Rights, goals, and fairness

2

Rights, goals, and fairness

Critics of utilitarianism frequently call attention to the abhorrent policies that unrestricted aggregative reasoning might justify under certain possible, or even actual, circumstances. They invite the conclusion that to do justice to the firm intuition that such horrors are clearly unjustifiable one must adopt a deontological moral framework that places limits on what appeals to maximum aggregate well-being can justify. As one who has often argued in this way, however, I am compelled to recognize that this position has its own weaknesses. In attacking utilitarianism one is inclined to appeal to individual rights, which mere considerations of social utility cannot justify us in overriding. But rights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects? This seems to be the uncontrovertible insight of the classical utilitarians. Further, unless rights are to be taken as defined by rather implausible rigid formulae, it seems that we must invoke what looks very much like the consideration of consequences in order to determine what they rule out and what they allow. Thus, for example, in order to determine whether a given policy violates the right of freedom of expression it is not enough to know merely that it restricts speech. We may need to consider also its effects: how it would affect access to the means of expression and what the consequences would be of granting to government the kind of regulatory powers it confers.

I am thus drawn toward a two-tier view: one that gives an important role to consequences in the justification and interpretation of rights but which takes rights seriously as placing limits on consequentialist reasoning

The original version of this paper was presented at the Reisensberg Conference on Decision Theory and Social Ethics and appeared in an issue of *Erkenntnis* devoted to papers from that conference. This revised version is used with the permission of the editors of that journal and D. Reidel & Co. I am indebted to a number of people for critical comments and helpful discussion, particularly to Ronald Dworkin, Derek Parfit, Gilbert Harman, Samuel Scheffler, and Milton Wachsberg. Work on this paper was supported in part by a fellowship from the National Endowment for the Humanities.

at the level of casuistry. Such a view looks like what has been called rule utilitarianism, a theory subject to a number of very serious objections. First, rule utilitarians are hard pressed to explain why, if at base they are convinced utilitarians, they are not thoroughgoing ones. How can they square their utilitarianism with the acceptance of individual actions that are not in accord with the utilitarian formula? Second, rule utilitarianism seems to be open to some of the same objections leveled against utilitarianism in its pure form; in particular it seems no more able than act utilitarianism is to give a satisfactory place to considerations of distributive justice. Third, in attempting to specify which rules it is that are to be applied in the appraisal of acts and policies, rule utilitarians of the usual sort are faced with an acute dilemma. If it is some set of ideal rules that are to be applied – those rules general conformity to which would have the best consequences – then the utilitarian case for a concern with rules, rather than merely with the consequences of isolated acts, appears lost. For this case must rest on benefits that flow from the general observance of rules but not from each individual act, and such benefits can be gained only if the rules are in fact generally observed. But if, on the other hand, the rules that are to be applied must be ones that are generally observed, the critical force of the theory seems to be greatly weakened.

The problem, then, is to explain how a theory can have, at least in part, a two-tier structure; how it can retain the basic appeal of utilitarianism, at least as it applies to the foundation of rights, and yet avoid the problems that have plagued traditional rule utilitarianism. As a start towards describing such a theory I will consider three questions. (1) What consequences are to be considered, and how is their value to be determined? (2) How do considerations of distributive justice enter the theory? (3) How does one justify taking rights (or various moral rules) as constraints on the production of valued consequences?

1. CONSEQUENCES AND THEIR VALUES

Here I have two remarks, one of foundation, the other of content. First, as I have argued elsewhere[1] but can here only assert, I depart from the classical utilitarians and many of their modern followers in rejecting subjective preferences as the basis for the valuation of outcomes. This role is to be played instead by an ethically significant, objective notion of the relative importance of various benefits and burdens.

[1] In "Preference and Urgency" (1975), in this volume, essay 4, pp. 70–83.

Second, as to content, the benefits and burdens with which the theory is concerned must include not only the things that may happen to people but also factors affecting the ability of individuals to determine what will happen. Some of these factors are the concern of what are generally called rights, commonly[2] distinguished into (claim-)rights to command particular things, where others have a correlative duty to comply; liberties to do or refrain from certain things, where others have no such correlative duties; powers to change people's rights or status; and immunities from powers exercised by others. I take it to be the case that the familiar civil rights, as well as such things as rights of privacy and "the right to life," are complexes of such elements. The de facto ability effectively to choose among certain options and the de facto absence of interference by others with one's choices are not the same thing as rights, although if it is generally believed that a person has a particular right, say a claim-right, this may contribute to his having such de facto ability or lack of interference. But, however they are created, such abilities and protections are important goods with which any moral theory must be concerned, and the allocation of rights is one way in which this importance receives theoretical recognition.

Any theory of right, since it deals with what agents should and may do, is in a broad sense concerned with the assignment of rights and liberties. It is relevant to ask, concerning such a theory, how much latitude it gives a person in satisfying moral requirements and how much protection it gives a person through the constraints it places on the actions of others. Traditional utilitarianism has been seen as extreme on both these counts. It is maximally specific in the requirements it imposes on an agent, and, since there are no limits to what it may require to be done, it provides a minimum of reliable protection from interference by others. Objections to utilitarianism have often focused on its demanding and intrusive character,[3] and other theories of right may grant individuals both greater discretion and better protection. But these are goods with costs. When one individual is given a claim-right or liberty with respect to a certain option, the control that others are able to exercise over their own options is to some degree diminished. Further, if we take the assignment of rights to various individuals as, in at least

[2] Following Hohfeld and others. See W. N. Hohfeld, *Fundamental Legal Conceptions* (New Haven, 1923), and also Stig Kanger, "New Foundations for Ethical Theory," in Risto Hilpinen, ed., *Deontic Logic: Introductory and Systematic Readings* (Dordrecht, 1971), pp. 36–58. On the distinction between concern with outcomes and concern with the allocation of competences to determine outcomes see Charles Fried, "Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test," *Harvard Law Review* 76 (1963), 755–78.

[3] See Bernard Williams, "A Critique of Utilitarianism," in J. J. C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge, 1973).

some cases, an end-point of justification, then we must be prepared to accept the situation resulting from their exercise of these rights even if, considered in itself, it may be unattractive or at least not optimal. Both these points have been urged by Robert Nozick,[4] the latter especially in his attack on "end-state" and "patterned" theories. What follows from these observations, however, is not Nozick's particular theory of entitlements but rather a general moral about the kind of comparison and balancing that a justification of rights requires: the abilities and protections that rights confer must be assigned values that are comparable not only with competing values of the same kind but also with the values attached to the production of particular end-results.

The same moral is to be drawn from some of Bernard Williams's objections to utilitarianism.[5] Williams objects that utilitarianism, in demanding total devotion to the inclusive goal of maximum happiness, fails to give adequate recognition to the importance, for each individual, of the particular projects which give his life content. The problem with such an objection is that taken alone it may be made to sound like pure self-indulgence. Simply to demand freedom from moral requirements in the name of freedom to pursue one's individual projects is unconvincing. It neglects the fact that these requirements may protect interests of others that are at least as important as one's own. To rise clearly above the level of special pleading these objections must be made general. They must base themselves on a general claim about how important the interests they seek to protect are for any person as compared with the interests served by conflicting claims.

The two preceding remarks – of foundation and of content – are related in the following way. Since the ability to influence outcomes and protection from interference or control by others are things people care about, they will be taken into account in any subjective utilitarian theory. I will later raise doubts as to whether such a theory can take account of them in the right way, but my present concern is with the question what value is to be assigned to these concerns. On a subjective theory these values will be determined by the existing individual preferences in the society in question. I would maintain, however, that prevailing preferences are not an adequate basis for the justification of rights. It is not relevant, for example, to the determination of rights of religious freedom that the majority group in a society is feverishly committed to the goal of making its practices universal while the minority is quite tepid about all matters of religion.

[4] In *Anarchy, State and Utopia* (New York, 1974), esp. pp. 32–5 and ch. 7.

[5] In sec. 5 of "A Critique of Utilitarianism."

This is of course just an instance of the general objection to subjective theories stated above. The equally general response is that one has no basis on which to "impose" values that run contrary to individual preferences. This objection draws its force from the idea that individual autonomy ought to be respected and that it is offensive to frustrate an individual's considered preferences in the name of serving his "true interests." This idea does not itself rest on preferences. Rather, it functions as the objective moral basis for giving preferences a fundamental role as the ground of ethically relevant valuations. But one may question whether this theoretical move is an adequate response to the intuitive idea from which it springs. To be concerned with individual autonomy is to be concerned with the rights, liberties, and other conditions necessary for individuals to develop their own aims and interests and to make their preferences effective in shaping their own lives and contributing to the formation of social policy. Among these will be rights protecting people against various forms of paternalistic intervention. A theory that respects autonomy will be one that assigns all of these factors their proper weight. There is no reason to think that this will be accomplished merely by allowing these weights, and all others, to be determined by the existing configuration of preferences.

II. FAIRNESS AND EQUALITY

Rather than speaking generally of "distributive justice," which can encompass a great variety of considerations, I will speak instead of fairness, as a property of processes (e.g. of competitions), and equality, as a property of resultant distributions. The question is how these considerations enter a theory of the kind I am describing. One way in which a notion of equality can be built into a consequentialist theory is through the requirement that, in evaluating states of affairs to be promoted, we give equal consideration to the interests of every person. This principle of equal consideration of interests has minimal egalitarian content. As stated, it is compatible with classical utilitarianism which, after all, "counts each for one and none for more than one." Yet many have felt, with justification, that utilitarianism gives insufficient weight to distributive considerations. How might this weight be increased? Let me distinguish two ways. The first would be to strengthen the principle of equal consideration of interests in such a way as to make it incompatible with pure utilitarianism. "Equal consideration" could, for example, be held to mean that in any justification by appeal to consequences we must give priority to those individual interests that are "most urgent." To neglect such interests in order to serve instead less

urgent interests even of a greater number of people would, on this interpretation, violate "equality of consideration." Adoption of this interpretation would ward off some objections to utilitarianism based on its insensitivity to distributive considerations but would at the same time preserve other characteristic features of the doctrine, e.g. some of its radically redistributive implications. Such a "lexical interpretation" has, of course, its own problems. Its strength (and plausibility) is obviously dependent on the ranking we choose for determining the urgency of various interests.

The nature of such a ranking is an important problem, but one I cannot pursue here. Whatever the degree of distributive content that is built into the way individual interests are reckoned in moral argument, however, there is a second way in which distributive considerations enter a theory of the kind I wish to propose: equality of distributions and fairness of processes are among the properties that make states of affairs worth promoting. Equality in the distribution of particular classes of goods is at least sometimes of value as a means to the attainment of other valued ends, and in other cases fairness and equality are valuable in their own right.

Classical utilitarianism, of course, already counts equality as a means, namely as a means to maximum aggregate utility. Taken alone, this seems inadequate – too instrumental to account for the moral importance equality has for us. Yet I do think that in many of the cases in which we are most concerned with the promotion of equality we desire greater equality as a means to the attainment of some further end. In many cases, for example, the desire to eliminate great inequalities is motivated primarily by humanitarian concern for the plight of those who have least. Redistribution is desirable in large part because it is a means of alleviating their suffering (without giving rise to comparable suffering elsewhere). A second source of moral concern with redistribution in the contemporary world lies in the fact that great inequalities in wealth give to those who have more an unacceptable degree of control over the lives of others. Here again the case for greater equality is instrumental. Were these two grounds for redistribution to be eliminated (by, say, greatly increasing the standard of living of all concerned and preventing the gap between rich and poor, which remains unchanged, from allowing the rich to dominate) the moral case for equality would not be eliminated, but I believe that it would seem less pressing.

Beyond these and other instrumental arguments, fairness and equality often figure in moral argument as independently valuable states of affairs. So considered, they differ from the ends promoted in standard utilitarian theories in that their value does not rest on their being good things *for* particular individuals: fairness and equality do not represent ways in which

individuals may be *better off*.[6] They are, rather, special morally desirable features of states of affairs or of social institutions. In admitting such moral features into the evaluation of consequences, the theory I am describing departs from standard consequentialist theories, which generally resist the introduction of explicitly moral considerations into the maximand. It diverges also from recent deontological theories, which bring in fairness and equality as specific moral requirements rather than as moral goals. I am inclined to pursue this "third way" for several reasons.

First, it is not easy to come up with a moral argument for substantive equality (as distinct from mere formal equality or equal consideration of interests) which makes it look like an absolute moral requirement. Second, considerations of fairness and equality are multiple. There are many different processes that may be more or less fair, and we are concerned with equality in the distribution of many different and separable benefits and burdens. These are not all of equal importance; the strength of claims of equality and fairness depends on the goods whose distribution is at issue. Third, these claims do not seem to be absolute. Attempts to achieve equality or fairness in one area may conflict with the pursuit of these goals in other areas. In order to achieve greater equality we may, for example, change our processes in ways that involve unfairness in the handling of some individual cases. Perhaps the various forms of fairness and equality can be brought together under one all-encompassing notion of distributive justice which is always to be increased, but it is not obvious that this is so. In any event, it would remain the case that attempts to increase fairness and equality can have costs in other terms; they may interfere with processes whose efficiency is important to us, or involve unwelcome intrusions into individuals' lives. In such cases of conflict it does not seem that considerations of fairness and equality, as such, are always dominant. An increase in equality may in some cases not be worth its cost; whether it is will depend in part on what it is equality *of*.

Economists often speak of "trade-offs" between equality and other concerns (usually efficiency). I have in the past been inclined, perhaps intolerantly, to regard this as crassness, but I am no longer certain that it is in principle mistaken. The suggestion that equality can be "traded-off" against other goods arouses suspicion because it seems to pave the way for defenses of the status quo. Measures designed to decrease inequality in

[6] Here I am indebted to Kurt Baier. Defending the claim that fairness and equality are intrinsically valuable is of course a further difficult task. Perhaps all convincing appeals to these notions can be reduced to instrumental arguments, but I do not at present see how. Such a reduction would move my theory even closer to traditional utilitarianism.

present societies are often opposed on the ground that they involve too great a sacrifice in efficiency or in individual liberty, and one way to head off such objections is to hold that equality is to be pursued whatever the cost. But one can hold that appeals to liberty and efficiency do not justify maintaining the status quo – and in fact that considerations of individual liberty provide some of the strongest arguments in favor of increased equality of income and wealth – without holding that considerations of equality are, as such, absolute and take priority over all other values.

III. RIGHTS

Why give rights a special place in a basically consequentialist theory? How can a two-tier theory be justified? One common view of the place of rights, and moral rules generally, within utilitarianism holds that they are useful as means to the coordination of action. The need for such aids does not depend on imperfect motivation; it might exist even in a society of perfect altruists. A standard example is a rule regulating water consumption during a drought. A restriction to one bucket a day per household might be a useful norm for a society of utilitarians even though their reasons for taking more water than this would be entirely altruistic. Its usefulness does not depend on self-interest. But the value of such a rule does depend on the fact that the agents are assumed to act independently of one another in partial ignorance of what the others have done or will do. If Dudley knows what others will do, and knows that this will leave some water in the well, then there is no utilitarian reason why he should not violate the rule and take more than his share for some suitable purpose – as the story goes, to water the flowers in the public garden.

I am of two minds about such examples. On the one hand, I can feel the force of the utilitarian's insistence that if the water is not going to be used how can we object to Dudley's taking it? On the other hand, I do not find this line of reply wholly satisfying. Why should *he* be entitled to do what others were not? Well, because he knows and they didn't; he alone has the opportunity. But just because he has it, does that mean he can exercise it unilaterally? Perhaps, to be unbearably priggish, he should call the surplus to the attention of the others so that they can all decide how to use it. If this alternative is available is it all right for him to pass it up and act on his own? A utilitarian might respond here that he is not saying that Dudley is entitled to do whatever he wishes with the surplus water; he is entitled to do with it what the principle of utility requires and nothing else.

Here a difference of view is shown. Permission to act outside the rule is seen by the nonutilitarian as a kind of freedom for the agent, an exemption, but it is seen by a utilitarian as a specific moral requirement. Dudley is required to do something that is different from what the others do because his situation is different, but he has no greater latitude for the exercise of discretion or personal preference than anyone else does. This suggests that one can look at an assignment of rights in either of two ways: as a way of constraining individual decisions in order to promote some desired further effect (as in the case of a system of rules defining a division of labor between co-workers) or as a way of parceling out valued forms of discretion over which individuals are in conflict. To be avoided, I think, is a narrow utilitarianism that construes all rights on the first model, e.g. as mechanisms of coordination or as hedges against individual errors in judgment. So construed, rights have no weight against deviant actions that can be shown to be the most effective way of advancing the shared goal.

If, however, the possibility of construing some rights on the second model is kept open, then rights can be given a more substantial role within a theory that is still broadly utilitarian. When, as seems plausible on one view of the water-shortage example, the purpose of an assignment of rights is to ensure an equitable distribution of a form of control over outcomes, then these rights are supported by considerations which persist even when contrary actions would promote optimum results. This could remain true for a society of conscientious (though perhaps not single-minded) consequentialists, provided that they are concerned with "consequences" of the sort I have described above. But to say that a rule or a right is not in general subject to exceptions justified on act-utilitarian grounds is not to say that it is absolute. One can ask how important it is to preserve an equitable distribution of control of the kind in question, and there will undoubtedly be some things that outweigh this value. There is no point in observing the one-bucket restriction when the pump-house is on fire. Further, the intent of an assignment of rights on the second model is apt to be to forestall certain particularly tempting or likely patterns of behavior. If this is so, there may be some acts which are literally contrary to the formula in which the right is usually stated but which do not strike us as actual violations of the right. We are inclined to allow them even though the purposes they serve may be less important than the values the right is intended to secure. Restrictions on speech which nonetheless are not violations of freedom of expression are a good example of such "apparent exceptions."

Reflections of this kind suggest to me that the view that there is a moral right of a certain sort is generally backed by something like the following:

(i) An empirical claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights (claim-rights, liberties, etc.).
(ii) A claim that this result would be unacceptable. This claim will be based on valuation of consequences of the sort described in section 1 above, taking into account also considerations of fairness and equality.
(iii) A further empirical claim about how the envisaged assignment of rights will produce a different outcome.

The empirical parts of this schema play a larger or at least more conspicuous role in some rights than in others. In the case of the right to freedom of expression this role is a large one and fairly well recognized. Neglecting this empirical element leads rights to degenerate into implausible rigid formulae. The impossibility of taking such a formula literally, as defining an absolute moral bar, lends plausibility to a "balancing" view, according to which such a right merely represents one important value among others, and decisions must be reached by striking the proper balance between them. Keeping in mind the empirical basis of a right counters this tendency and provides a ground (1) for seeing that "apparent exceptions" of the kind mentioned above are not justified simply by balancing one right against another; (2) for seeing where genuine balancing of interests is called for and what its proper terms are; and (3) for seeing how the content of a right must change as conditions change. These remarks hold, I think, not only for freedom of expression but also for other rights, for example, rights of due process and rights of privacy. In each of these cases a fairly complex set of institutional arrangements and assumptions about how these arrangements operate stands, so to speak, between the formula through which the right is identified and the goals to which it is addressed. This dependence on empirical considerations is less evident in the case of rights, like the right to life, that lie more in the domain of individual morality. I will argue below, however, that this right too can profitably be seen as a system of authorizations and limitations of discretion justified on the basis of an argument of the form just described.

This view of rights is in a broad sense consequentialist in that it holds rights to be justified by appeal to the states of affairs they promote. It seems to differ from the usual forms of rule utilitarianism, however, in that it does not appear to be a maximizing doctrine. The case for most familiar rights – freedom of expression, due process, religious toleration – seems to be more concerned with the avoidance of particular bad consequences than with promoting maximum benefit. But this difference is in part only

apparent. The dangers that these rights are supposed to ward off are major ones, not likely to be overshadowed by everyday considerations. Where they are overshadowed, the theory I have described allows for the rights in question to be set aside. Further, the justification for the particular form that such a right takes allows for the consideration of costs. If a revised form of some right would do the intended job as well as the standard form at clearly reduced costs to peripheral interests, then this form would obviously be preferred. It should be noted, however, that if something is being maximized here it cannot, in view of the role that the goals of fairness and equality play in the theory, be simply the sum of individual benefits. Moreover, this recognition of an element of maximization does not mean that just any possible improvement in the way people generally behave will become the subject of a right. Rights concern the alleviation of certain major problems, and incremental gains in other goods become relevant to rights in the way just mentioned only when they flow from improvements in our ways of dealing with such problems.

I have suggested that the case for rights derives in large part from the goal of promoting an acceptable distribution of control over important factors in our lives. This general goal is one that would be of importance to people in a wide range of societies. But the particular rights it calls for may vary from society to society. Thus, in particular, the rights we have on the view I have proposed are probably not identical with the rights that would be recognized under the system of rules, general conformity to which in our society would have the best consequences. The problems to which our rights are addressed are ones that arise given the distribution of power and the prevailing patterns of motivation in the societies in which we live. These problems may not be ones that would arise were an ideal code of behavior to prevail.[7] (And they might not be the same either as

[7] How much this separates my view of rights from an ideal rule-utilitarian theory will depend on how that theory construes the notion of an ideal system of rules being "in force" in a society. In Brandt's sophisticated version, for example, what is required is that it be true, and known in the society, that a high proportion of adults subscribe to these rules, that is, chiefly, that they are to some extent motivated to avoid violating the rules and feel guilty when they believe they have done so. ("Some Merits of One Form of Rule Utilitarianism," in Gorovitz, ed., *Mill: Utilitarianism, with Critical Essays* [Indianapolis, IN, 1971].) This may not ensure that the level of conformity with these rules is much greater than the level of moral behavior in societies we are familiar with. If it does not, then Brandt's theory may not be much more "ideal" than the theory of rights offered here. The two theories appear to differ, however, on the issues discussed in sections I and II above. These issues also divide my view from R. M. Hare's version of rule utilitarianism, with which I am otherwise in much agreement. See his "Ethical Theory and Utilitarianism," in H. D. Lewis, ed., *Contemporary British Philosophy, Fourth Series* (London, 1976). Like these more general theories, the account of rights offered here has a great deal in common with the view put forward by Mill in the final chapter of *Utilitarianism* (particularly if Mill's remarks about "justice" are set aside).

those we would face in a "state of nature.") Concern with rights does not involve accepting these background conditions as desirable or as morally unimpeachable; it only involves seeing them as relatively fixed features of the environment with which we must deal.

Which features of one's society are to be held fixed in this way for purposes of moral argument about rights? This can be a controversial moral question and presents a difficult theoretical issue for anyone holding a view like rule utilitarianism. As more and more is held fixed, including more about what other agents are in fact doing, the view converges toward act utilitarianism. If, on the other hand, very little is held fixed then the problems of ideal forms of rule utilitarianism seem to loom larger: we seem to risk demanding individual observance of rights when this is pointless given the lack of general conformity.

This dilemma is most acute to the degree that the case for rights (or moral rules) is seen to rest on their role in promoting maximum utility through the coordination of individual action. Where this is actually the case – as it is with many rules and perhaps some rights – it is of undoubted importance what others are in fact doing – to what degree these rights and rules are generally observed and how individual action will affect general observance. I suggest, however, that this is not the case with most rights. On the view I propose, a central concern of most rights is the promotion and maintenance of an acceptable distribution of control over important factors in our lives. Where a certain curtailment of individual discretion or official authority is clearly required for this purpose, the fact that this right is not generally observed does not undermine the case for its observance in a given instance. The case against allowing some to dictate the private religious observances of others, for example, does not depend on the existence of a general practice of religious toleration. Some of the benefits at which rights of religious freedom are aimed – the benefits of a general climate of religious toleration – are secured only when there is general compliance with these rights. But the case for enforcing these rights does not depend in every instance on these benefits.

For these reasons, the view of rights I have proposed is not prey to objections often raised against ideal rule-utilitarian theories. A further question is whether it is genuinely distinct from an act-consequentialist doctrine. It may seem that, for reasons given above, it cannot be: if an act in violation of a given right yields some consequence that is of greater value than those with which the right is concerned, then on my view the right is to be set aside. If the act does not have such consequences then, in virtue of its conflict with the right and the values that right protects, it seems that the

act would not be justifiable on act-consequentialist grounds anyway. But this rests on a mistake. The values supporting a particular right need not all stand to be lost in every case in which the right is violated. In defending the claim that there is a right of a certain sort, e.g. a particular right of privacy, we must be prepared to compare the advantages of having this right – the advantages, e.g. of being free to decline to be searched – against competing considerations – e.g. the security benefits derived from a more lenient policy of search and seizure. But what stands to be gained or lost in any given instance in which a policeman would like to search me need not coincide with either of these values. It may be that in that particular case I don't care.[8]

There is, then, no incoherence in distinguishing between the value of having a right and the cost of having it violated on a particular occasion. And it is just the values of the former sort that we must appeal to in justifying a two-tier view. What more can be said about these values? From an act-consequentialist point of view the value attached to the kind of control and protection that rights confer seems to rest on mistrust of others. If everyone could be relied upon to do the correct thing from an act-consequentialist standpoint would we still be so concerned with rights? This way of putting the matter obscures several important elements. First, it supposes that we can all agree on the best thing to be done in each case. But concern with rights is based largely on the warranted supposition that we have significantly differing ideas of the good and that we are interested in the freedom to put our own conceptions into practice. Second, the objection assumes that we are concerned only with the correct choice being made and have no independent concern with who makes it. This also seems clearly false. The independent value we attach to being able to make our own choices should, however, be distinguished from the further value we may attach to having it recognized that we are *entitled* to make them. This we may also value in itself as a sign of respect and personhood, but there is a question to what degree this value is an artifact of our moral beliefs and customs rather than a basis for them. Where a moral framework of rights is established and recognized, it will be important for a person to have his status as a right holder generally acknowledged. But is there something analogous to this importance that is lost for everyone in a society of conscientious act consequentialists where no one holds rights? It is not clear to me that there is, but, however this may be, my account emphasizes

[8] On the importance of establishing the proper terms of balancing see Fried, "Two Concepts of Interests," p. 758.

the value attached to rights for the sake of what they may bring rather than their value as signs of respect.

If the factors just enumerated were the whole basis for concern with rights then one would expect the case for them to weaken and the force of act-consequentialist considerations to grow relatively stronger as (1) the importance attached to outcomes becomes absolutely greater and hence, presumably, also relatively greater as compared with the independent value of making choices oneself, and as (2) the assignment of values to the relevant outcomes becomes less controversial. To some extent both these things happen in cases where life and death are at stake, and here mistrust emerges as the more plausible basis for concern with rights.

IV. CASES OF LIFE AND DEATH

From the point of view suggested in this paper, the right to life is to be seen as a complex of elements including particular liberties to act in one's own defense and to preserve one's life, claim-rights to aid and perhaps to the necessities of life, and restrictions on the liberty of others to kill or endanger. Let me focus here on elements in these last two categories, namely limits on the liberty to act in ways that lead to a person's death. An act-consequentialist standard could allow a person to take action leading to the death of another whenever this is necessary to avoid greater loss of life elsewhere. Many find this policy too permissive, and one explanation of this reaction is that it represents a kind of blind conservatism. We know that our lives are always in jeopardy in many ways. Tomorrow I may die of a heart attack or a blood clot. I may be hit by a falling tree or discover that I have a failing liver or find myself stood up against a wall by a group of terrorists. But we are reluctant to open the door to a further form of deadly risk by licensing others to take our life should this be necessary to minimize loss of life overall. We are reluctant to do this even when the effect would be to increase our net chances of living a long life by decreasing the likelihood that we will actually die when one of the natural hazards of life befalls us. We adopt, as it were, the attitude of hoping against hope not to run afoul of any of these hazards, and we place less stock on the prospect of escaping alive should we be so unlucky. It would not be irrational for a person to *decide* to increase his chances of survival by joining a transplant-insurance scheme, i.e. an arrangement guaranteeing one a heart or kidney should he need one provided he agrees to sacrifice himself to become a donor if he is chosen to do so. But such a decision is sufficiently controversial and the stakes so high that it is not a decision that can be taken to have been made for

us as part of a unanimously acceptable basis for the assignment of rights. What I have here called conservatism is, however, uncomfortably close to a bias of the lucky against the unlucky insofar as it rests on a conscious turning of attention away from the prospect of our being one of the unlucky ones.

A substitute for conservatism is mistrust. We are reluctant to place our life in *anyone's* hands. We are even more reluctant to place our lives in *everyone's* hands as the act-consequentialist standard would have us do. Such mistrust is the main factor supporting the observed difference between the rationality of joining a voluntary transplant-insurance scheme and the permissibility of having a compulsory one (let alone the universally administered one that unrestricted act consequentialism could amount to). A person who joins a voluntary scheme has the chance to see who will be making the decisions and to examine the safeguards on the process. In assessing the force of these considerations one should also bear in mind that what they are to be weighed against is not "the value of life itself" but only a small increase in the probability of living a somewhat longer life.

These appeals to "conservatism" and mistrust, if accepted, would support something like the distinction between killing and letting die: we are willing to grant to others the liberty not to save us from threat of death when this is necessary to save others, but we are unwilling to license them to put us under threat of death when we have otherwise escaped it. As is well known, however, the killing/letting die distinction appears to permit some actions leading to a person's death that are not intuitively permissible. These are actions in which an agent refrains from aiding someone already under threat of death and does so because that person's death has results he considers advantageous. (I will assume that they are thought advantageous to someone other than the person who is about to die.) The intuition that such actions are not permitted would be served by a restriction on the liberty to fail to save, specifying that this course of action cannot be undertaken on the basis of conceived advantages of having the person out of the way. Opponents of the law of double effect have sometimes objected that it is strange to make the permissibility of an action depend on quite subtle features of its rationale. In the context of the present theory, however, the distinction just proposed is not formally anomalous. Conferrals of authority and limitations on it often take the form not simply of licensing certain actions or barring them but rather of restricting the grounds on which actions can be undertaken. Freedom of expression embodies restrictions of

this kind, for example, and this is one factor responsible for the distinction between real and apparent violations mentioned above.[9]

Reasons for such a restriction in the present case are easy to come by. People have such powerful and tempting reasons for wanting others removed from the scene that it is obviously a serious step to open the door to calculations taking these reasons into account. Obviously, what would be proposed would be a qualified restriction, allowing consideration of the utilitarian, but not the purely self-interested, advantages to be gained from a person's death. But a potential agent's perception of this distinction does not seem to be a factor worth depending on.

The restriction proposed here may appear odd when compared to our apparent policy regarding mutual aid. If, as seems to be the case, we are prepared to allow a person to fail to save another when doing so would involve a moderately heavy sacrifice, why not allow him to do the same for the sake of a much greater benefit, to be gained from that person's death? The answer seems to be that, while a principle of mutual aid giving less consideration to the donor's sacrifice strikes us as too demanding, it is not nearly as threatening as a policy allowing one to consider the benefits to be gained from a person's death.

These appeals to "conservatism" and mistrust do not seem to me to provide adequate justification for the distinctions in question. They may explain, however, why these distinctions have some appeal for us and yet remain matters of considerable controversy.

[9] For a view of freedom of expression embodying this feature, see Scanlon, "A Theory of Freedom of Expression" (1972), in this volume, essay 1, pp. 6–25.