type and I live in a very isolated community where only one other person and I are known to have that blood type. Let us also stipulate that I do not have religious convictions that go against blood transfusions. I just do not want to give blood. The other person, through no fault of his own, is involved in an accident and will die without an immediate blood transfusion and I am alone able to give it to him. I may rightly in such a circumstance be required (strapped down and forced, if necessary) to give my blood. Libertarians will say that that does not respect the independence of persons, to which non-libertarians should reply that not being required to give blood does not respect the interdependence of persons and how much each person owes to others for what he is and what he can do. Moreover, it is the latter attitude and not the former which most clearly shows respect for persons.

Let us now turn to the right not to be subject to arbitrary arrest, the right to the protection of the law, the right to due process, the right to a fair trial. We have to be careful here that some of these rights-claims are not so read (so understood) that they fail to be substantive: that they become what in the bad old days would be called analytic, like "Murder is wrong" where "murder" means "wrong killing" so that "Murder is wrong" is understood to be equivalent to "Wrong killing is wrong." (This is a vacuity not dissimilar in its emptiness to Aquinas's first principle of the natural moral law: "Good is to be done and evil is to be avoided.") If "arbitrary arrest" means "everything considered *unjustified* arrest" or "through and through *wrongful* arrest" we get something equally vacuous and we can protest by noting that and then adding that that is not the only way these sentences can be understood. They can be read substantively and they naturally would take substantive readings and, with these substantive readings, or so I shall argue, they all have exceptions: they all could be rightly overridden in certain circumstances. Again, to see that this is so, we must go to extreme situations. Let us suppose a country A (a country that in no way was aggressive, expansionist, or even exploitative) was seriously threatened by another country B. One way B did this was by, for a long time before B's intentions were known, systematically infiltrating agents into A to engage, when the time was ripe, in all sorts of acts of sabotage, assassination, and mayhem but that it is also the case that there was a not inconsiderable amount of perfectly legitimate and innocent emigration from B to A: emigrants with no evil intentions toward A and very glad to be out of B. A, now gravely threatened by B, let us postulate, is often not able to make even a good guess at who are the innocent immigrants and who are not. This situation could very well provide sound grounds—morally justifiable grounds—for preventive

detention. But this preventive detention remains in a way a form of arbitrary arrest. (If we deny that this in any way counts as "arbitrary arrest" we are on the way to making the rights-claim nonsubstantive.)

Similar things should be said for the right to a fair trial, the right to due process, the right to the protection of the law, the right to security of person. I shall treat them all under the following case. Suppose a fragment of an army, devastated and nearly defeated, is trying desperately to escape from behind enemy lines, where the enemy in question is a brutal enemy that is known to take no prisoners. Suppose the retreating soldiers come upon a civilian of the enemy country. There is, let us suppose, absolutely no feasible way of taking the man with them and it is very likely that if, even bound and gagged, they leave him there, he will alert the enemy army and the retreating soldiers will all be killed. With a trial it might be ascertained that he did not come into that region for that purpose and anyway would do nothing of the kind. He might, though there is no way of ascertaining this, even sympathize with the retreating soldiers and hope their country would defeat his own. But there is no time for a trial for the army must speedily retreat. The army commander will be justified, if that plainly is really the circumstance, in overriding all of the above rights-claims and ordering the man executed, though as painlessly and humanely as possible.

The cases I have considered involve the standard and paradigmatic human rights-claims. Less standard, less clearly paradigmatic human rights-claims, such as a right to education, a right to work, a right to health care, a right to social security, a right to a decent standard of living, are even more plainly claims that are sometimes overrideable *if* only for the reason that in some circumstances (e.g., in very poor countries) they cannot be met. It can hardly be intelligibly said of a government that it *must* do what it *cannot* do. (We also need to be confident that it really cannot do it, that there is no reasonable re-direction of resources possible to meet the more pressing need.) Such "rights," where at a given time they cannot be met, are better thought of as desirable goals, though not the less important for all of that, though where the situation becomes one in which they can reasonably be met, they may become rights, perhaps they even *must* become rights.

Perhaps more specific human rights are unconditional and are never rightly overrideable. Consider here Maurice Cranston's two examples which he apparently at least believes to be unconditional and in no conceivable circumstance overrideable. He takes them as things which "should never be done," "freedoms which should never be invaded."¹³

A black student in South Africa is awarded a scholarship to Oxford, and then refused a passport by the South African government *simply because he is black*. We feel this is a clear invasion of the human right to freedom of movement.

13. M. Cranston, "Are There Any Human Rights?" in Guy LaFrance, ed., *Ethics and Basic Rights* (Ottawa: University of Ottawa Press, 1989).

Jews are annihilated by the Nazi government *simply because they are Jews*. We feel this is a manifest abuse (an atrocious abuse) of the human right to life.¹⁴

These are clear violations of rights (if anything is) and they are plainly inexcusable. These are evil things if anything is and plainly some things are evil. We do not need philosophical or any other kind of theory to tell us that. Indeed any theory which gave to understand that this was not so would itself be, at least in that respect, a mistaken theory, a mistaken account of morality.¹⁵ (This is an application, out of its Moorean home in metaphysics and epistemology, of G. E. Moore's defense of common sense against philosophical extravagance. Here Moore, the defender of common sense in matters metaphysical and epistemological, was far better than G. E. Moore the moral philosopher.)

Nonetheless, Cranston's cases are not exceptions to my contextualist consequentialism: my *weak* consequentialism. First, note the phrases in the passage from Cranston that I have underscored. To do what is done to him "simply because he is black" or to them "simply because they are Jews" gives to understand that what is done is plainly done for no good reason, indeed is done arbitrarily and, given the grave harm (the plain evil) of what is done, to do such things arbitrarily is equally plainly to do it unjustifiably. (Indeed "unjustifiability" is too weak a word here.) Thus there can be no justification for an override here. But then the rights-claims are in reality non-substantive claims. Again it is like "Wrong killing is wrong." It says, "The issue of a passport should not be restricted *arbitrarily*" and "The freedom of movement should not be restricted *arbitrarily*." Being so non-substantive, they are, of course, exceptionless in the way "Good is to be done and evil is to be avoided" is. (Where we get something that is exceptionless, we get something empty. That is the price we pay for certainty.)

14. *Ibid.*, italics mine. There are situations, truly horrendous situations, where, when we describe them in some detail, they can be seen to involve the doing of things which should never be done. But the doing of such things, some place or other in the world, are reported almost daily in our newspapers. I have in mind such things as the gunning down for no reason of a lot of innocent people in a shopping mall. Such killing in just that situation is unconditionally wrong. But—and this shows how dependent this whole story is on the circumstances—change the circumstances a little and we get a different story. Suppose Hitler had been in the crowd and this was the gunman's only chance to kill him. Then it would not be so obvious that shooting into the crowd would be wrong. (We are supposing that the only way to kill Hitler also involved the killing of others and that these others were innocent persons.) So we see that even in such horrendous situations it all depends. Consequences are always relevant and actions become justifiable or excusable in accordance with them. Some things should—indeed must—never be done, never allowed, where they can be prevented, just because of their truly horrendous consequences.

15. This utilization of G.E. Moore, and Ludwig Wittgenstein as well, is theoretically articulated in my *After the Demise of the Tradition*, *supra*, note 8 at 82–110.

If we give it substance by changing it to say "If a black is allowed on campus at Oxford there will be race rioting with extensive plunder, killing and general mayhem in Oxford," then it is not so clear that (if this will clearly be so) the refusal to give the passport, and with it the consequent restriction of movement, is not justified under the circumstances. Even more desert-islandish and fanciful, and indeed offensively so, is the following case. Suppose the Jews were a very small minority (try gypsies instead in a gesture toward reality) living among a much larger population of non-Jews. Further suppose the Jews, and only the Jews, had an incurable but strongly contagious disease which would eventually kill them all and would, if they were not themselves killed with some quick dispatch, eventually, through infecting them, unintentionally kill the whole population as well. (We have to assume, to pile implausibility on implausibility, that none of the non-Jews was already infected.) It is not so clear that under these stringent circumstances that their right to live or (by *universalizability*) anyone's right to live so situated should not be so overridden. Given the vileness of the holocaust and the gross brutality of the Nazis, I hesitate to use this desert-island example, though Cranston's case calls for it and in responding I would be evasive if I did not use some such case. Still, I can't help but feel that the very articulating of it is something like an insult to the memory of all those who were so murdered. All the same, offensive though it may be, it is true that *if* the circumstances (the wildly counterfactual circumstances) were as I described them then such killing (though not in the way the Nazis did it) would be justified unless we are justified (as we are not) in taking the Hebrew-Christian turn of saying that we must never do evil that good may come. But in the above case we are doing a very great evil to avoid a still greater evil. Moreover, the stern Hebrew-Christian injunction admittedly only makes sense if we can bring ourselves to believe that there is such a sovereign and providential God as is conceptualized in those traditions. But that takes a bit of believing, perhaps even a crucifixion of the intellect. Atheists who think they need to so crucify their intellects to make sense of the moral life should think again.

Considering all the above examples of human rights-claims taken together, it should be noted that to find circumstances in which it is plausible to claim that any of these rights-claims could be overridden we need to go to extreme situations (typically catastrophic or near catastrophic situations) and in a few instances to desert-island cases as well. Where the cases are desert-islandish we can be assured, given that desperate expedient, that in our actual moral life we can rely on the moral claims or practices for guidance. The theoretical appeal of such desert-island cases in our context is to show against deontological Absolutism that these rights-claims were not really free of consequentialist considerations.¹⁶ If certain

16. Where we are actually trying to ascertain what should be done in some fairly determinate circumstances we should point to the irrelevance of desert-island cases. Where the context, as in the present essay, is more theoretical there are situations where this is exactly what we should appeal to. See for a discussion here of the use of desert-island cases P.H. Nowell-Smith, *Ethics* (Harmondsmith: Pelican, 1954).

consequences were to obtain, these allegedly *unconditional* Absolutes would be shown to be non-Absolute and (trivially as a consequent of that) mistaken when taken as unconditional claims. Pointing out that these consequences will not in fact obtain obscures the fact that the viability of the moral claims are dependent, in part at least, on what the consequences actually are. If the consequences were very different from what in fact they are what we should say and believe would very likely be different as well.

English-language moral and social philosophy, and social and political philosophy out of the analytic tradition even more specifically, with its greater fastidiousness and penchant for understatement has tended not to concentrate much on how morality should go in extreme situations. Deontological Absolutists such as Robert Nozick and Charles Fried have, rather as asides, admitted that in catastrophic situations their strong rights-claims do not hold but they have not integrated that into their theories. Moreover, it is not clear how they could integrate such considerations without extensively recasting their theories. Their admissions (note the quotations with which my essay starts) are rather like the black sheep in a family. They are better kept out of sight. It has been left to Continental philosophers such as Jean-Paul Sartre and Maurice Merleau-Ponty and (as well) their liberal critics, Raymond Aron and Lezek Kolakowski, to respond to such situations. But while their accounts have frequently been insightful there has not been a lot of argumentative development here. What I think I have shown, against rights-based moral theories of an Absolutist sort, is that we cannot avoid appealing, in trying to ascertain what must be done, to circumstances and consequences.

IV

I have canvassed a thorough sampling of actual rights-claims, indeed typically paradigmatic rights-claims, and I have argued against rights-based or deontological Absolutism that circumstances can arise in which any of them could rightly be overridden. In that vital sense, none of them are unconditional. However, I have left aside philosophical articulations of rights-claims: general principles that have been articulated by philosophers and other theorists as the ultimate or at least an ultimate grounding of rights, where, unlike the fundamental principles of utilitarianism or perfectionism, these principles are themselves very general rights-claims. They are meant to rationalize and justify (typically only partially justify) the more particular rights-claims as well as concrete appeals made in the courts and elsewhere to rights.

I shall conveniently but somewhat inaccurately call them meta-rights-claims or meta-rights.¹⁷ They might be thought (mistakenly I shall argue) to be exceptionless

17. I say "inaccurately" because they are not actually second-order claims *about* our moral talk—and hence genuine meta-claims—but actual very general, philosophically articulated rights-claims themselves. But the label is useful to have a way of briefly referring to these distinct claims. They are much more theoretical than the standard rights-claims.

and claims, general though they be, that can never rightly or justifiably be overridden. The following are key examples:

- 1) All people have a right to be treated as equals, not because they happen to be equal in some particular respect or other but simply because they are human.
- 2) All people are of equal worth, and have a right to be so treated however unequal they may be in merit, abilities or even in moral sensitivity.
- 3) All people have a right to be treated as ends (as something of intrinsic worth) and never merely as means.
- 4) All human beings, capable of such choices, have an equal right to choose how they shall live.
- 5) All human beings have a right to an equality of concern and respect, a right they possess not in virtue of birth, characteristic, merit, or excellence, but simply as human beings with the capacity to make plans and give justice.

These meta-rights are all quite similar and each has been taken as the fundamental rights-claim by some natural rights theorist or proponent of a rights-based ethical theory. Ronald Dworkin defends #5, J. L. Mackie #4, Kant #3, Gregory Vlastos #2, and Maurice Cranston #1.¹⁸ I have in some detail elsewhere argued that these principles are all subject to plausible skeptical challenge.¹⁹ An iconoclastic moralist such as Nietzsche or Stimer, a defender of aristocratic morality, a consistent Hobbesian or utilitarian would not accept such claims or, specifically in the case of the utilitarian, if she accepts them at all, she will not accept them as fundamental or basic principles but as derivative principles that can in theory at least be overridden by the principle of *utility*: for the utilitarian, the sole fundamental principle of morality.

I further argued that we have no better grounds for believing these meta-rights to be true (or false) than we have for believing the alternatives to be true or false. Setting considerations of truth aside, we also have no good grounds for believing that rationality requires any of these meta-rights principles any more (or any less) than their alternatives or certain clear denials of any of them. *Pace* Plato, Kant, Gewirth, and Gauthier (among others), I argued that morality is under-determined with respect to rationality. There are, that is, no systems of moral principles, beliefs and attitudes *required* by reason either in or outside a contractual situation, but there are a range of diverse moral principles, beliefs, attitudes, and whole systems of morality that are

18. Cranston, *supra*, note 13; G. Vlastos, "Justice and Equality" in R. Brandt, ed., *Social Justice* (Englewood Cliffs, N.J.: Prentice-Hall, 1962) at 31–72; J.L. Mackie, *Persons and Values* (Oxford: Clarendon, 1955) at 105–19; and R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 171–77.

19. See references in notes 5 and 10.

compatible with reason and perhaps (if we could figure out more clearly what this means) equally compatible with reason. Reason (rationality) does not require any particular moral system but it is compatible with a considerable range of such systems: they are, that is, in accordance with reason without being required by reason. I am not saying or suggesting that anything goes and that there are no irrational moral beliefs. They abound in our moral life. To take some random examples: masturbation is wrong for it will stunt your growth, all humans are corrupted by original sin, selfishness is the first virtue of a person of principle, or integrity is the *only* virtue. But I did argue that there remains in the field for a rational critical morality a range of competitors from Nietzschean iconoclasm and Aristotelian elitist perfectionism, to Hobbesianism, justice as fairness à la Rawls, justice as impartiality à la Brian Barry, justice as mutual advantage à la Gauthier to Sidgwickian classical utilitarianism (if its rationalistic epistemological apparatus is dropped). All these moral theories no doubt have some defects, some more than others, but there can, and have been, and no doubt will continue to be, piecemeal rational reconstructions to rectify the defects. Defects remain but many of the theories do get articulated in increasingly more adequate forms. They remain in the field as competitors with each other. No one theory for very long, and then only locally, wins the day. But the crucial thing to see in this context is that there are no good grounds for believing that reason itself (independently of our considered moral convictions) requires us to be utilitarians, Gauthierian contractarians, Rawlsians, perfectionists (Aristotelian or Nietzschean), or Rossean pluralistic deontologists, though I am not suggesting that all the bodies are equally healthy. Rationality is under-determined with respect to morality, though such a rationalism (a rationalism that denies this) dies hard, as the history of moral philosophy (including our recent history) shows. It may be more difficult than we usually think for people with philosophical inclinations to live without at least an *ersatz* God.

I also discussed—developing and turning to my own purposes, some arguments from John Rawls and Norman Daniels—whether, starting with our considered judgments and using the method of wide reflective equilibrium, we could give grounds, admittedly of an indecisive sort (after all fallibilism is the name of the game as much in science as in morality and politics) for favoring over an elitist perfectionism an egalitarian rights-based account that is something in the rough neighborhood of Dworkin's account or at least an account which develops from taking as basic or perhaps even foundational one or another of the meta-rights principles listed above.²⁰

20. I shall argue in the final section of this essay that classical utilitarianism significantly differs from what is now commonly regarded as utilitarianism and that the later version does not represent progress. See also references in note 11. Some excellent essays making clear what classical utilitarianism was about are reprinted in S. Gorovitz, ed., *Utilitarianism: John Stuart Mill with Critical Essays* (Indianapolis, Ind.: Bobbs-Merrill, 1971).

I argued that a modest case could be made for such an account. However, I also raised the “worry” that such a grounding of a human rights approach may only work when the moral agents involved have the specific considered judgments of people who are broadly speaking liberals or Enlightenment-based extensions of liberals such as Bentham or d’Holbach or Marx or Luxemburg or some modern communitarians such as Michael Walzer or Charles Taylor. Where we try to include Stirner, Nietzsche, Loyola, or Aristotle and *perhaps* even Alastair MacIntyre or Jacques Maritain or a very hard nosed *realpolitik* Hobbesian, we may get very different and *perhaps* even incommensurable reflective equilibria. I do not think that issue is by any means near a resolution yet but I do not despair of a rational resolution.

Pursuant to that, I think we should share Donald Davidson’s and Isaac Levi’s skepticism concerning the fashionable claim that fundamental moral principles, beliefs, ways of moral reasoning or even whole moralities are incommensurable: that there is no way for a Loyola and a Mill to argue with each other, that Rawls and MacIntyre occupy incommensurable moral spaces such that between them there is no room for fruitful exchange or any reasonable way of establishing which view is the more plausible: that there is not even any way of comparing their views with an eye to normative assessment. If these claims of mine are well taken, then what I claim to gain out of a careful application of the method of wide reflective equilibrium is also arguably near to the mark and this gives us *lebensraum* to argue for a Dworkin-like or Rawls-like defense of human rights.²¹

I do not want to step, or even try to step, in the same river twice, so I simply report here on what I have argued in some considerable detail elsewhere. But what I said there and now report is relevant to central claims of this essay, though I think its main argument will stand even if my above hunches and reported contentions are importantly mistaken. But if they are well-taken we get a rather more valuable package: we will have overrideability of rights, a defense of human rights, and a *weak* consequentialism all in a coherent and plausible package that is not caught up in incommensurabilities or hobbled by being just one reflective equilibrium among others. With this we have the prospect of gaining a greater objectivity than that with an account of morality which is stuck with many reflective equilibria all incommensurable with each other.

What is central to what I argue in this essay is the correctness of the claim that an appeal to any of the above meta-rights will not justify reversing the judgment that, neither appealing to reason (our rationality) nor to our considered judgments in wide reflective equilibrium, will provide a sound basis for claiming that any of the human rights-claims discussed in the previous section could never rightly, on a particular occasion, be overridden. This, I believe, can be justifiably extended to other first-order rights claims as well as to the meta-rights listed above. Neither

21. See my *Equality and Liberty*, *supra*, note 5, c. 2 and *After the Demise of the Tradition*, *supra*, note 8, pt. 2.

reason nor wide reflective equilibrium provide us with a sound basis for revising our claim that there are no unconditional rights.

We could have Hobbesian *realpolitik* or Nietzschean reasons for denying that all people are of equal worth or somehow deserve or are entitled to equal concern or respect. The Hobbesian and Nietzschean might join hands in thinking that that belief in equal human worth is the merest sentimentality. What parades as Enlightenment reasonability really has, they might say, a Christian stink. There is no reason, they could add, why a thoughtful and informed person should embrace that sentimentality about everyone having equal worth: Einstein and Nixon, for example.

I argued in my *Equality and Liberty* that on utterly secular grounds we could, using the method of wide reflective equilibrium, reasonably argue for such meta-rights principles, though not for unconditional rights. But the case I made there is by no means obviously correct and I am not very confident that I have convinced many people who did not already basically agree with me. This does not, of course, mean that I was mistaken, but only just what I said: that I was not very convincing.

If one sticks with Hobbesianism, eschewing considered judgments or at least egalitarian considered judgments in any sort of reflective equilibrium, then there is no reason to think human rights-claims cannot on occasion be overridden. That, of course, squares with my central claim in this essay. But, and more interestingly, even if we appeal to considered judgments of a distinctively liberal sort à la Dworkin, Scanlon, Rawls or myself, we have with such approaches, with their family resemblances, no good reasons, accepting as we do some such meta-rights, for believing that first-order rights claims such as we discussed in the previous section cannot rightly, depending on the circumstances and thus on the consequences, sometimes be overridden. Nothing changes this because we accept one or another of these philosophical “backups” for our first-order rights-claims.

What about the meta-rights principles themselves (#1 through #5)? Can they ever rightly be overridden? Let us look first to their justification or lack thereof and to how trying to justify such principles proceeds. As we have seen, it is not clear what it would be like to prove them. They are hardly self-evident truths clear to the light of reason; they are hardly principles that all rational contractors (in or out of the state of nature), apart from any considered convictions they might just happen to have, must, or even predictably would, unanimously agree on; and it is not even clear that there would be a sufficient consensus (if we get at all cross-cultural and perhaps even within our Western cultures) concerning what considered judgments crucially to rely on even when they are winnowed by a resolute utilization of the method of wide reflective equilibrium.

Such considerations certainly make the justification of these meta-rights principles look a little bit wobbly. It is certainly not unreasonable to wonder whether we have available a method which would yield sound grounding principles for human rights: the first-order human rights claims. These meta-rights principles

may be the articles of faith—the here I stand I will do no other—of social democratic liberals, non-confused Marxians (e.g., G. A. Cohen and Andrew Levine), and libertarian socialists (anarchists à la Michael Bakunin and Noam Chomsky). But then we cannot plausibly claim that these meta-rights principles cannot be overridden, meaning by that in this context that a properly informed person must, if she is reasonable, reason in accordance with them.

In another trivial sense they *may* not be overrideable. To see what is involved here, contrast #2 with the first-order human rights principle “Each person has a right to his individual assets.” A believer in human rights might accept that first-order right and still consistently believe that in certain situations it could be rightly overridden. Where A has plenty and there is extensive starvation, some of A’s personal assets may rightly be taken from him. In short, it can be specified, and perhaps even widely agreed on, when the first-order principle applies and when it does not. But it may seem, though I shall argue appearances are deceptive here, that nothing like that obtains for the meta-rights principles. I shall seek to show, using #2 as an example, that this is a mistake and vis-a-vis overriding the first-order rights and the meta-rights principles are more alike than different. #2 says “All people are of equal worth, and have a right to be so treated however unequal they may be in merit, abilities or even in moral sensitivity.” Unlike the first-order rights principle just discussed, it is rather more unclear or at least indefinite what #2 asserts. Sometimes we rightly award A a fellowship and not B. Is this really a denial of the equal worth of A and B? *If* it is, then #2 can in some even rather routine circumstances be rightly overridden. Presumably those who assert #2 do not think that so awarding fellowships is incompatible with treating A and B as having equal worth or anything like that. But then perhaps it is not clear what treating people as being of equal worth comes to. What would we have to do or fail to do to *not* treat people as having equal worth? Presumably if we treated a person as a mere instrument, a slave without any rights at all, to do anything we like with whatever their wishes or interests might be, that would *not* be treating them as persons of equal worth to other people who were not so treated. Suppose, so purely instrumentally treating a person, we simply took him off the street and dragged him into a hospital and, against his will, operated on him and took both his good eyes and gave them to a famous scientist whose eyes were failing. If that were done we would plainly not be treating him as a person of equal worth to at least the scientist. So acting would be incompatible with reasoning in accordance with #2.²² But could we never in any possible circumstances be justified in so acting and thus overriding #2? Would this be categorically and unconditionally wrong (forbidden) no matter what the possible circumstances, no matter what the consequences?

22. Something very like that in fact happened to an eighteen year old in a New York hotel, though with a kidney taken out rather than his eyes.

Again, there are desert-island cases that might persuade us to deny such categorical unconditionalism. Suppose the scientist was a kind of Einstein of cancer research and she was on the verge of a discovery that would finally definitively and for all types of cancer prevent the occurrence of cancer and that she was going blind and needed good eyes to be able to complete her research and that only by having new eyes could she have the good eyes she sorely needed to complete her research. Suppose, further, that no one could plausibly take over her research and complete it and that there were no fresh cadavers about with useable eyes and none were to be expected and that there were no volunteer donors and that there was no time to set in place a lottery system for who is to be the unlucky person. All these are (to put it minimally) very desert-islandish assumptions indeed, but if these were the circumstances it is at least arguable that #2 should in those circumstances be overridden. The person's claim to equal worth in that circumstance should be overridden, though not forfeited, and the meta-right turns out to be in that respect very much like the first order-right.

Suppose, implausibly, #2 is not said not to be overridden even in that circumstance. The two people, even with such different treatment, are still said, and somehow correctly said, to be taken to have equal worth and to be of equal worth. That plainly strains credulity. Still, in its defense, it might be pointed that there is no violation of *universalizability* and we could further speak of role reversibility.²³ If the abilities and needs were similarly shifted around then the eye-loss and eye-gain should also be shifted around. Decisions, hard decisions, are made on relevant differences: *universalizability* and impartiality are kept. Hard cases are indeed hard cases but we are being morally evasive if we do not bite the bullet here.

It seems to me that this is just a way of pointing to their unequal worth. But if bizarrely this is denied and the two are said to be persons, as are all persons, of equal worth and are being so treated even in that situation, then it is not evident (to understate it) what "equal worth" means in #2. Does it mean anything other than a claim to some "commitment" to *universalizability*, a completely formal property? If that is so it doesn't come to much.²⁴ We should ask, concerning the above case, if that is not a case (given its circumstances) where #2 is rightly being overridden, and people are arguably rightly treated as not being of equal worth, what would be a case of overriding, and arguably rightly overriding, #2? If nothing is forthcoming, #2 is threatened with vacuousness. Such a meta-right seems to be doing no work at all: providing no guidance at all. But it, to repeat, would be very implausible in the above circumstance to maintain, as we just have, that #2 was not overridden. If all the same someone did maintain that, it would be reasonable to believe he was

23. K. Nielsen, "Universalizability and the Commitment to Impartiality" in N. Potter and M. Timmons, eds., *Morality and Universality* (Dordrecht: D. Reidel, 1985) at 91–101.

24. *Ibid.*

trying to save a paradoxical philosophical thesis at any cost. That, of course, is not an unknown phenomenon in philosophy. But those not uncommon philosophical phenomena are surely not a cause for celebration.

I think that very similar things can and should be said about the other meta-rights principles listed above (#1, #3, #4, and #5). When they are inspected these “background rights” or allegedly “foundational rights” behave, in respect to overriding, very much like the first-order rights, except that, unlike some first-order rights, the only circumstances in which the meta-principle rights are plausibly rightly overrideable are in ridiculously fanciful desert-islandish circumstances. This shows, I believe, that in real-life situations, as distinct from not so near possible world situations, they would *in fact* never be overridden. If they are acceptable at all (the skeptical challenge again) they are always to be acted in accordance with in the real world. And Rawls will say, and perhaps Dworkin as well, that he constructed his ethical theory for this world and not for all possible worlds.²⁵ That, I believe, is fair enough—and Rawls for his purposes rightly stresses that—but there still remains a point to such desert-islandish adventures. These examples show, against rights-based and other deontological Absolutisms, that circumstances and consequences always do count. It is always the case that it all depends. Because the consequences in real-life circumstances are sometimes predictably of a certain sort—in certain circumstances practically certain to be of a certain sort—certain reasonably definite things must be done or left undone. There is in those practically inevitable circumstances a kind of practical quasi-unconditionality about them. If, however, the consequences were very different that would not be so. That we are talking about counterfactuals here does not alter, does not diminish, the theoretical force of this point. Circumstances do massively intrude into moral deliberations. For certain general claims the relevant circumstances are in fact very stable. But if they were to change, the right thing to do or leave undone would very likely change as well. Anscombian and Donaganish Absolutism fails to take proper note of this.²⁶ But we should no more be spooked by the falsity of Absolutism than we are by the possibility of global epistemological skepticism. They are both philosopher’s artificial constructions. For the purposes of practical political and moral argumentation, it is important not to lose sight of the practical quasi-unconditionality of such meta-rights principles. The moral horror of *The Heart of Darkness* is certainly not upon us because of the logical possibilities I have canvassed.

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25. J. Rawls, “The Independence of Moral Theory” (1974/75) 47 *Proceedings and Addresses of the American Philosophical Association* at 7–10.
 26. E. Anscombe, “Modern Moral Philosophy” (1958) 33 *Philosophy* at 1–19 and A. Donagan, *The Theory of Morality* (Chicago, Ill.: University of Chicago Press, 1977). Brian Barry ably criticizes the rationalizations around the doctrine of double effect in *Liberty and Justice*, *supra*, note 11 at 40–77. See also J. Bennett, “Morality and Consequences” in S. McMurrin, ed., *The Tanner Lectures on Human Values II* (Cambridge: Cambridge University Press, 1981) at 47–116.

There is a further point of importance that follows, if my arguments about the proper overrideability of these meta-rights are well taken. The point is this: sometimes in moral deliberations justice does not (*pace* Rawls and Dworkin) outweigh all other moral considerations such that to take the moral point of view requires that justice trump not only utility but any other moral consideration. Whether one conceives of justice as the impartial consideration of interests or (mistakenly, I believe) as the mutual advantage of all the persons involved in the situation, sometimes we rightly do what even, everything considered, is unjust. When (as in one of my cases) a person is not given a fair trial and, though possibly innocent, is shot to protect the lives of a retreating army, that person is not being treated justly. There we override, and rightly so, considerations of justice in terms of other moral interests; when a person is forced to give up his eyes, as in my above example, it is a travesty to speak of an impartial consideration of interests (where each is to count for one and none to count for more than one) or of a respecting of what would be in the *mutual* advantage of the parties. In such a situation, we act unjustly but still rightly. Moreover, we come very close to treating in those circumstances some persons as means only and not as ends in themselves: not as members of a Kantian kingdom of ends. However, while we override the requirements of justice, we still do what is morally appropriate in the circumstance. Sometimes, while acting unjustly, we still act rightly. You do not have to be a utilitarian to believe that moral agents, faced with the necessity of the choice, should (without engaging in rationalizations about double effect and the like) always do the lesser evil even when doing the lesser evil involves overriding what justice requires. Fixing on your own moral purity here, as Bernard Williams and Charles Fried do, shows a lack of moral seriousness. What gets decked out as moral integrity is either confusion, moral evasion, or a squeamishness which amounts to acting wrongly. Jean-Paul Sartre is right in his paradox: sometimes not to choose is to in effect choose and to choose evasively and wrongly.

V

Someone might follow me so far but counter that it is a confusion to think that any of this refutes anything but the naivest forms of rights-based ethics. Where I point to the consequences as showing that in a certain circumstances a specific rights-claim should be overridden, a sophisticated rights-based account, such as Ronald Dworkin's, would appeal to a conflict of rights and to one rights-claim overriding another rights-claim in that circumstance. Sometimes a liberty right is overridden by a security right and sometimes a security right by a liberty right. The proper dispute should be over whether we just have a plurality of sometimes competing rights-claims all on the same level and, like Rossians, just have to decide or judge or come to appreciate (without any rule to follow) in the particular situation which right makes the more stringent claim or whether instead we have something of a hierarchy of rights, perhaps even in lexical order or at least capable of non-arbitrarily being lexically

ordered. Whatever we should say here, what we have, hierarchy or no hierarchy, is, the claim goes, *rights against rights* and not a right against some other value or somehow simply against consequences, showing, against a purely rights-based account, that our well-being or welfare would be diminished (perhaps only somewhat diminished) if we stuck with these rights-claims. That, for Dworkin, would not defeat the rights-claim. Rights, Dworkin has it, always trump utilities or any other evaluative considerations. On his account, we always work in moral deliberation within a system of competing rights-claims together (where this obtains) with their correlative duties and obligations. If we reason properly, he has it, we work, in moral deliberation, within a system of competing rights.

Dworkin's own view appeals to a modest hierarchy of rights. When a specific right (typically one of the garden variety of rights) comes into question, he says, we justify it (if we can justify it) by deploying a more basic right.²⁷ Rights-based theories, as Dworkin puts it, place "the individual at the center, and take his decision or conduct as of fundamental importance."²⁸ Its "basic idea . . . is that distinct individuals have interests that they are entitled to protect if they so wish."²⁹ Moreover, Dworkin has it, the rights-based theory "must be a theory that is based on the concepts of rights that are natural, in the sense that they are not the product of any legislation, convention, or hypothetical contract."³⁰

However, Dworkin's conception of natural rights (as does J. L. Mackie's), keeping in mind the critique of natural rights of the Scandinavian legal realists, travels metaphysically light; no strange noumenal realm or realm of moral relations is invoked or in any way appealed to. What is done by such an invocation is to stress the importance of "the protection of certain individual choices as fundamental, and as not properly subordinate to any goal or duty or combination of these."³¹

In Chapter 7 of *Taking Rights Seriously*, Dworkin develops the idea that when a right is rightly overridden we do not have a right trumped by something else but one right trumping another right. "The claim that citizens have a right to free speech must imply that it would be wrong for the government to stop them from speaking, even when the government believes [and believes correctly] that what they say will cause more harm than good."³² Dworkin agrees that the State may sometimes be justified in overriding a particular right of an individual when it is necessary to protect the rights of others, perhaps their rights to life or security, or

27. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 170.

28. *Ibid.* at 172.

29. *Ibid.* at 176.

30. *Ibid.*

31. *Ibid.* at 177.

32. *Ibid.* at 190.

it might, Dworkin allows, override even a deeply entrenched particular right in order to prevent a catastrophe. The first is clearly a case of security-rights winning out over the right to free speech. Consider, for example, where to avert an impending catastrophe—say, a situation where there will be looting and rioting in the streets, perhaps the putting of a whole town to the torch—the free-speech rights of a charismatic leader inciting riot are in that circumstance rightly overridden, though not forfeited. But what we appeal to, Dworkin maintains, in justifying such an overriding, are our security rights and right to life.

So, given this perfectly natural way of characterizing the above situation, we still seem at least, with this conflict of competing rights, to be operating within the parameters of a rights-based theory. We have rights conflicting, or at least competing, with rights. And, consonant with that, but also not in conflict with how I argued, what the government cannot do is, in rightly overriding, on certain occasions, the right to free speech, to justify such an overriding simply on the grounds, however certainly true that that claim may be, that by so acting it will “produce, overall, a benefit to the community.”³³ We justify, Dworkin argues, overriding or limiting some specific right by invoking “the notion of competing rights that would be jeopardized if the right in question were not limited” or (in more extreme cases) overridden.³⁴ “The law of defamation . . . limits the personal right of any man to say what he thinks, because it requires him to have good grounds for what he says. But this law is justified, even for those who think that it does invade a personal right, by the fact that it protects the rights of others not to have their reputations ruined by a careless statement.”³⁵ Dworkin goes on to remark that the “individual rights that our society acknowledges often conflict in this way.”³⁶ What the government must do, to the best of its ability, is to protect the more important right at the cost of the less important right, always operating, in so adjudicating, within a system of competing rights.

However, we need to ask this question: how do we judge which rights are the more important? We need, Dworkin’s answer goes, to look at the situation and to the consequences but not simply with an eye to what maximizes or optimizes welfare and minimizes ill-fare. That, Dworkin has it, takes us down an illicit utilitarian path. We could say, alternatively, whichever right meets more adequately the requirements of justice. But for Dworkin that still will not do, for Dworkin, as becomes clear in his discussion of Rawls, believes that we need in doing that (in ascertaining what justice requires) to appeal to a deep underlying rights-principle that is prior to anything that could be contracted, that is, that that would be

33. *Ibid.* at 192.

34. *Ibid.* at 193.

35. *Ibid.*

36. *Ibid.*

unanimously agreed on in the original position. It is a principle that Dworkin holds himself and that he believes Rawls implicitly appeals to and it is, as well, the basic right in accordance with which, he has it, we judge the relative importance of conflicting rights. It is the claim that “individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them.”³⁷ [This is closely related to meta-right #5.]³⁸

As we have seen in our discussion of meta-rights in the previous section, such meta-rights can rightly be overridden or limited. This being so, such a meta-right cannot be effectively used in the foundationalist way that Dworkin does.³⁹ Where a state—let us say a social democratic liberal state—is gravely threatened or at war, say, with a Fascist state, there are extreme situations, as we have seen, where some individuals are not treated, and justifiably not treated, in that circumstance with equal concern and respect. Where, as in my earlier example, a perhaps innocent man is simply executed or innocent children are simply killed by intense saturation bombing designed to destroy a munitions factory which must be put out of commission to win the war, individuals, in any straight meaning of the words in question, are not being treated with equal concern and respect. The very design of the liberal institutions allows in extreme circumstances for such eventualities. If we proceed in Dworkin’s foundationalist way, we must say, contrary to what he wants to say, that something other than a right sometimes trumps even a basic right. (Recall that there is, at least on Dworkin’s account, no more ultimate or basic right to appeal to.) If instead we appeal to a thoroughly coherentist model of rights and say that in that situation security-rights trump the right to life, because they are the more important in that particular context, our test for “the more important” rests on interests and on an appeal to consequences. And the consequences that are appealed to are the harms that human beings will suffer. There is no evading such considerations in gauging the more important interest. With either justificatory move, foundationalist or coherentist, we break out of the self-containedness of a rights-based theory. We have no purely rights-based Archimedean point here (or elsewhere).

An alternative foundationalist super-right (putatively foundational meta-rights principle) might be invoked, namely, the equal right of all persons to the most extensive liberty compatible with a like liberty for all. Some might object to this on the grounds that it is too much like utilitarianism in being concerned (among other things) with maximizing, or at least optimizing, liberty and, relatedly, for departing from the core idea behind a rights-based theory, namely, that of protecting individual rights. On such an account, the individual, as we saw Dworkin putting it, should be center-stage.

37. *Ibid.* at 180.

38. See, for the statement of #2, *ibid.* at 182.

39. *Ibid.* at 177–79.

To see what is involved here consider the following: there is in liberal practice both the right to be left alone by the government and citizenship rights to equal, effective participation in government.⁴⁰ They are both rights that are highly prized in constitutional democracies, but, with the differential power structures that obtain in these societies, the above super-right in effect favors the right to effective participation over the right of people to be left alone with their own initiatives provided they do not interfere with others. (The individual center-stage again.) Through the institutions that will emerge or be strengthened if democratic participation is effective, a very considerable increase of liberty in the society will obtain. Simply being free from interference, by contrast, is compatible with a less extensive liberty in the society. In short, accepting that super-right forces us to give priority to the citizenship rights of fair cooperation over the right to be left alone by our government. But it is precisely the latter and not citizenship rights that is really crucial for many people in our societies. Horatio Alger types abound and they will favor that right to be left alone over the right to political participation and they will not, if they are being at all clearheaded, accept the above super-right with its interest in maximizing liberty. Important, and at least seemingly legitimate interests of theirs, will be harmed or at least threatened by accepting that super-right (meta-right, if you will). We may get social democratic welfarism rather than pure *laissez faire*. Horatio Alger types will then not be committed to favoring the most extensive liberty compatible with a like liberty for all—the maximizing doctrine—for what they want, as individualists, is to give pride of place instead to the right peacefully to pursue their own endeavors without interference from others. Whether that will lead to a more extensive liberty all around is another matter and is not at the center of their interests.

It looks, at least, as if there is no non-question begging way of claiming that that super-right should be taken as foundational. Consistent social democratic liberals will, if they are also foundationalists, go for it; consistent individualistic liberals will not. Moreover, in the early days of capitalism to have taken it as foundational would have so impeded the development of the productive forces that it would very likely have made factually impossible the kind of society of productive wealth in which that super-right could even plausibly have had a feasible application. There was an economic need then for Horatio Alger types. (Again, we see how contextual—this time historically contextual—moral claims can be.) In arguing about priorities here, and more generally in arguing for what is to be done, there are no sound grounds for remaining with a rights-based theory. Any particular rights-claim can in at least certain conceivable circumstances be rightly overridden. In deciding when this is so, and what justifies the overriding, we not infrequently cannot just appeal to conflicting rights and claim, in that situation at

40. R. Miller, *Analyzing Marx* (Princeton, N.J.: Princeton University Press, 1984) at 20-36 and K. Nielsen, *Marxism and the Moral Point of View* (Boulder, Colo.: Westview, 1989) at 203-15.

least, one right to be overriding. Interests and consequences, including a reckoning of the harm, misery and pain that predictably would result from certain actions or policies, come importantly to the fore. It all depends.

VI

Another likely response to what I have argued is to claim that it is consequentialist and thus utilitarian and by now people, who know anything at all, know that utilitarianism and consequentialism are mistaken.⁴¹ I shall, running against current intellectual fashion (a fashion that has been in the making since about 1970), defend a form of consequentialism, distinguishing it from what in our times has come to be called utilitarianism. I do not dispute that contemporary utilitarianism has grave mistakes. But it is at least as grave a mistake to believe that we can make adequate moral assessments, while ignoring consequences, and by simply noting the intrinsic nature of acts and actions.⁴²

To be a consequentialist is to believe that the morality of an action is to be judged by its consequences or in part by its consequences and not just, or perhaps even at all, by the intrinsic nature of the actions. (The two occurrences of "or" here allow for a distinction between *strong* and *weak* consequentialism. My consequentialism, as I remarked initially, is of the latter sort.) It is further the case that the consequences that most consequentialists, including this consequentialist, are interested in are interests and needs (typically human interests and needs) and things that affect interests and needs. I want to know the bearing that certain actions, practices and policies have on the interests and needs of people: how they are aided or harmed by them. Here, like a utilitarian, I am plainly concerned with human well-being and with what can undermine it. I am, moreover, interested in the consequences that affect all human beings and to a lesser extent all sentient creatures. I am, that is, a universal consequentialist as distinct from a egoistic or class consequentialist.

The core arguments of this essay have been made in the service of resisting and refuting Absolutism, namely, the doctrine that actions are right or wrong just according to their nature, though the thrust of my critique of Absolutism was on

41. Classically, J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), Dworkin, Fried, Williams, Philippa Foot, Scanlon, Jon Elster, and David Gauthier have been the major players here. See note 11; S. Scheffler, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1982); and P. Foot, "Utilitarianism and the Virtues" (1985) 94 *Mind* at 196-207. For perceptive but more historically oriented critical reactions to utilitarianism, see I. Berlin, *The Crooked Timber of Humanity* (New York: Alfred A. Knopf, 1991) at 1-19 and his *Four Essays on Liberty* (New York: Oxford University Press, 1969). For a succinct statement of what makes utilitarianism initially attractive together with a similarly succinct account of how it is fatally flawed, see W. Kymlicka, *Contemporary Political Philosophy* (Oxford: Clarendon, 1990) at 9-49.

42. This has been all argued by Barry, *supra*, note 11 at 40-77.

rights-based rather than on duty-based or virtue-based forms. Similar arguments, however, could be deployed against duty-based or virtue-based forms. Indeed I think the case there is rather simpler.

Anti-consequentialism in its purest form (Elizabeth Anscombe and Alan Donagan being prime examples) argues that certain things should be absolutely (unconditionally) prohibited or forbidden simply in virtue of their description as such-and-such identifiable kinds of actions regardless of further consequences.⁴³ I have been at pains to show that this is not so at least for rights-claims. Consequentialism can, as Barry remarks, be usefully seen as a negative doctrine that “denies that it is possible to specify a list of act-descriptions in terms of their ‘nature’ such that it would never under any circumstances—whatever the consequences—be right to do an act of a kind that was on the list.”⁴⁴

This negative form of consequentialism is *weak*, so weak, as Anscombe realized herself, that even W. D. Ross and C. D. Broad (good rule deontologists) could properly be counted as *weak* consequentialists.⁴⁵ Stronger forms of consequentialism, identified as utilitarianism by Kurt Baier and Bernard Williams, and subsequently by a host of others, is the view that each person has a *duty* to act at all times so as to maximize the greatest total amount of good achievable.⁴⁶ This view is what J. L. Austin would have called *dotty*. It would mean that an individual, indeed all individuals capable of moral agency, would at all times be obligated to work as hard as possible to contribute maximally to so maximizing the good. She would only be justified in resting or doing what she wants to the extent, and just to that extent, that by not so resting the achieving of the total maximum good, or total aggregate good, would be likely to be adversely affected. People would be required to drive themselves relentlessly, to the limits of their powers, in the making of an effort (indeed their best effort) to maximally increase the total amount of good in the universe. The only respite from effort here would be to tool oneself up so that later one could, with better chances of success, make still greater efforts.

It is not a mistake for *strong* consequentialists (utilitarians) to say that *prima facie* everyone’s interests are to count equally (each to count for one and none to

43. Anscombe, *supra*, note 26; and Donagan, *supra*, note 26.

44. Barry, *supra*, note 26 at 73.

45. Anscombe, *supra*, note 26 at 198. See also her “Who Is Wronged?” (1967) *The Oxford Review* at 16–17. For an earlier critique on my part of such Absolutism and anti-consequentialism see my *Ethics Without God*, rev’d. ed. (Buffalo, N.Y.: Prometheus, 1990), c. 6 and my “Against Moral Conservatism” (1972) 82 *Ethics* at 219–31.

46. Barry, *supra*, note 26 at 73–74. See P. Gombert, “Consequentialism and History” (1989) 19:3 *Canadian Journal of Philosophy* at 383–404. For a brilliantly conceived short critique of utilitarianism coupled with a defense of consequentialism, see Kymlicka, *supra*, note 41 at 9–49.

count for more than one) and that we must start from a baseline in which everyone's interests do count equally and to only depart from that baseline for the gravest of reasons or because it is impossible in a certain circumstance to so proceed. Where such utilitarianism went most obviously wrong is in making it the *duty* of a moral agent to maximize, or try to maximize, the net benefit, to, as G. E. Moore put it, take "I am morally bound to perform this action" to be equivalent to "This action will produce the greatest possible amount of good in the universe."⁴⁷ That is a dotty view first because nobody has even the faintest idea of what this greatest possible amount of good in the universe is and secondly, as Barry puts it, by "making it a duty that the agent act to maximize net benefit, it makes acts that would be heroic [and I would add superogatory] into routine duties."⁴⁸ It is simply not the case, whatever utilitarians and communitarians may believe, that to find out in some specific circumstance what it is that we must do that we must be able to ascertain what the good is.

Barry nicely articulates the differences and relations between *strong* and *weak* consequentialists as follows:

Weak consequentialism holds that there is no class of cases, definable in advance, such that the consequences are never relevant to the question of what is the right thing to do. Strong consequentialism holds that there is at all times a duty to act so as to maximize the amount of good—to maximize aggregate happiness if one is a utilitarian, to maximize something else if not. Strong consequentialism entails weak consequentialism and the denial of weak consequentialism entails the denial of strong consequentialism. But it is logically possible to accept weak consequentialism and reject strong consequentialism.⁴⁹

Barry remarks that the classical utilitarians, Bentham and J. S. Mill, were *weak* consequentialists.⁵⁰ He could, as well, have added Henry Sidgwick. In fine, and paradoxically, the *classical* utilitarians were not utilitarians in the contemporary sense. The appeal to consequences, articulated in this essay, is that of *weak* consequentialism. *Strong* consequentialism seems to me, for most of the reasons adumbrated in recent analytical literature, a very flawed doctrine and is not needed for the contextualist and consequentialist arguments developed in this essay against Absolutism.⁵¹

47. G. E. Moore, *Ethics* (London: Oxford University Press, 1912) at 140.

48. Barry, *supra*, note 26 at 74.

49. *Ibid.* at 76.

50. *Ibid.* at 75.

51. Again see the references in notes 11 and 41. I tried very simply to bring out the non-utilitarian side of my consequentialism in Chapters 5 and 9 of my *Ethics Without God*, *supra*, note 45.

It does seem to me, however, that Sidgwick rightly argued that the kind of classical utilitarianism that is a weak consequentialism needs to add, to do justice to justice, an independent axiom(s) or principle(s) of fairness: perhaps something like Rawls's two principles or the two principles I articulated in my *Equality and Liberty*. An adequate account of morality will not only be concerned with maximizing or optimizing the aggregate satisfaction of interests but will be concerned with a fair distribution of interests. Sometimes these two considerations conflict as Sidgwick saw. A carefully crafted and nuanced ethical theory may be able to help us to see how such conflicts can reasonably be resolved and perhaps even yield some guidance concerning what is to be done. Here John Rawls's, Thomas Scanlon's and Brian Barry's work is the best we have to date. All three theories, in spite of (Barry aside) their eschewing such labels, are forms of *weak consequentialism*.⁵² But so (as we have noted) are W. D. Ross's and C. D. Broad's pluralistic deontology and so, as we have in effect seen, is Ronald Dworkin's rights-based theory. Rights for him are protected, extremely important interests. And these interests sometimes conflict. We must try to determine in such circumstances which interest is the more important. Consequences are brought in all along the way here. Where rights conflict Dworkin looks as much to interests as do I.

However, the reference to W. D. Ross and C. D. Broad shows how *weak weak consequentialism* is (though, as her contemptuous remarks about the Oxford Objectivists—Ross and Pritchard—reveal, it still offends Anscombe's rigid Hebrew-Christian Absolutist sensibilities).⁵³ Only that *weak consequentialism* (so offensive to Anscombe) is required for my case against unconditional rights claims.

Something that does remain is the task of seeking a more discriminating form of *weak consequentialism*. John Rawls and Ronald Dworkin believe that we are never justified in acting unfairly, in overriding what everything considered is the just thing to do. I, on the other hand, and I think Brian Barry as well, believe that in extreme situations—among them some situations in politics that have been characterized by the problem of dirty hands—considerations of human well-being and, even more evidently and decisively, massive suffering, justify overriding even what everything considered justice requires. We should not, as Kleist's *Michael Kolhaas* dramatizes, do justice though the heavens fall. We act morally, in those circumstances, while doing things that conflict with the requirements of justice. Rawls and Dworkin and just about everyone else are right in claiming that

52. Rawls's work is, of course, familiar. Scanlon's is less so. See his "Contractualism and Utilitarianism" in Sen and Williams, *supra*, note 11 at 103–28 and his "Rights, Goals and Fairness" in S. Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978) at 93–112. For Brian Barry, see his *Theories of Justice* (Berkeley: University of California Press, 1989).

53. Anscombe, *supra*, note 26.

just a slightly greater utility will not justify overriding considerations of justice, but they are wrong in thinking a very great disutility will not justify overriding justice. Sometimes justice trumps utility and sometimes utility, justice. There is no lexical order here and we are not going to find an algorithm to decide which one trumps when. Sometimes we may even find, even after careful reflection, no answer at all for in certain circumstances there may be no answer. We should beware of claiming anything like a principle of sufficient reason in ethics or politics. But a somewhat more robust consequentialism—a not quite so weak *weak* consequentialism—if we can clearly articulate it) might sometimes give us somewhat more definite guidance than any theory presently yields. It was not part of my task to attempt that here but instead to argue that we have very good reason indeed to believe that there are no unconditional, utterly categorical rights. Such an Absolutism should be seen to be a relic of the Hebrew-Christian tradition and (*pace* Fried) quite indefensible without that tradition. But since that tradition itself is not defensible such Absolutism is not defensible at all (*pace* Anscombe and Donagan).⁵⁴

54. I have argued the “moral side” of that in my *Ethics Without God*, *supra*, note 45 and in my *God and the Grounding of Morality*, *supra*, note 5. For the cognitive, cosmological side—a side Anscombe and Donagan and many other traditionalists would take to be vital to really ground the moral side—I argue against that in fairly traditional ways in my *Reason and Practice* (New York: Harper and Row, 1970) at 152–275. In less traditional ways, getting more to what I believe is the heart of the matter, I carry forward the argument in my *Scepticism* (New York: St. Martin’s Press, 1973); *Contemporary Critiques of Religion* (London: Macmillan, 1973); *An Introduction to the Philosophy of Religion* (London: Macmillan, 1982); *Philosophy and Atheism* (Buffalo, N.Y.: Prometheus Press, 1985); and *God, Scepticism and Modernity* (Ottawa: University of Ottawa Press, 1989). See also J. L. Mackie, *The Miracle of Theism* (Oxford: Clarendon, 1982) and K. M. Parsons, *God and the Burden of Proof* (Buffalo, N.Y.: Prometheus, 1989).