

## **Against Rights**

**Richard J. Arneson**

**University of California, San Diego**

Claims to rights and negotiation about their shape are pervasive in our public and private culture. Rights consciousness is surely desirable and is part and parcel of the transition toward a more democratic world. In this essay I consider the proper placement of moral rights in moral theory. In a famous essay, "Taking Rights Seriously," Ronald Dworkin argues that if it is accepted that individuals have moral rights against their government, that implies serious constraints on the conduct of government and the freedom of a political majority to enforce its wishes through law.<sup>1</sup> I endorse the thesis that individuals have such moral rights and support taking rights seriously in Dworkin's sense. My focus is elsewhere. In this essay I shall argue that moral rights do not and should not figure in our fundamental moral principles; rights enter at the level of subordinate principles. In a very broad way, to take this stand is to side with utilitarians and consequentialists, who see rights as instruments for achieving other values, not moral goals in their own right.<sup>2</sup>

Is this more than a verbal issue? We can say that act utilitarianism assigns each person the moral right not to be harmed by anyone unless doing so maximizes utility and to be benefited by everyone whenever doing so maximizes utility. Someone who believes that morality just is Pareto efficiency can say that each person has a moral right, if the status quo can be altered by making her better off without making anyone else worse off, either that the status quo be altered to her benefit or that some entirely new

situation be brought about, establishing a new status quo to which no one can make a similar complaint. Given these implications, are act utilitarianism and the Pareto norm rights principles? Following J. S. Mill, we might hold that the idea of a right involves a duty imposed on some person or persons along with a specifiable person or persons who are wronged if the duty is violated.<sup>3</sup> Rights utilitarianism and the Pareto rights view, advanced as fundamental moral principles, would qualify as including rights on this understanding of a right. To block this result, we might try stipulating that when a right exists, the performance of the associated duty would necessarily provide a benefit to the person who would be wronged if there is nonperformance.

We can do better. Following a suggestion first made by Joseph Raz, let us say that a person has a moral right to X just in case her interest in X (a) establishes a claim to X that should be honored, other things being equal, and (b) is a rationale for assigning other people duties to act or refrain from acting so as to secure X for her (or is a reason for holding that other people are bound by duties to act or refrain from acting so as to secure X for her).<sup>4</sup>

This analysis of what it is to have a right needs further elaboration. For the purposes of this essay, I note that on this analysis, the existence of a moral right implies a right-holder who benefits if the right is fulfilled. The right-holder's interest that the right protects may be generic—X is the sort of thing that is standardly advantageous. So one can have an interest in X, in the intended sense, even if in one's particular circumstances X will not be to one's advantage all things considered. I may have a right that you return the money you borrowed and promised to repay on this date, even though

it is certain that if I get the money I will use it to purchase and consume a harmful recreational drug to my detriment.

In addition, for purposes of this analysis I accept a further definitional stipulation introduced by Ronald Dworkin.<sup>5</sup> According to Dworkin, one has a genuine moral right only if the right should be upheld even against the general welfare. That is to say, a valid claim of moral right trumps utility, takes precedence over the goal of bringing it about that utility is maximized. This trumping stipulation is consistent with the claim that if upholding a moral right in a particular case requires a sufficiently large loss of utility, the right should not be upheld in this case. The trumping priority need not be absolute. Rights trump utility to the extent that a valid claim of moral right should be upheld even if its nonfulfillment would bring about a marginal or modest increase in aggregate utility.

Since I want it to be an open question whether rights should be included as fundamental values in a consequentialist theory, at this point I do not insist that the essence of a right is to function in practical deliberation as a side constraint that removes some actions from the set of an agent's set of eligible options rather than as goal be promoted. I would suppose that the common-sense understanding of a moral right is the side constraint view, but consequentialism is subversive of common-sense moral views in several ways and its construal of rights might be another instance.<sup>6</sup>

Several types of moral views give no place to moral rights at the foundational level. Here we concentrate on views in the utilitarian and consequentialist family. The fundamental principles of such moral theories state what is morally valuable for its own sake and indicate what it is right to do, given what is morally valuable. With fundamental principles on hand, one knows how to proceed if one knows the facts of

one's situation that these fundamental principles pick out as relevant for choice.

Nonfundamental principles specify means to the moral goals affirmed by fundamental principles. If a consequentialist moral theory does not assign positive (or negative) weight to the fulfillment of moral rights in the evaluation of states of affairs and the determination of what should be done, moral rights are nonfundamental in that theory. My thesis is that moral rights should not be included at the level of fundamental moral principles.

Being nonfundamental is not the same as being unimportant. The story I tell about moral rights is not intended to be deflationary or debunking. Moral rights are important; my aim is to clarify how they are important, not deny their significance. The important means to what matters do themselves matter.

The position that moral rights are noninstrumentally valuable and belong in fundamental principle gains support from a variety of considerations. Many forces are mobilized under this banner. The overall strategy of this essay is to concede ground without losing the battle. I believe that the reasons that people offer for holding rights to be fundamental include important concerns and considerations which moral theory should accommodate, but this can be done without recognizing rights at the level of fundamental principle.

### **Reasons for Taking Rights to Be Fundamental**

The case for recognizing rights as fundamental looks compelling if one supposes the exclusionary alternative is utilitarianism, the doctrine that one should always do whatever most promotes utility (human good).

John Rawls argues that utilitarianism fails to match our considered moral judgments on such topics as freedom of expression and the moral status of a feudal order in which caste privileges are assigned to an aristocratic elite on a basis of birth.<sup>7</sup> For utilitarian doctrine, the judgments that wholesale denial of freedom of expression is wrong and that feudalism should not be reinstated depend on the answers to complex and uncertain empirical questions as to whether these policies would fail to maximize human happiness over the long run, compared to feasible alternative regimes. Since these matters are contingent and uncertain, our confidence that these policies of repression are morally wrong should also be contingent and uncertain, if the basis for deciding these issues is utilitarian calculation. But reasonable moral conviction diverges sharply from the utilitarian pattern of reasoning. Our confidence that tyrannical censorship and caste hierarchy are wrong is firm and unshakable and rests on the belief that these policies violate fundamental rights, and are morally beyond the pale whatever their consequences for long-run human happiness might or might not be.

In a similar spirit, Joseph Raz observes that according to hedonistic act utilitarianism, if we must choose between denying a large number of people the trivial pleasure of eating a lick of ice cream and killing an innocent individual, then provided that the number of potential ice cream eaters is sufficiently large, we should sacrifice the one for the many.<sup>8</sup>

Amartya Sen describes an example in which several thugs would enjoy severely beating a well-off shopkeeper to such an extent that principles that require equalizing utility among persons, equalizing utility among persons at the highest feasible level, maximizing the utility of the individual who has least utility, and maximizing average

and aggregate utility would all favor enabling the beating to go forward rather than preventing it.<sup>9</sup> According to Sen, only a moral principle that includes fulfillment of human rights at the fundamental level among the goals to be maximized can plausibly endorse the common-sense conviction that the right-violating utility-promoting beating would be morally undesirable.

These considerations are weighty. My argument will be that these arguments for inclusion of rights at the level of fundamental moral principle combine several different strands of argument. Once the strands are separated and examined one by one, no one or combination looks compelling, and exclusion looks plausible.

### **Sen's Argument.**

Sen's counterexample merits close attention. A line of thought running through several of his writings argues that utilitarianism is defective not in virtue of its consequentialist structure but in virtue of its claim that nothing matters morally except utility.<sup>10</sup> The counterexample he presents in "Rights and Agency" is directed against any utility-based fundamental moral principle.<sup>11</sup> A utility-based principle is a consequentialist principle that identifies morally right action with action that maximizes some function of human utility. Maximize aggregate utility, maximize average utility, maximin utility, prioritize utility,<sup>12</sup> equalize utility, and equalize utility at the highest possible level would all qualify as utility-based fundamental moral principles. Sen construes utility as desire or preference satisfaction of life plan fulfillment or pleasure. He urges that an adequate morality (which might be consequentialist) must assign positive weight to the fulfillment of individual rights in the evaluation of states of affairs and the determination of what should be done.

In the example that Sen presents, Ali the shopkeeper is menaced by a gang of thugs, the Bashers, so-called because they intend to give him a bashing. If the threatened bashing occurs, it is stipulated that total utility, average utility, the utility of the worst off, and the degree to which utility is equalized across persons will all increase, compared to the alternative in which the bashing does not occur. Any of these utility-based principles would then have to recommend that the Bashers ought to inflict a bashing on Ali, even though his right not to be severely assaulted would be violated in this scenario. Sen hopes to elicit the reader's agreement that in this example bringing it about that Ali's important right is respected is morally more valuable than bringing about the net utility increase that would accompany the violation of Ali's right.

Sen elaborates the story to make two further points. Donna, Ali's friend, can prevent the violation of Ali's right not to be bashed, but only by inspecting the files of Ali's therapist Charles, thereby violating Charles's right to privacy. She correctly believes that Ali's right not to be bashed is morally more important than Charles's right to privacy in these circumstances, so if she adopts an act-consequentialist morality with rights as trumps, she will act to violate the little right in order to protect the bigger right, thereby bringing about a higher level of rights fulfillment on the whole. If on the other hand she adopts a morality in which rights are side constraints, so that any action that would violate a right is removed from the set of eligible acts from which one chooses, then her choice is to do nothing, violating no one's rights but allowing the Bashers to abolish Ali, or to violate Charles's right to privacy. (In this essay, given my purposes, I can sidestep the issue whether rights should be understood as goals to be promoted rather than as side constraints to be respected.)

In a further elaboration, Sen imagines that there are no Bashers, and Ali is menaced by some natural event such as a landslide that does not involve human agency. The landslide will inflict damages on Ali equivalent to the damage he would have suffered from being bashed. In this version of the example Donna can still save Ali by violating Charles's right to privacy in order to discover Ali's whereabouts just prior to the landslide. But if the threat of being hit by a landslide does not implicate any of Ali's rights, we no longer have a case in which Donna must choose either to bring about the fulfillment of Charles's less important right to privacy or to bring about the fulfillment of Ali's more important right not to be bashed. No bashing is in prospect.

Sen takes the lesson of this version of the example to be that we should see Donna as having equally good reason to violate Charles's right to prevent Ali from being mashed by a landslide as she would have to prevent Ali from being identically mashed by subjection to a violent beating. If we think of rights as relations between an individual and some significant capability, if rights in general are rights to capability, then we can account for the sense that Donna's two decision problems posed by the two versions of the example are morally equivalent. In each case Ali's right to the capability of moving freely about the city without injury is at risk, in one case menaced by the prospect of bashing and in the other case threatened by landslide. If I have a capability to achieve X then if I choose to achieve X, I do so, and if I choose not to achieve X, I do not do so. Capability is effective freedom. Sen's proposal then is that the fundamental human rights that can trump utility in the determination of what we morally ought to do are rights to important capabilities.

Several ideas are interwoven in Sen's ingenious story. Let us examine some of the separate strands, focussing first on the issue whether exclusion of rights from a fundamental principle blocks one from formulating an adequate morality.

### **Construed Subjectively, Utility Is Not so Important**

It is plausible to think that in the example the Bashers might draw a significant amount of subjective satisfaction, pleasure or preference satisfaction or the like, from inflicting a thrashing on an innocent victim. Such acts do prove enticing to people. But it is implausible to think that gaining pleasure or desire satisfaction or life plan fulfillment from inflicting a savage beating on someone makes one's life go better. If this is so, then what Sen's example suggests is that the attainment of utility construed as subjective satisfaction does not take precedence over rights fulfillment. This leaves it open that utility identified as what objectively makes a person's life go better does deserve pride of place in moral theory. Robert Adams proposes that "what is good for a person is a life characterized by enjoyment of the excellent."<sup>13</sup> My view is that a person's well-being can be augmented by excellent achievements that are not enjoyed, and also by some ordinary enjoyments such as the slaking of thirst that cannot be stretched to fit within the category of excellence enjoyment, but I agree that enjoying what is bad has less value than enjoying what is good and the taking pleasure in deliberate infliction of gratuitous pain on another person is valueless or virtually valueless.<sup>14</sup> If we identify utility or well-being with what is objectively worth seeking, what makes one's life go better, Sen's critique of the position that the amount and distribution of utility are all that fundamentally matters morally loses its force.

This response invites the reply that one can rewrite the Donna and the Bashers example so that the Bashers stand to gain significant objective utility. It turns out that they need to inflict a bashing on Ali (from which none derives any pleasure) so that they can secure the means to gain significant objective utility not otherwise obtainable. Subjection to violent assault significantly worsens the victim's life, so the gains the Bashers will secure must be large to offset Ali's loss.

But this version of the example is less compelling. Sen's case does not collapse, but is less powerful. I find it unobvious that the bashing as described is not justified by the significant objective utility gain it secures for persons with poor overall life prospects. Others may disagree. The point is that to test the resources of utility-based views, to give them a fair run for their money, we must develop the most convincing account of utility or well-being or what is good for people and then see how the utility-based views fare.

### **Moral Limits on Trade-offs.**

Another reason for rejecting utility-based views and including rights at the fundamental level is perhaps suggested in Sen's story and definitely pressed by Raz. The worry is that any moral principle that bids us to maximize the sum of benefits that accrue to an aggregate of persons when benefits range widely in quality will in some possible circumstances grind out the disturbing result that gaining very small, trivial benefits for a very large number of persons can yield a larger sum of benefits than achieving overwhelmingly urgent and important benefits for a very few persons. Against the morality of aggregation we might urge that morality must have greater internal structure, with lexical (strict) priority relations.<sup>15</sup> Rights might be thought to incorporate morally

compelling priority relations and to express our commitment to rejecting promiscuous aggregation.

This issue may be a red herring in this context. For the same issue can arise when we reflect on intrapersonal comparisons and no conflict of interest among persons is in view. One might deny that any number of years of life that is barely worth living, muzak and potatoes in Derek Parfit's phrase, could render my life better than a normal life span filled with the best things.<sup>16</sup> Of course, asserting this discontinuity raises problems, given that the best things and the barely-good-at-all things in life lie on a continuum, and at any point on the continuum it would seem that some sufficiently large quantity of lower-quality life just below that point should outweigh any given quantity of higher-quality life just above the point, so by transitivity the barely-good-at-all things should trade off against the best things. At any rate, one might either incorporate lexical priority relations into the understanding of utility or reject such thresholds in the interest of continuity. Either way, Raz's concern about many frivolities outweighing urgent needs need not force the rejection of utilitarian aggregation. Either we judge that continuity rules, which is the same as denying that Raz's worry is compelling, or discontinuity rules, in which case utilitarian aggregation can accommodate Raz's concern.

Another reason to doubt that the problem of promiscuous aggregation supports the inclusion of moral rights in fundamental moral principles is that rights are susceptible to the same problem. Some moral rights are important, some less important, some trivial. I have a right that other people should not steal my extra shirt button. But then we can generate a version of Raz's puzzle involving moral rights. If a huge number of people are threatened with violation of their right that their shirt buttons not be stolen, the

combined moral weight of this huge number of tiny rights can outweigh a single individual's important moral right not to be murdered. If so, then if one must choose between acting to prevent the huge number of shirt button thefts and acting to prevent the one murder, one should act to prevent the greater aggregate rights violation, the button thefts. Again, I take no stand on the issue whether this apparent problem is really a problem, whether we should formulate moral principles that avoid the implication that many small rights should take priority over one big right. My point is just that if there is a difficulty here, one can avoid it by assigning some rights lexical priority over others, so that no degree of fulfillment of the lexically prior rights should ever be sacrificed to secure any gain, no matter how great, in the degree to which lexically less favored rights are fulfilled. But the recourse to lexical priority is available for the pure welfarist (whose fundamental moral principles hold that nothing matters except utility and its distribution) as well as to the one who insists on taking rights seriously.

#### **Driving Someone to the Wall.**

Suppose we are led to insistence on inclusion of moral rights at the level of fundamental principle by reflecting that utilitarian aggregation can yield the outcome that it is morally right to drive someone to the wall, to an intolerable and horrible condition, in order to secure benefits for persons who are already very well off. We have a moral aversion to pressing Smith into a hellish condition in order to gain benefits for those already in heavenly bliss.

Again, the consideration fails to support the proposed rights affirmation. If avoidance of intolerable and horrible conditions for a person is taken to be an urgent matter for moral theory, we could incorporate the concern directly into a principle that

bids straight maximization of good consequences. For example, we might identify a threshold of decent existence and postulate that getting people up to this threshold level is a matter of utmost moral urgency. This yields a triage morality, which insists on using resources and setting policies and actions so that as many individuals as possible are raised to the threshold level. (Notice that this might require driving some, or even a great many individuals to the wall, when doing that is required to get as many people as possible up to the threshold of decent existence. One could avoid this result, if one wishes, by stipulating that moral priority is to be given to achieving gains in well-being for people below the threshold of decent existence. The farther one is from the threshold, the greater the priority that attaches to getting one benefits. Strict lexical priority is given to the aim of advancing the well-being of people below the threshold when their interests conflict with those of people above the threshold level.)

I am not endorsing triage morality (or the alternative threshold prioritarianism described in the previous sentence), merely noting that its assertion does not commit one to individual rights at the fundamental level. What we would have instead is a variant of a utility-based consequentialism in which one particular level of utility, the level deemed to mark the level of a decent existence, is given privileged status.<sup>17</sup> This would not be a consequentialism of rights. A principle that assigns each person the “right” that as many people as possible be boosted to the threshold of decency may not be beneficial to the “right”-holder (since the principle may require that the “right”-holder be driven to the wall).

**Distribution across Persons Is Morally Significant.**

One might hold that there is no moral bar against aggregation of any sort within a single life, but that aggregation across persons, which may require violating the rights of some to secure small benefits to others (licks of ice cream) who may already be extremely well off, is morally dubious. Distribution across persons matters, and might be thought to generate a case for insistence on rights and for their inclusion.

To evaluate this point we need to consider the ways that distribution might be incorporated in moral principles without asserting rights. If we agree that the distribution of utility matters and that bringing about one outcome may be morally superior to bringing about another even if the utility sum is made highest in the second outcome, we are agreeing to reject utilitarianism but not yet to leave behind the utilitarian family of moral views. Let's say very roughly that a moral theory lies within the utilitarian family if it is consequentialist (acts, motives, rules, institutional arrangements, and practices are to be evaluated according to the moral value of the consequences they produce) and nothing affects the moral value of consequences except utility and how it is distributed across persons. So accepting this point that distribution across persons matters fundamentally, as I think we should, moves us beyond utilitarianism but not beyond the family of utility-based views. (Utility-based principles that are distribution-sensitive fall into the category of what Nozick called "end-state principles".<sup>18</sup>)

I will give an example of such a distribution-sensitive view that I find plausible. Weighted utilitarianism or prioritarianism holds that we should act, and set policy, so that moral value is maximized. Moral value is utility weighted by the utility level of the person who gains or loses as a result of what we do. The value of achieving a benefit for a person is greater, the larger the utility she gets from the benefit, and greater, the lower

the person's lifetime utility level would be absent this benefit.<sup>19</sup> (This formulation just identifies a class of principles; to specify a principle one would need a weighting of the mentioned factors.) Later I shall further amend prioritarianism; for now I want to trumpet its merits as stated.

If part of our response to Raz's example is revulsion at the idea of driving someone to the wall just to achieve a marginal gain in aggregate utility that takes the form of a trivial increase that goes to boost the well-being of many already advantaged persons, weighted utilitarianism allays this concern, at least to some extent. This distribution-sensitive principle counts at a discount making gains and avoiding losses for those who are already well off and gives extra weight to making gains and avoiding losses for those who are badly off. It is arguable that such a principle captures our intuitive judgments about how to decide on action and social policy when we must choose between grain for the peasants (the worse off) and cakes and ale for the lords (the better off).

If a unit of resource would give the same amount of utility to someone whose lifetime expectation of utility is now low or to someone whose lifetime expectation is high, the distribution-sensitive principle holds that it is morally more valuable to bring it about that the disadvantaged person gets the resource. But the right discount rate is not infinite. As we imagine a unit of resource producing less and less grain and eventually less and less well-being for me, whereas it could produce more and more cakes and ale and eventually more and more well-being for the lords, at some point as a reasonable person I will say, "All things considered, it is morally better that I sacrifice a bit to produce a big increase in well-being for the lords."

Return now to the contemplation of the distribution problem set by Raz. With limited resources and very severely limited flexibility in our deployment of resources, we face a stark choice: we can cut short a single human life in its prime and simultaneously gain the pleasure of a lick of ice cream for many, many people, or we can sustain the life in its prime at the cost of taking away a huge number of small ice cream pleasure experiences. Which to choose? For whatever it is worth, I find the distribution-sensitive principle yielding a close fit to my judgments. If we suppose that the masses of potential ice cream lick beneficiaries are extremely rich in utility to begin with, and the lone individual to be sacrificed is badly off at the outset, then a high discount rate kicks in and the numbers of persons who benefit at the expense of the sacrificed victim must be astronomically large. Galaxies teeming with individuals for tens of thousands of years must be anticipating their ice cream. On the other hand, if we picture initial well-being reversed, so that the lone individual has led an incredibly rich and fulfilling existence, and the many for whose sake he is to be sacrificed are living on hell on earth, so that the moment's respite of delicious ice cream provides huge numbers of people the single rewarding moment of their lives, I find myself inclined to stop resisting the sacrifice of the one for the many at a huge, but smaller number.

Given that our imaginative capacities that enable us to make moral comparisons involving large numbers are quite limited, our intuitive confidence in our judgments about cases involving very large numbers becomes quite weak. But this outcome is not fatal to the prospects for distribution-sensitive views in their rivalry with rights-based approaches. Consternation when faced with moral problems involving either (1) infinitesimal risks of enormous losses versus the certainty of small losses or (2) huge

numbers of very, very small benefits versus very, very small numbers of huge benefits and the like will doubtless occur whether our fundamental moral principles are good-based, right-based, or based on whatever. On the rights-based approach, questions must be faced such as whether the violation without compensation of many people's right not to be lightly assaulted is morally worse than a single violation of an individual's right not to be killed. Recall the discussion above under the heading "Moral Limits on Trade-offs."

### **Absolutism and Deontology.**

If rights are absolute, and must never be violated whatever the consequences, then it is not true that the difficulties of aggregating moral values in calculations that involve tiny and huge numbers will arise within a rights-based approach. Another possible construal of the Raz and Rawls counterexamples would understand their lesson to be that our discomfort with utilitarian aggregation extends to any consequentialist aggregation and ultimately reflects our allegiance to a side constraint understanding of the place of rights in moral decision making.

According to the conception of rights as side constraints, each individual as she decides what to do will have available an array of disjoint actions any one of which she might choose. Some of these available actions would violate someone's individual rights. These are to be deleted from her options. She may choose any of the actions available to her that do not violate anyone's right and must not choose any that do. Rights constrain the set of permissible actions, and if rights are absolute, these constraints must always be respected. In order for it to be the case that it will always be possible for an individual to avoid violating any rights when she acts, whatever the circumstances in

which she finds herself, the specification of the substance of rights must satisfy conditions that guarantee that the individual rights will always be co-possible—all may be satisfied together in any circumstances. Given that all rights, the lesser along with the greater, are all always absolutely to be respected, the issue of how best to aggregate the moral value of disparate rights so as to be able to decide which to prefer when they conflict does not arise. The conditions that serve to guarantee the co-possibility of rights may severely limit the kinds of moral considerations that can figure as rights, and may in this way diminish the plausibility of assigning respect for rights an absolute priority in the determination of right action. This issue I set aside.

I assume here without argument that if moral rights have a place at the level of fundamental moral principles, these will be consequentialist in structure. The proper doctrine that takes rights seriously would be a consequentialism of rights, not a deontology. Although absolutist construals of moral rights are widely rejected, the idea of a side constraint morality that gives weight to traditional deontological distinctions is popular. I note that its appeal might be accommodated to some extent in a hierarchical position, in which rights are not regarded as morally foundational but find a place in derivative, secondary principles. These are instruments to secure the foundational values. Against this demotion of moral rights to secondary status, it is said that the side constraint understanding of rights, implying that each person is inviolable up to a point, in effect confers a high status on everyone, the status of inviolability-up-to-a-point, which has great value. Leaving aside the worry that we seem to be justifying choice of nonconsequentialist principles by appeal to the good consequences of such choice, I note that the appeal to the value of status is question-begging in this context, as Shelly Kagan

has noted.<sup>20</sup> For a consequentialist position assigns everyone the status of unignorability, meaning that when one is a potential beneficiary of an infringement of a right, one's interest may not be ignored in the moral calculation that determines what ought to be done all things considered. To inquire whether the status of inviolability up to a point is morally more desirable than the status of unignorability is just to raise in other words the initial question whether the side constraint or consequentialist construal of rights is correct.

Another reason to doubt whether deontology is as firmly rooted in common-sense intuition as is often supposed comes from recent theoretical work that attempts to articulate the fine structure of a morality of side constraints. Theorists who have done excellent work in this tradition recently include Frances Kamm and Judith Thomson.<sup>21</sup> But the structures elaborated in these analyses are increasingly baroque in their complexity and lack strong intuitive appeal. One possibility here is that we need to do more work to uncover the intuitively compelling deep structure of principles that rationally organizes the morality of side constraints. This may be. But the longer the project is continued without discernible progress toward this result, the alternative possibility that we have strong responses to some paradigm cases but that these do not cohere in any intuitive system becomes salient.

### **The Promotion of Goods other than Utility Matters Intrinsically.**

The issue of utility versus rights touches on questions about monism versus pluralism in value theory. If matters other than utility and how it is spread across persons are intrinsically morally significant, then these significant values should register directly in moral principles at the fundamental level. This issue, it would seem, can only be

addressed piecemeal, by taking up each putative intrinsically morally significant non-utility value and testing its claim to nonderivative importance. Moreover, if the answers should turn out to be that non-utility values are significant and nonderivative, on the face of it, this result would yield pluralistic consequentialism not yet consequentialism of rights.

To bring this issue into focus, I shall propose a version of pluralistic consequentialism that strikes me as promising and plausible and that emphatically is not a consequentialism of rights. Suppose we held that if our moral principles are responsive in the right way to information (a) about how much utility the actions and policies we might choose would achieve and (b) about the way in which the utility that might be achieved from each possible course of action would be distributed across persons and finally (c) about the lifetime utility those who might be affected by our choices would have absent those choices, we are responding to all of the genuinely morally relevant features of situations. No other information should affect our choices. This is the position espoused by weighted utilitarianism or prioritarianism as characterized so far. It is arguable that more factors are relevant to proper moral choice than I have so far countenanced.

Consider matters of responsibility and deservingness. No doubt within the framework of weighted utilitarianism there will usually be good instrumental reason to steer utility toward deserving and responsible individuals and away from others. Doing so will reliably tend to promote the weighted utilitarian goal in the long run. But the extent to which this is so depends on contingencies. Suppose it turns out that the normal instrumental relations between rewarding the deserving and responsible and maximizing

weighted utility are reversed, so that punishing the responsible and deserving surprisingly would maximize weighted utility. Suppose that we combine responsibility and deservingness considerations so that in principle we can assign a number to each individual that indicates the extent to which she is virtuous or nonvirtuous. But a world in which good fortune goes to the nonvirtuous and bad fortune to the virtuous is not morally on a par with a world where good fortune goes to the virtuous to a greater degree than to the nonvirtuous, given that the two worlds are equal in their weighted utility score. To some extent we should favor channeling utility to the virtuous, and we should do this for its own sake, quite apart from any calculation about how rewarding virtue would boost weighted utility in the long run.

Weighted utilitarianism with this modification then becomes a form of pluralistic consequentialism. Of the available actions that might be chosen, one ought always to do the act that maximizes moral value. Bringing about a benefit for an individual always per se augments moral value (and bringing about a loss for an individual per se decreases moral value). The greater the utility gain that a benefit provides an individual, the lower in lifetime utility the person would be apart from this benefit, and the more virtuous the individual, the greater the moral value the benefit provides.

Weighted utilitarianism modified in this way strikes me as plausible, but for purposes of this essay, there is no need to defend it. Either the pluralistic consequentialism just described is adequate as stated or it should be modified to incorporate the intrinsic significance of further moral values. Suppose that this pluralistic consequentialism is modified so that it is properly responsive to all further moral values (if any) except the putative moral significance of rights. The reader can develop in

thought her ideal version of pluralistic consequentialism subject to the constraint that moral rights are not incorporated into this fundamental moral principle. The question then becomes, why add rights to the pluralistic mix?

Normally protecting rights protects many important moral values including physical security, relationships of respectful community, the self-worth of the persons whose rights are respected, and so on. For simplicity I shall focus on the moral values of increasing total utility, achieving utility gains for those whose utility level would otherwise be low, and channeling utility gains to the virtuous. The reader may keep in mind a more complex rights-excluding pluralistic consequentialism, whatever strikes her as best. To decide whether we should further transform this pluralistic consequentialism into a consequentialism of rights, the cases to consider are those in which rights are secured but without any gain to any of the other moral values deemed intrinsically worthwhile. If there were such gains, there would be to that extent for such cases instrumental reason to bring it about that rights are secured. But the instrumental value of rights protection is not what is at issue. If rights are intrinsically morally significant, then securing rights must have moral value even if no other moral value is advanced. Contemplating these situations in which bare rights gains unaccompanied by no other benefits are secured, I find the protection of rights in these situations to be a blankly formal and barren enterprise. I have no argument that this is so, but I suspect that rights tend to enter our thought as a freight locomotive bearing many cars laden with important moral goods. We care about whether or not the freight train arrives, but we should care about the arrival of the locomotive only if it pulls cargo.

Consider an example. Suppose that we can perfectly protect and secure people's

rights to freedom of speech, at some cost to other values. However, it turns out that no one ever exercises her free speech rights, so that the values of informed public deliberation are not achieved to any greater extent than they would have been had free speech rights not been secured. Nor does the protection of free speech rights deliver any other values beyond itself. Since the maintenance of these rights *ex hypothesi* is not morally costless, in this imagined scenario the pluralist consequentialist holds, and holds reasonably, that we should forego protecting free speech rights. Being a liberal democrat, I believe that the imagined scenario is wildly counterfactual, and that protection of free speech rights tends directly and indirectly to promote the achievement of significant values. But to hold this position is to favor protection of such rights for instrumental reasons, not on the ground that they themselves are *per se* morally valuable.

### **Capabilities as Rights and as Consequentialist Goals**

Posed abstractly, the issue whether whether rights as such are intrinsically valuable is hard to get a grip on, because possible individual moral rights are so heterogeneous. The best procedure might be to consider specific claimed values whose fundamental status would justify specific linked rights.

I propose to focus on Sen's suggestion on this issue.<sup>22</sup> Recall that he proposes that fundamental moral rights might be one and all rights to capabilities or to positive freedom. For Sen, if one has the capability to function in a certain way, then one can achieve this functioning if one chooses and sincerely tries to do so.

This suggestion resonates with the important view that protection of rights is above all protection of the individual right-holder's choice or discretion. Indeed, on one approach to the understanding of what it is to have a right, having a right is having a

certain protected discretion or freedom, which amounts to a control on the freedom of others who have duties corresponding to the right.<sup>23</sup> Sen revives this idea by way of a claim about the substance or content of rights rather than a claim about the concept of a right.

Indeed, it may seem that in allowing an open-ended pluralistic consequentialism with plural values unspecified, which would allow that Senian capabilities are values of the first importance for an adequate consequentialist theory, I am merely splitting hairs rather than significantly differing from Sen's affirmation of a consequentialism of rights with rights to capabilities having pride of place in this system.<sup>24</sup>

I do not deny that for any system of moral goals that includes rights as fundamental goals, one could probably frame a system that is very similar in content, a close approximation to this rights inclusive system, by artful selection of values that will serve as goals, but that formally excludes rights. (One might deliberately select the values so that the practical effects of having rights are approximated as closely as possible.) Without trying to decide whether acceptance of capabilities to function in significant ways is tantamount to acceptance of rights in a consequentialist system, I shall resist the suggestion that capabilities or positive freedom should be included among an adequate consequentialism's list of fundamental moral goals.

This issue is delicate, because well-being does include aspects of freedom. Freely and willingly choosing to play the flute, for example, enhances one's well-being more than merely playing the flute (perhaps under coercion or duress). An important aspect of well-being is achieving agency goals, which we may define as goals that one advance a cause by one's own agency, the cause itself not being a part of one's well-being. I might

have the goal to save the whales (not as aspect of my well-being), but I might well have the desire that the whales be saved by my agency or that my choices and actions contribute significantly to the goal of saving the whales. The satisfaction of these latter agency desires, if reasonable, do contribute to my well-being. Having wide personal freedom is then in these and other ways important both as means and sometimes as partially constitutive of well-being.

But none of this goes so far as to admit that freedom itself or having capability is morally valuable except when it contributes to well-being or is partly constitutive of well-being. One should also notice cases in which one person's having freedom is morally valuable because its exercise contributes to the well-being not of the agent but of other people. If I exercise my freedom by smothering with my body a grenade about to explode in a crowded room, this does nothing for my well-being but a lot for the well-being of those who are saved from death by explosion.

The cases to consider to evaluate Sen's proposal that capability is morally valuable per se or that having one's right to capability protected is per se morally valuable are cases in which capability is not exercised in any way that enhances anyone's well-being or any other value beyond itself.

Think again of Sen's examples involving Ali and his capability to move about the city without bodily harm, which might be threatened either by violent assault or violent forces of nature. Suppose we know for certain that if the victim who is threatened with assault in Sen's example is not assaulted, he will immediately thereafter negligently choose a course of action that will result in damage to his capabilities identical to what the assault threatens, or will deliberately and wrong-headedly choose to impose damage

to his capabilities identical to what the assault threatens. Or suppose we somehow know for certain that the capability sustained by having a healthy nonassaulted body will never be deployed by the person in any way that does him any good, advances his well-being in any way, and moreover will not be deployed to advance any other creature's well-being either. In these examples where the instrumental value of capabilities for well-being disappears, I lose the intuition that bringing it about that the right to capability is fulfilled is morally valuable.

Is it not disrespectful to a person to deny her a capability to which she has a right on the ground that others know for certain she will not exercise it to any useful purpose? This question may point to considerations that a view that regards capability and rights to capability as only instrumentally valuable can readily acknowledge. Perhaps Smith gains utility from being treated in a way she regards as suited to competent moral agents, or perhaps having one's rights respected when one will not exercise them well today may bring it about that one will buck up and be better capable of effective prudent and moral action in the future. These gains an instrumental view of rights will register. What is being denied is just that respecting and protecting rights is per se valuable even when it does no good.

**Can Some Utility (or Other Value) Only Be Attained as a By-product of Protecting and Respecting Moral Rights?**

The arguments advanced to this point do not rule out all possible arguments for inclusion of rights in fundamental moral principles. Here is one argument. It might be the case that not being morally required to act so as to advance one's own or anyone else's utility to the maximal possible extent is itself a significant source of utility. Suppose

rights to significant capabilities are understood as leaving one morally at liberty to exercise the capabilities or not, and that being morally at liberty in this way is itself a source of utility.

Here it is conjectured that establishing rights at the fundamental level is supposed to generate utility that would otherwise be unobtainable. The same point would apply if some other nonutility value could be secured only by establishing rights at the level of fundamental moral principle. Arguing that the consequentialist can recognize rights, Philip Pettit proposes that a person has dignity only if she has rights that ought morally to be upheld even if in particular cases bringing about nonfulfillment of the rights would produce better consequences overall than bringing about fulfillment.<sup>25</sup> If dignity itself has considerable moral value, then there is a moral gain that comes about not as a result of actions that people might or might not take but by virtue of the very existence of genuine, fundamental moral rights.

On this way of thinking, it is not that accepting moral rights as fundamental is itself an action that generates good consequences. Moral rights, we are supposed to think, do exist, and correct fundamental moral principles must incorporate moral rights. But we see that value that would not otherwise exist accompanies the existence of moral rights. Recognizing this value, we then see the point at which the constraints that moral rights establish should give way to the consideration that ideal consequences will be brought about in particular cases by bringing about or allowing their nonfulfillment. This is the point at which the dignity value that necessarily accompanies rights is outweighed by the better consequences that acting in disregard of rights could bring about. In principle, if dignity lexically outweighs all other values that might be arrayed against it,

this form of argument could establish absolute rights that may never legitimately be violated for any reason. If dignity has great but not overriding value, then we end up with a moral system in which fundamental moral rights exist but should be respected only up to a threshold of consequentialist value that disrespecting them could produce.

My response to this entire line of argument is that the possibilities envisaged are logical possibilities but we have no reason to think they actually obtain.<sup>26</sup> Supposing for the sake of the argument that there is a dignity value that the existence of fundamental moral rights brings into existence, one notes that if there are no fundamental moral rights and agents may always and should always act to bring about best consequences, one can just as well say that another sort of dignity accrues to the individuals who stand to benefit from the value-maximizing consequentialist acts (that is to say, all of us from an ex ante perspective). Pending further argument, the value that is thought to spring into being from the fact that one or another fundamental moral principle is correct can be invoked by the advocate of rights and the act consequentialist who denies such rights.<sup>27</sup> These ethereal dignity values offset each other so should not be thought to support one side or the other in argument about what does or does not belong in fundamental moral principles.

In the argument above I presented a bowdlerized version of Pettit's argument. I did so because I think this version of the argument is worth considering and needs to be cleanly distinguished from what I believe Pettit actually wants to assert. Pettit takes the view that with fundamental moral rights in place, people can and should take actions that will bring about a value that could not have been obtained if rights had not been in place. It is not that the very existence of rights somehow infuses the world with value, but that

without fundamental rights, moral value cannot be maximized even if all agents always do what is best by act-consequentialist standards. One might say that moral rights facilitate the production of maximal consequentialist value.

By establishing and securing a system of fundamental moral rights, people thereby secure dignity for all. This dignity could not be secured for people if there were no fundamental moral rights. One has dignity only if one has the practical assurance that one's moral rights will actually be upheld and the theoretical assurance that one has rights, and no one legitimately may countenance nonfulfillment of one's rights even to bring about best consequences (up to a threshold at which the dignity value can be outweighed by consequentialist considerations).<sup>28</sup>

These claims about dignity and how it might be obtained strike me as having a gerrymandered, perhaps question-begging quality. Why think there is a special dignity that only recognition of rights at the fundamental level can provide? Recall that the act-consequentialist position I espouse happily concedes that moral rights may be efficient instruments for producing moral value and that at a derivative level, moral rights as instruments may well be established. These merely derivative and instrumental rights will not be genuine and hence will not be engines that promote dignity, it is claimed. The essential point is that if I have a merely derivative and instrumental right to X, my having this right is compatible with its being the case that I myself ought morally not act to secure X for myself and that other people who might act to fulfill my right to X ought morally not do so. This ever present possibility is thought to smother dignity.

Perhaps one acquires a special dignity by knowing that moral principles treat all people on a par and that whatever entitlements and duties and privileges are established

for any humans by fundamental moral principles are established for all including oneself. But this formal notion of dignity can be secured no matter what the content of these universal principles that at the fundamental level treat all persons equally in some way. Why must the dignity-conferring fundamental principles entrench moral rights at the fundamental level? We are simply begging the question if we merely stipulate that the dignity one has in mind is the special dignity that only accrues to people if a system of fundamental rights is in place, recognized and established.

What holds true of dignity holds true of self-worth and other values that tend to be asserted in this context as essentially linked to fundamental moral rights. Understood straightforwardly, one has a sense of self-worth if one believes oneself to be a worthy being. Any of a wide range of universal moral principles including varieties of consequentialism imply that each human being has equal worth. Every one to count for one, nobody for more than one, as Bentham asserts. A caste principle that says that some people are essentially more worthy and have greater dignity than others might reasonably be thought likely to undermine the beliefs of the subordinate others in their dignity and worth, but we are not speaking here of such hierarchical fundamental principles. One can stipulate that real self-worth can be had only when one's self-worth is supported by society's recognition of fundamental moral rights, but such stipulation can be countered by counter-stipulation and one can see the argument on this path will lead to deadlock.

In this connection Pettit makes an interesting analogy to special ties between parents and children and among friends. A child gains an important sense of security by confidently believing that her parents will favor her and give special priority to her interests in their decisions about what to do. Loving their child, parents will favor their

child and will not be motivated to behave in an impartial act-consequentialist fashion, which would mean favoring their child when and only when doing so produces best consequences overall. The acceptance of act-consequentialist morality by parents is incompatible with securing an important value, the children's confidence that parents will be especially solicitous of their welfare.

The claim then is that similar considerations hold true when it comes to moral rights. Those who are the intended beneficiaries of moral rights gain a confident sense of security and thereby a kind of assurance of worth and dignity that they could not obtain in a world in which moral rights were not morally fundamental and accepted as such.

But there is something peculiarly moralized about the assurance the child, the friend, and the right-holder are said not to be able to get if act consequentialism is the accepted morality and moral rights are not entrenched in fundamental moral principles and firmly established in practice. As a child, what I want to be assured of is that my parents love me and will be especially solicitous of my welfare. The world being as it is, this is an important good to the child, and those who lack it tend to be bereft. But it is no part of the assurance I need that my parents will favor me specially and will be morally right in doing so. The italicized phrase is neither here nor there. The same goes with friendship. Genuine friends give special extra consideration to the interests of their friends in their deliberations about what to do. Seeming friends who do not tailor their practical deliberation in this way are not genuine friends, and genuine friendship relations are a good. But for the existence of genuine friendship so characterized it is not plausibly required in addition that the friend give special weight to her friend in her deliberations and be morally right to do so.

Perhaps the argument is that if act consequentialism were accepted as the sole morally fundamental principle and if all perfectly conformed to it, best consequences would not be obtained, because the interests of those who gain from special ties and moral rights would not be fulfilled to as great an extent as would be possible in a world in which special ties and moral rights enter morality at the fundamental level and people conform their conduct to what fundamental moral principles require.

This might be so, but so far I do not see more than the invocation of logical possibility. If special ties and moral rights tend in practice to generate lots of moral value, then an adequate act consequentialism would provide free space for special ties and rights in derivative principles. Let us suppose that genuine parent-child relations, genuine friendship, and real moral rights would not exist in the perfect act-consequentialist world (this must be so if we have defined these special ties so that the genuine variety cannot exist if agents accept act consequentialist morality). But presumably ersatz parent-child relations, ersatz friendship, and a derivative facsimile of moral rights would have a significant place in human life in the perfect act-consequentialist society. These substitute versions of special ties and rights would be designed so as to achieve, so far as possible and desirable, the values generated by true special ties and moral rights but in ways that are consistent with act consequentialism. It is an empirical question whether act consequentialism if all were perfectly to conform to it would still be self-defeating in the way that the argument supposes, despite all mitigating and substituting of near-equivalents that a rational implementation of this moral doctrine would involve. Again, I do not see that the arguments do anything to advance the claim that the answer to this empirical question is negative beyond the bare

invocation of logical possibilities. These should not faze the act-consequentialist advocate.

### **Can There Be Derivative Moral Rights?**

Throughout this essay I have repeatedly allowed myself the assumption that moral rights, excluded from appearance in moral principles at the fundamental level, might yet appear in moral principles at a nonfundamental, derivative level. This assumption might well be subject to challenge. At any rate the assumption requires clarification and defense.

The fundamental moral principles as I see them state what is intrinsically morally valuable and what agents morally ought to do. That is, the fundamental principles include principles that determine the moral value of states of affairs that actions might produce. The principles include a statement of act consequentialism, that among the available alternatives on each occasion of choice, each person morally ought always to do an act the consequences of which would be no worse than those of any other act she could do. Finally, the principles state that institutions, social practices, rules, laws, constitutions, character traits and dispositions, and so on are to be assessed according to their tendency to produce consequences no worse than those of any alternatives.

Nonfundamental principles are instruments for bringing about the greater fulfillment of the fundamental moral principles, or in other words the greater achievement of the intrinsic moral values.

The considerations here are familiar from discussions of act utilitarianism. Humans tend to be not well informed, not very able at integrating such relevant information as they have into their deliberation about what they ought to do, and selfish

rather than wholeheartedly dedicated to discovering and doing whatever they morally ought to do. Hence it may well better promote consequentialist values if people most of the time do not directly deliberate about what would produce best consequences but instead follow clear and relatively simple moral rules. Some of these rules should perhaps establish moral rights that leave specific forms of discretion to individuals and place others under duties to respect these rights or bring about their fulfillment. People are obligated to follow these rules and to conform to the duties implied by rights. If one is obligated to do X, one should be punished in some way, by law, public opinion or peer pressure, or pangs of conscience, if one fails to do what one is obligated to do.

Socialization and social practices that sustain obligations through punishment maintain this network. In a decent society, the rules established are such that in the actual circumstances their maintenance efficiently promotes the moral values, and then the obligations people are trained to experience are morally genuine. When society's rules are not well directed toward the achievement of the moral values, people will feel obligated but are not genuinely obligated.

The objection is that if act consequentialism is asserted at the fundamental level, genuine moral rights cannot be established, because they would be incompatible with act consequentialism. David Lyons has pressed this objection.<sup>29</sup> If Mary has a moral right to go to the movies or stay home, then (a) she is morally at liberty to do either, and it is not the case that she morally must do one or the other, and (b) other agents are under a duty to let her do either, and it is not the case that anyone morally must bring it about that Mary does one or the other. But act consequentialism holds that if one of Mary's two choices would produce better consequences, then she morally must do that act, and if

bringing it about that Mary's doing one of these two acts would produce best consequences, then the agent for who can act in this way morally must do so. What must be true of Mary and other agents if Mary has a moral right cannot be true of Mary and other agents if act consequentialism is correct. The point generalizes, so acceptance of moral rights and acceptance of act consequentialism are incompatible.

The question then is whether the existence of moral rights, established as means to producing best consequences, is compatible with its being the case that each person always morally ought to do whatever in her circumstances would produce best consequences. My claim is that the existence of moral rights is linked to moral obligation, which can come apart from what one morally ought to do. If one has a moral right to X, there should be a social practice that secures one X, and people should be socialized and educated so that they are obligated to bring it about that one has X and experience punishment if they fail to carry out their obligation in this regard. What one morally ought to do according to act-consequentialism is not necessarily connected with sanctions and punishment for noncompliance. In the example, Mary is not obligated either to go to the movies or stay home and in this sense she is at liberty to do either, despite the fact that if one of these acts would produce better consequences she morally ought not to do the other. If you like, you can say that in a strong sense, one cannot have a moral right if others morally ought to deny one what one has a right to in order to secure small gains in good consequences, but in a weak sense, one can, as just explained. If weak rights are good enough instruments for promoting good consequences, the incompatibility of act consequentialism and strong rights is not problematic.

Applying this line of thought to Sen's counterexample, we get this result. If there is a derivative moral right not to be bashed, then Donna morally ought to act to bring about the bashing even though she is obligated not to do so and she therefore should not be blamed or feel guilty for not doing what she ought and perhaps should be punished for doing what she ought.

### **Weak, Instrumental Moral Rights as Side Constraints and as Moral Goals**

For all that has been asserted to this point, it could turn out that the weak moral rights that would be the best instruments for the advancement of good consequences might be rights construed as side constraints on eligible choices of action rather than goals to be promoted. I do not wish to argue for this point, just note the possibility.

Notice that this possibility provides angle of insight into Sen's argument that moral rights should be included in fundamental moral principles as goals to be promoted rather than as side constraints to be respected. I have argued against Sen that moral rights should not be included in fundamental principles (and also that the fundamental moral principles, consequentialist in structure, should not make room for positive freedom or capabilities to function as fundamental value). It might also turn out to be the case that moral rights should be included in nonfundamental principles that state means to the fundamental goals and that at this nonfundamental level the rights that will be instrumentally best will have the character, to some extent, of side constraints to be respected rather than of goals to be promoted.

### **Conclusion.**

This essay has followed a path with many twists and turns. Its conclusion can be simply stated. I argue that moral rights should not be included at the level of

fundamental moral principles. I concentrate on what can be said for and against the inclusion of rights in a consequentialist moral system. I reject the rights-inclusive positions defended by Sen and Pettit. I argue that capabilities to function in significant ways (positive freedom) as espoused by Sen should not be included among the fundamental goals of a consequentialist morality and I suggest--but only suggest-- that a spare set of goals integrating weighted utility and the desirability of rewarding the virtuous and responsible individuals yields a morally adequate version of act consequentialism.

### Notes

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<sup>1</sup>. See Dworkin (1977), the title essay.

<sup>2</sup>. Of course a consequentialist position might include protection of moral rights among the fundamental goals to be promoted. I argue against such a rights-inclusive consequentialism.

<sup>3</sup>. Mill (1957; originally published 1861), chapter 5.

<sup>4</sup>. Raz (1986), chapter 7. As Raz explicitly recognizes, this analysis must be qualified to allow for the evident fact that many rights such as the right of free speech serve the interests of people other than the right-holder and that the proper shape of such rights depends on a balancing of the interests of the right-holder and the interests of others who will tend to benefit if the right is upheld.

<sup>5</sup>. Dworkin (1977), p. 192.

<sup>6</sup>. Robert Nozick argues that rights are properly regarded as side constraints and hence that it is anomalous to suppose that rights can figure as “utilitarianism of rights” in Nozick (1974), chapter 3.

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- <sup>7</sup> . In Rawls (1971), chapter 1.
- <sup>8</sup> . Raz (1986), chapter 6.
- <sup>9</sup> . Sen (1982).
- <sup>10</sup> . Sen (1979), (1982), and (1985).
- <sup>11</sup> . Sen (1982).
- <sup>12</sup> . On prioritarianism, see the text below.
- <sup>13</sup> . Adams (1999), p. 93.
- <sup>14</sup> . Arneson (1999a)
- <sup>15</sup> . If value A has lexical priority over value B, one should not accept any loss in the maximal amount of A one can get, or the maximal extent to which A is fulfilled, not matter how tiny the loss, in exchange for any gain of any size, however huge, in the amount of B that one gets or the degree that B is fulfilled.
- <sup>16</sup> . See Parfit (1986), p. 160.
- <sup>17</sup> . For doubts about these sufficientarian moral views, see Arneson (1999b), (2000), and (2002).
- <sup>18</sup> . Nozick (1974), p. 155.
- <sup>19</sup> . Prioritarianism is formulated and discussed in Weirich (1983), McKerlie (1994), and Parfit (1995).
- <sup>20</sup> . See Kagan (1991). An excellent further exploration of this issue is in Lippert-Rasmussen (1996).
- <sup>21</sup> . See especially Kamm (1992) and the references she cites in this essay.. For Thomson's views, see her (1990).
- <sup>22</sup> . In Sen (1982).

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<sup>23</sup> . See Hart (1962) and (1973), Sumner (1987), Wellman (1985), and Lyons (1994), Introduction.

<sup>24</sup> . In fact Sen does not commit himself as to whether he favors consequentialism of rights (a consequentialism in which rights are included among the fundamental goals) or a broader system that is not entirely consequentialist (that does not evaluate states of affairs impartially, for example). The point on which he wishes to insist is that rights must be included as fundamental in one's fundamental moral system, whatever its exact structure.

<sup>25</sup> . See Pettit (1988). It should be noted that my first presentation of "Pettit's view" does not describe the view I think he actually asserts.

<sup>26</sup> . A difficulty emerges here. If utilitarianism is defeated by the fact that it yields unacceptable implications for merely possible cases, why is not the exclusion of rights from fundamental moral status likewise defeated by the fact that it generates bad consequences in possible cases? My reply is that the logical possibility of bad consequences if rights are excluded is offset by the logical possibility of bad consequences if rights are included, so these possibilities cancel. In possible worlds "close" to the actual world, exclusion of rights fares well. Moreover, one would need to explore the issue whether the fact that rights exclusion generates bad consequences in a logically possible world is a morally unacceptable implication of the position (aside from the consideration that the logical possibilities are counterbalanced). If reason should favor principle A for a certain range of logical possibilities and Principle B for another range., one wants to know the underlying principle that generates this result,

<sup>27</sup> . This point is made in Lippert-Rasmussen (1996).

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<sup>28</sup> . Feinberg (1980) asserts that having rights "makes claiming possible, but it is claiming that gives rights their special moral significance." Having rights enables an individual "to feel in some fundamental way the equal of anyone" (p. 155). Establishing and protecting equal rights induces a certain equality of self-respect among persons. From an act-consequentialist perspective, this might be read as recommending that acts of establishing and sustaining a system of rights produce better consequences than any alternative acts available even though they bring it about that many people will not act to produce best consequences in many circumstances (they will stand on their rights instead). So construed, rights are being viewed as complex instruments to other goals, not goals pursued for their own sakes. But Feinberg also suggests that respect for human dignity be understood as respect for rights and that self-respect be understood as respect for one's rights. This move renders rights fundamental goals.

<sup>29</sup> . See Lyons (1980) and (1994).

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