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_Ethics_
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The chief reason society cannot simply judge the rightness of particular outcomes by their utilities is that, even at egregious costs, institutions for doing so would be unreliable. For example, in the Matthew and Luke problem of Braithwaite and Barry, the utility of Matthew's action of playing his jazz trumpet depends on whether there is a Luke who lives beyond a thin wall from him.1 Playing a trumpet is not simply an action tout court, it is an action with contingent consequences. As a result, the rightness of Matthew's action depends on its effects on Luke. To judge directly from utility in practice in general would require an account in each case of all such effects. A far less expensive set of institutions gets us closer to the "ideally best" outcome: that set which simply establishes rules for conduct in typical cases and which leaves some freedom to the relevant parties to work out their own better solutions or to recur to political institutions to prevent others from violating the rules. We need an institutional structure of rights or protections because not everyone is utilitarian or otherwise moral and because there are severe limits to our knowledge of others, whose interests are therefore likely to be best fulfilled if they have substantial control over the fulfillment.

This is how rights should be understood. They are institutional devices for achieving good outcomes despite the egregious burden of gathering information and calculating consequences. They differ from rules in the lexicon of twentieth-century rule utilitarians in their institutional force, but they are similar to the rules of thumb of some rule utilitarians in their actual function. Unlike rules of thumb that an individual would follow to reduce information and calculation costs, however, such institutional rules as legally defined rights cannot easily be overridden when calculation shows that in a particular case a better outcome would follow

* This paper has benefited from comments by the participants, especially Allan Gibbard and Arthur Kuflik, in the Weingart conference for which it was originally written and by participants in colloquia in the departments of philosophy and political science at the University of Wisconsin—Madison and the Murphy Institute at Tulane University. It has also benefited from extensive written commentaries by Joe Carens, Andrew Levine, Charles Silver, and Duncan Snidal, and an energetic discussion with Richard Epstein.


Ethics 97 (October 1986): 47–74
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from violating the rules. This follows for relatively complex reasons of the strategic structure for the establishment and enforcement of the rules. Again, the reason for not violating relevant institutional rules in practice in particular cases is related to the reasons for having them in the first place: the costs of setting up the devices for deciding on when to violate the rules are too great to be justified by the gains from violation. When this conclusion seems not to follow in a particular case, then we may institutionally, as we do individually, resolve that case against the rules.

Conceiving of rules for individual behavior as rules of thumb to be violated when calculation recommends it gives rule utilitarianism very little force. It is nothing more than simple decision theory applied to moral choosing. Hence, it can be judged to be fully consistent with straightforward act utilitarianism. Much of twentieth-century ethical debate has clearly been motivated by a sense that there is more to rule following than this. In part, one might suppose that the reason for seeing more to rule following is that the individualist focus of deontological ethics, the focus on the rightness of individual actions, has pervaded even the ethical thinking of utilitarians.

If there is any force to the kinds of insights that many have had about rule utilitarianism, however, it cannot be that deontological concerns should pervade utilitarian thinking. Rather, it is that many of the rules that we would commonly accede to in our daily lives are conspicuously utilitarian in their consequences and that we cannot imagine living without such rules. This class of rules is generally the class of institutionally determined and—generally but not always—institutionally enforced rules. Much of the twentieth-century effort to read earlier utilitarians, such as Mill, as really rule utilitarians largely misses the point of the earlier concern, which was with institutional arrangements that would help to secure good consequences and not with individual rule following. To avoid such confusion we should speak not of rule utilitarianism but of institutional utilitarianism. Perhaps the largest concern of institutional utilitarianism in a modern society is with rights legally defined.

Even if one granted all of the above, one might still be bothered by a nagging suspicion that, somehow, concern with rights and concern with outcomes or utility are quite different concerns. Part of the reason for this suspicion is perhaps that rights are generally related to the strategic structure of various interactions and not directly to outcomes in the following sense. Rights are not generally about particular outcomes but about particular classes of action. Hence, they might seem to be preeminently deontological in character. The difference between typical rights theories and utilitarianism on this point is, however, less significant than

it might seem. The utilitarian judgment of an action is in fact a judgment of the outcome which the action helps to bring about. But few actions that interest moral theorists bring about outcomes on their own. Generally, outcomes of moral concern result from the interactive effects of the actions of more than one person. But we cannot generally legislate that certain kinds of outcomes should result and not others and also make clear who is responsible for what results. Instead of decreeing that outcomes of type \( x \) are to happen, we legislate that actions of type \( a \) are legal, or required, or illegal insofar as they would not hinder, would bring about, or would prevent outcomes of type \( x \). In many cases, however, it would be prima facie ludicrous to suppose that we actually care about whether actions of type \( a \) are undertaken tout court. For a trivial but important example, we do not a priori care whether people drive on the right or the left. Rather, we only care whether they drive in such a way as to cause harm. Requiring everyone to drive on the right or, alternatively, requiring everyone to drive on the left is justified merely because it brings about a good outcome in general. We constrain individuals' choices of strategy in order to produce a better outcome than would have resulted from unconstrained choices.

In what follows, I wish to argue that morally defensible rights are sensibly grounded in a concern for consequences and that the character of particular rights therefore depends on more general strategic considerations of the nature of the society and of incentives for action within it. Although some rights might seem to be valuable in almost any society we may know, few if any rights can be given an a priori grounding independently of a fairly articulate account of the society or societies in which they are to be defended. If we have established a system of rights we must, of course, have a set of institutions to guarantee and implement them. The institutions will have roles and norms of their own that are institutionally determined. Hence, there are two general issues of concern in what follows: the grounding of rights and the defense or implementation of them. After considering these, I will take up the problem of conflicts that can arise from one or more persons' exercise of their rights, as in the problem of Matthew's trumpet playing. Finally, I will briefly discuss the apparent implication of Sen's "liberal paradox" that a utilitarian theory of rights is inherently contradictory.

STRATEGIC CLASSES OF RIGHTS

In general, the point of traditional legal rights is to secure the aggregation of individual benefits. We may, however, distinguish three ways in which this is accomplished: we may secure benefits to individuals that are independent of other individuals' benefits, we may secure benefits that are mutual but that are generally available only to dyads or very small numbers independently of benefits to the larger society, and we may secure benefits to larger groups or even the whole society. As will become clearer below, the first of these cases involves protection of some
against intrusions by others and the latter two involve protection of some against their own strategic incapacities to benefit themselves. To some extent, all can involve the problem of paternalism, which, however, I will not discuss at length here.

All rights protect people against other people. There are no rights against impositions of the laws of physics. Hence, they are all directed at interactions between people. Again, these protections are strategic: they do not directly secure outcomes; rather, they protect individuals by securing them or denying them certain choices or actions. A signal value of the game-theoretic representation of moral (and other) choice problems is to clarify the relationship between actions and outcomes. Hence, it helps us to grasp better the sometimes contrary claims of action-based and consequentialist theories, although this is not a central concern here because I am not here concerned with action-based theories in general. What is of concern is to understand why a fundamentally consequentialist moral theory may, when limits to information, theory, and cognitive capacity are severe, address outcomes indirectly through actions even though classes of actions are not inherently either right or wrong on that theory.

Many of the protections that interest us may plausibly be seen as falling into more than one of the classes above. For example, the freedom of contract is dyadic at base but may have large implications for the whole society, even large enough to justify enforcing it independently of our concern with pairwise exchanges. Similarly, the right of ownership of property may have far more important implications for the larger society than for individual property owners considered separately. Both these rights, as do many others, may have external effects that go far beyond particular relationships. Hence, we may wish to secure them for their particular effects, their more general collective effects, or both.

There is a sense in which one could say that securing any of these benefits is a benefit to the larger society, especially if the way in which the benefits are secured in particular cases is through the workings of an ongoing institution. To secure a right that benefits me is, in this sense, to secure it for everyone or nearly everyone. However, for the present discussion, I wish to speak of securing benefits in particular cases in order to show that the way in which this is done may depend on the strategic structures of the cases. That the same strategic structure recurs commonly is good reason for creating an institutional protection and, one may say, widespread recurrence makes the protection a collective benefit. But the protection may explicitly apply individual by individual, dyad by dyad, or only collectively, and it is useful to keep clear which kind of case is at issue.

Exemplars of the three classes of rights are rights of privacy, rights of voluntary exchange or contract, and rights of freedom of speech or freedom from servitude. At first blush it may not be obvious why these

3. There may also be grounds for collective or welfare rights, but I will not discuss this issue here. See further, Russell Hardin, "Collective Rights," in The Restraint of Liberty,
should be put in their respective categories, but I hope to make clear that their strategic structures justify the categorizations. In the following three sections I will discuss these three categories by focusing on central examples of each. From the general grounding of liberalism in individual protections I will go on to discuss what is perhaps the best understood of the more complex cases, the protection of the dyadic right of voluntary exchange. This right, like certain of the individual protections, is generally considered to be fundamental to liberalism by utilitarian as well as by deontological rights theorists. Of course, utilitarians typically consider the right to be derivative from concern with consequences, whereas many deontological and natural rights theorists derive it from a consideration of a priori reason, from direct apprehension, or perhaps from a relevant metaphysical cloud of the sort that hangs more commonly over some schools of thought than over others. Finally I will discuss what is strategically the most complex of all the classes of rights, the collective rights, some of which are positively directed at creating a beneficial form of government and some of which, the so-called inalienable rights, are negatively directed at preventing certain failures of collective action.

INDIVIDUAL PROTECTIONS

One ground on which virtually all individual protections can be based is the supposition that individuals are generally the best judges of their own interests. Hence guaranteeing them the control over their lives to determine their own consumptions will generally make them better off. The same grounding can be given for dyadic rights as well. The principle is essentially Paretian and utilitarian: protecting an action that makes someone better off while making no one worse off produces a better state of affairs on the whole. Moreover, protecting certain classes of action can make virtually everyone better off. Ensuring certain rights supposedly has just this effect. For example, as all the great English political philosophers assert, ensuring the right to ownership of property guarantees that actions I take to better my condition will indeed better it. Without the security of expectations inherent in such a right, I would be far less likely to exert myself to create the property and to make myself better off.

Although the protection of property is the central concern of early liberal theory, one can defend virtually any individual protection on the same argument. From the freedom of religious practice that exercised Locke to the right of privacy that has exercised jurists and legal theorists in our century, these protections generally have in their favor that they let people make the best of things for themselves without capricious and destructive intervention by others, particularly by others who have the power of the state with them. These protections represent the simplest of the utilitarian logics of liberalism. Indeed, their violation for the purpose

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ed. Thomas Attig, Donald Callen, and John Gray, vol. 7 of Bowling Green Studies in Applied
Philosophy (Bowling Green, Ohio: Bowling Green State University, 1985), pp. 88–101.
right to keep what one "owns." I can meaningfully have the right to exchange my money for your car only if you have no right to take my money for nothing in return. Hence, we first protect my right of ownership and then we further protect my right to exchange what I own with someone who wants to make a presumptively beneficial exchange with me. If we assume that players in such a game as game 1 will not voluntarily move from an outcome to another that is inferior to it in their preference schedule, then the protection of the right of ownership is guaranteed by blocking the 1,4 and 4,1 outcomes from happening as the result of a move from one of the other outcomes. (One of these, say the 4,1 outcome, might occur as the status quo. But then it would be wrong to represent our "interaction" as including the possibility of my choosing my lower strategy. The protection of your right to own both the money and the car implies that I cannot unilaterally act to put you in the less advantageous position of any of the other payoffs.) Further protection of the right of voluntary exchange then requires that we be permitted to move from the 3,3 outcome to the 2,2 outcome that we both prefer to it.

There are basically three ways such exchanges are regulated. One is for us to face each other in a given moment and make an instantaneous exchange under the threat of violence if either should try to take from the other and run; the second is to have a rich ongoing relationship that guarantees that we will each want to treat the other fairly in order not to jeopardize the future of our relationship; and the third is to have an external power enforce our voluntary agreement on whether to exchange. Macneil calls exchanges regulated in the latter two ways relational exchanges because they involve ongoing relationships, in the first case between the parties themselves, and in the third case between each of the parties and the state. In a complex society, the state typically enforces voluntary agreements through the law of contracts. Indeed, for a very large number of exchanges, it also enforces the reliability of each of us in discrete exchanges of the second type by outlawing and punishing theft so that, as Macneil argues, virtually all exchange is relational and the economists’ favored category of discrete exchange is virtually empty.

We want the state to intervene to protect our voluntary exchanges when we exchange with people who are strangers to us, when our exchanges involve unusually large values so that even close associates might not be trustworthy, and especially when either or both of these conditions are coupled with the need to consummate our exchange over time with one of us fulfilling now and the other later. Because all are arguably made better off and no one is harmed by such exchanges, it is a Pareto improvement to have an efficient regulator of exchange, as the state can be (this view can be overstated—see further the discussion below under

“Conflicts between Rights”). Indeed, if we are restricted to considering only utilities to individuals without comparisons across individuals, this Paretian concern is virtually all that remains of utilitarianism. We can say that an institutional protection of exchange and of contract is utilitarian if everyone seems likely to be better off with it than without it. In contemporary economics, the grandchild of utilitarianism, one speaks of Pareto-efficient changes in the state of affairs rather than of the maximization of social utility. In its weakest version—unanimity—the Pareto principle is perhaps the most generally accepted principle of social choice. But for Amartya Sen’s well-known views, one might suppose it was unanimously accepted.\(^6\)

Since the possible range of states of affairs without state protection of exchange and contract may be quite large, it may not easily be shown that such protection is utilitarian, but this is an issue that goes beyond the present concern, and I will skip over it here. If we were concerned only with a particular exchange of the moment, we might easily conclude that it would be utilitarian as compared with not making the exchange. Surprisingly, much of social and political theory has been argued as though this were the only concern: justifying piecemeal actions against the background of everything else held constant. That this is a fundamentally flawed way to frame political theory is suggested below (under “Institutionalization of Rights”).

Suppose now that we have a relatively efficient state empowered to intervene to prevent theft, so that virtually discrete exchange is possible, and to enforce contracts, so that fairly complex exchanges, such as those that must take place over time, are possible. Our original insight and model concerned dyadic exchanges. But there are at least three classes of contracts that the state might enforce. First, there are ordinary contracts for mutual benefit through exchange between two or more parties in cases in which all of the benefits of the contracted action derive from “internal” sources, that is, from and to the contracting parties. Second, there are contracts for mutual benefit between two or more parties when one of the parties is a member of a larger class of people who share a common interest in not being able to enter such contracts. Third, there are contracts such as those among members of a group to enable them to support their interest in a conflict with another party, in which case the benefits of contracting derive from “external” sources, that is, from the conflicting party. The second of these classes is the subject of the following section on “Collective Protections.” It is enforcement of only the first of these which seems Pareto efficient in plausible cases. Enforcement of the second and third classes of contract will make some people better off at the expense of other people.

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6. Sen supposes that the weak Pareto principle violates liberalism, which he thinks counts against it as a general principle of social choice. See further below, under the section “Rights versus Unanimity.”
Perhaps, one might suppose, the way to keep to Paretian results is to restrict contracts to dyads and to leave others to their own spontaneous devices by not enforcing group contracts. Alas, to do so is automatically to give advantage to certain interests over others, in particular, to give advantage to the interests of small numbers against those of large numbers. For example, for a large group case, recall the early history of labor unions in the United States. The Supreme Court held that collective efforts by workers to negotiate for higher wages were illegal, that workers must individually enter dyadic contracts with their employers. In principle, of course, workers could all have coordinated on negotiating individually for the same wage level they might have got collectively. But, for reasons of the logic of collective action, one would not expect them to have great success in doing so in factories with large numbers of employees or even more generally in any factory which could draw its workers from a relatively large pool. Restriction of contracts to dyads only therefore virtually guaranteed greater bargaining power to employers over potential employees than they would have had against employees legally capable of bargaining collectively.

For a small group case, consider the Chicago–East Coast railway cartel in the latter half of the nineteenth century. Overlapping dyadic contracts between the very small number of railway companies could easily have been arranged to accomplish anything a group contract could have accomplished. If the state had enforced the dyadic contracts, the result would have been monopolistic pricing in an effectively stable cartel. That the state chose to try to block the cartel did not turn on the fact that its organization was of more than two parties. The frequency of failures of the cartel, given that the state would not enforce its agreements, may well be explained by the fact that there were several parties to it with strong incentives to take advantage of those cooperating. But basing the cartel on dyadic as opposed to group agreements would not have made it a more liberal achievement. One might suppose therefore that the rulings against workers trying to bargain collectively likewise did not turn on the stated concern with the protection of freedom of—implicitly dyadic—contract.

Interestingly, the two kinds of cases, involving small and large number collectives, differ enough strategically that they may finally differ legally. To stop cartelization of some small number industries might require positively outlawing agreements and informal coordination since the relevant firms might each be able to reckon that its gains from cheating on an agreement would be outweighed by its probable losses from the failure of the agreement caused by its own cheating. To stop unionization, however, may require little more than refusing to enforce contractual agreements among workers. The general sense very early on that workers needed the union shop to protect their interests was probably well grounded. As Gompers argued in 1905, "Persons who are desirous of becoming beneficiaries of an agreement should become parties to that
agreement, and . . . they should bear the equal responsibility which such an agreement involves. 7

Is it liberal for the state to intervene as a partisan in a conflict of interests? Since partisanship one way or the other either by enforcing or refusing to enforce contracts is unavoidable, a liberal must either answer this hard question or define it away. One might answer that no one loses from the enforcement of certain classes of contracts and that therefore they should be enforced; but for classes of contracts that bring benefits to some parties at the cost of others, the state should not act as enforcer. Where, then, should it stand with respect to contracts that benefit some at the cost of others but that do not require state enforcement? Should the state intervene to block these? Answers to these questions do not follow straightforwardly from considerations of rights sensibly defined. In the case of the railway cartel one can sensibly argue that much of the monopolistic pricing of rail transport—for example, to small towns served by only one line—did not directly harm anyone in a way that simply not offering the rail transport would not have harmed them. Hence, running lines into small towns and charging monopolistic prices was clearly a benefit to the small towns. But it would be hard to argue on grounds of liberal rights that the railways were required to serve anyone, so that it is hard to see how any rights were violated by the monopolistic pricing of a railway that chose to serve an isolated community. There may have been violations of justice and utility, but not of rights.

If the state has the power to enforce or not to enforce contracts, it therefore unavoidably has the power to decide for one party against the other in certain conflicts of interest. The liberal's disinterested state cannot be disinterested. More generally, liberal support for the freedom of contract cannot be unlimited. It is not easy to present arguments that are exclusively rights based for why contracts to monopolize prices would be wrong so long as the state does not intervene to prevent competitive entry into the market. A utilitarian account that turned on ordinal comparisons between the benefits to the contractors and the costs to the parties against whom they have contracted could, however, yield relevant qualifications on the freedom of contract. Hence, a derivative theory of utilitarian rights stands up better to the problems we face than does a theory that is nonderivatively, fundamentally rights based. In large part, this is because strategic considerations are of overwhelming importance not merely between any two parties to a transaction that is protected by right but also between them and many others who may be unable to influence the transaction.

COLLECTIVE PROTECTIONS

In traditional views there are at least two basic classes of collective protections, as indicated by the locutions “freedom of” or “right to,” and

“freedom from”: (1) those that help to bring about particular collective benefits more or less to the whole society, as in the right to vote, freedom of assembly, freedom of speech, freedom of the press, and other such guarantees in the Bill of Rights of the American Constitution; and (2) those that protect particular classes against themselves and against adversary classes, as in various so-called inalienable rights, such as the freedom from servitude. These two classes of protections address somewhat different strategic problems and should generally be kept separate in discussion. Rights or freedoms of the first class are generally permissive for the individual: they simply guarantee that the individual may do certain things if the individual wishes to. Those of the second class are generally binding on the individual: they require that the individual not do certain things. In this sense, rights of the second class are sometimes considered duties. But the label “duty” fits them no more perspicuously than the label “rights” since these protections are not so clearly directed at particular individuals as at classes or groups.

Let us consider these two classes of protections in turn. Those of the first class typically function to establish the form of governance of the society. In typical liberal societies, they tend to make politics and collective decision making more open, less fettered by particular powerful interests. In the vocabulary that many liberals like to use, they help to guarantee that politics takes place in a marketplace of ideas with open debate, careful scrutiny of government action, and strong protection of individual rights of participation. Although formulated as individual protections, they secure the genuinely collective benefits of democratic government. They do so not because they mandate that people act in certain ways but because they give people the freedom to act from their own incentives and on their own initiative.

These protections can be successful in their intendment only if people take advantage of the freedoms they provide to control and direct their government. Moderately egoistic people and reasonably utilitarian people can both be expected, from our experience, to take such advantage of these freedoms. For this contingent reason, the rights can be strongly defended by utilitarians—and perhaps also by most egoists, as libertarians assert (although an egoist with great resources might be expected to want to subvert them rather than to defend them). They can also be strongly defended by contractarians of both actual-consent and rationalist varieties, although one might suppose that such contractarians are very nearly utilitarian.

One can make a sophisticated claim that the protection of private-property falls in this class of collective protections rather than in the class of individual protections discussed above. The overwhelming value of the right of ownership of property is not in the enjoyment of what one has without fear of its being taken away but in the strategic or structural impact of such a right. The protection of private property gives extraor-

ordinary incentive to anyone capable of doing so to enhance the well-being of all or many of us by creating new wealth. This is, of course, the eighteenth-century Whig view of Smith and Hayek. Much of the early concern with freedom of contract is similarly, in fact, a concern with allowing anyone who can satisfy demands of others by producing and selling particular goods to do so without restriction.9 One might, as libertarians such as Nozick commonly do, simply assert such rights out of direct intuition as strictly justified at the level of the individual independently of their effects on the larger society. But if the economic and social theories of Hume, Smith, Mill, and other political economists are sufficiently correct, they can be solidly grounded in their general utility.10 On this point, contrary to his own apparent belief, Hayek is utilitarian.11

Turn now to the second class of collective protections. A typical view of so-called inalienable rights is that they are, and even must be, grounded in concern for individual autonomy. To quote an unlikely source, Knight says that freedom “is a ‘value,’ a thing the individual ought to want, even ought to have if he may not choose it, a part of the modern ideal of the dignity of the person. Thus the laws of liberal states do not allow men to sell themselves (or their children) into ‘involuntary servitude,’ even if they so choose.”12 In fact, however, the strategic case for the inalienability of certain rights is compelling and has long been recognized. These rights protect the interests of relevant classes of individuals by changing, in their favor, the terms on which they face other classes.

Consider Mill’s example of the problem of reducing the workday from ten to nine hours: “Assuming then that it really would be the interest of each to work only nine hours if he could be assured that all others would do the same, there might be no means of their attaining this object but by converting their supposed mutual agreement into an engagement

9. However, “to a considerable degree, freedom of contract began by being freedom to deal with property by contract” (Atiyah, p. 85).
10. Even Blackstone sees this: “Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey” (William Blackstone, Commentaries on the Laws of England [Chicago: University of Chicago Press, 1979, facsimile of first edition of 1766], vol. 2, p. 7).
11. Hayek supposes that the utilitarian program necessarily falters on the problem of limits to our knowledge to predict outcomes well enough for us to be act-utilitarians or to construct the rules to be rule-utilitarians. His complaint against utilitarians is not that the moral content of their theory is wrong but that the way they speak of applying it is wrong because they do not take account of human ignorance and social complexity, constraints that a rational chooser must recognize. Hence, his criticism of utilitarians is just his criticism of social theorists more generally (F. A. Hayek, The Mirage of Social Justice, vol. 2 of Law, Legislation and Liberty [Chicago: University of Chicago Press, 1976], pp. 17–23). Norman Barry accepts Hayek’s view of himself as not utilitarian (Norman P. Barry, Hayek’s Social and Economic Philosophy [Atlantic Highlands, N.J.: Humanities Press, 1979], pp. 129–31).
under penalty, by consenting to have it enforced by law.\textsuperscript{13} Because factory workers as a class face a difficult collective action problem, in which the logic is for all to favor the nine-hour day as a general rule but to work ten hours in their particular cases, they will wind up working ten hours for a day’s pay if they are not prevented from doing so. Hence, what they need is not the simple right to a nine-hour day but the inalienable right to a nine-hour day. Indeed, the force of the logic of collective action may make the simple right of little value. We might simply extend the freedom of contract to allow the members of such a class to contract among themselves to hold together in seeking their interest against another party. But that freedom would not help a very large group. Hence, Mill’s workers would require that their right be effectively inalienable.\textsuperscript{14} The problem of involuntary servitude is analogous, as may be the problem of marriage in perpetuity.

In all of these cases, the members of a relevant class are potentially pitted against each other to their collective harm, and the only way to secure them against that collective harm is to deny them singly the right to free ride on the abstinence of other members of the class. If one holds, as many, including Mill,\textsuperscript{15} do, that a right is for the benefit of the right holder, one might find it odd that, when it is ever invoked, it is actually invoked to stop the right holder from acting in a particular way. Therefore, libertarians can argue with some force that so-called inalienable rights are not rights but the denial of rights because they impose a duty—such as the duty not to sell oneself into servitude—on the supposed right holder. The notion of an inalienable right is somehow contradictory if it is seen as an individual right. It makes sense only at the group level because whatever benefit comes to an individual under the right comes indirectly through its effects on the relevant larger class. It is unfortunate that it has been given the name “right”—again, protection would be a better term.

Many of the first class of collective protections can be strengthened if they are made in some sense inalienable. For example, one can choose not to exercise the right to vote, but there are good reasons to block one from alienating it in the stronger sense of selling it. Making alienation in this sense virtually impossible secures the right in two ways. On the one hand, it makes the right to vote meaningful by preventing the destruction of the voting process through the buying of votes. On the other,


\textsuperscript{14} Mill does not recommend doing so (\textit{Principles of Political Economy}, p. 958).

it is a strategic device to protect holders of the right against coercions to which those rights would otherwise make them subject. In the case of voting, the requisite inalienability can be secured relatively easily by arranging the actual process of voting so that it is strategically almost impossible for one to prove that one has kept any bargain to sell one's vote. But we may go further and make it a crime to sell one's vote.

While the strategic justification for making such protections as freedom from involuntary servitude inalienable has not forced itself upon the understanding of many critics and defenders of the protection, one suspects that the parallel justification for outlawing the selling of votes would easily be accepted. Presumably no one would think it paternalistic to block the selling of votes—perhaps because this would clearly be a case of protecting a good that is conceived to be important generally to anyone and not only to members of a particular class. But one could imagine in most societies a large block of people who would willingly sell their votes. Hence, protecting the right to vote by making it inalienable is not qualitatively different from protecting the freedom from involuntary servitude by making it inalienable.

It is often claimed or apparently presupposed that people can never be made worse off by being given more possibilities from which to choose. That this claim is specious should be clear in such collective action contexts as those above. Requiring that people not take the individual choice that, if taken by all or even many, destroys the possibility of mutually beneficial collective gains helps to secure those gains collectively and hence individually. If I am not required to contribute to a collective benefit, I may prefer along with everyone else not to contribute. But against the outcome of such individualistic actions by all, I might prefer that all, including myself, be required to contribute to the provision of our mutual benefit. The examples I have given are powerful because each involves genuine and important interests of the class that faces a collective action problem. For example, suppose, as Mill assumes, that one of Mill's workers who simply chose to work nine hours while all others worked ten would get nine-tenths the daily wage of all workers if none could work more than nine hours. It follows that all would be significantly better off if they could not work more than nine hours.

One can cite other examples of cases in which more choice—hence more liberty—is worse than less, as Dworkin does when he canvasses such problems as the duel and coed dorms. Alexander Hamilton may have had little choice but to duel Aaron Burr if he wished to keep a political career. Hence, a scoundrel could impose horrendous burdens on someone who would not choose to bear such burdens. Hamilton had worked to block Burr's accidental election to the presidency over Thomas

Jefferson when the electoral college failed to decide between them in 1800. Had dueling been illegal and socially scorned, Hamilton would likely have been safe against Burr's efforts to revenge him for his action, and Hamilton might have lived much longer. The strategically similar complications of life under the social pressures of coed dorms may be left to the reader's imagination. In these, as in the other cases above, the only way to secure an individual benefit without undue cost may be to secure the collective benefit by denying certain courses of action.

In a minor aside, Rawls says that a person does not "suffer from a greater liberty." But Hart rightly counters that "it does not follow that a liberty which can only be obtained by an individual at the price of its general distribution through society is one that a rational person would still want." For example, I might want to have available to me the recourse to perpetual servitude in the event of severe economic duress. But if the only way to have it available to me is to have it available to everyone, the result might soon be a relatively widespread instance of slavery with substantially poorer prospects overall for hired employment. Hence, Rawls's Difference Principle might require that there be no slavery, as suggested by the following argument.

Suppose there are crudely three conditions into which the worst-off members of our society might fall: destitution without opportunity to work for support but with general freedom otherwise, slavery, and wage labor with general freedom. One can imagine that virtually everyone might prefer these in reverse order. Hence, without an inalienable right to freedom, the destitute might readily consent to slavery. If they were barred from consenting to slavery, however, you who need their labor would choose to hire them while leaving them generally in freedom. We could now apply the Difference Principle to two ways of organizing our society: one that imposes an inalienable right to freedom and one that does not. In both societies, the worst-off class would be destitute. But in the society with the inalienable right to freedom the next worst-off class would be wage laborers while in the society with the right even to alienate one's freedom the next worst-off class would be slaves. By Rawls's

17. Under the original constitutional provisions, members of the electoral college cast two votes for president. If the person who received the most votes got votes from more than half the electors, he was elected president. The person who received the second highest vote count, if it represented a majority of the electors, was elected vice president. Jefferson's cleverly organized party did not fit the original provisions because its representatives on the electoral college voted for the ticket of Jefferson and Burr, giving each the same number of votes, so that the election had to be decided in the House of Representatives where the opposition party, led by Alexander Hamilton, was in the majority. Against more destructive sentiments in his party, Hamilton preferred his enemy Jefferson to the scoundrel Burr. It was a fatal preference.

criterion, the first organization of our society, with the inalienable right, is more just.

Many examples of the creation of de facto inalienable rights in the actual laws of the nineteenth century of the United States and England involved breaking the supposed sanctity of the freedom of contract since they involved laws that protected classes against actions by their own individual members in contracting, for example, for longer days. Much of the legislation that protected specific classes of people by giving them legally inalienable rights is generally called paternalistic. That may often have been its stated motivation, but it can easily be understood as, in fact, an effort to redress strategic imbalances. The political rhetoric of the time had liberals such as T. H. Green defending the defenseless in order that they might eventually become autonomous, developed persons and conservatives defending the inviolable freedom of contract. But note what a restrictive quality contract had, perhaps especially in late nineteenth- and early twentieth-century American law. Contracts were dyadic, between individuals, not between a large class and an individual or another large class. To outlaw collective negotiations was inherently to disadvantage that class whose collective action problem was the more severe.

We may not be able to know what were the views of the workers, women, tenant farmers, and children protected by various pieces of supposedly paternalistic legislation over the decades, but it is plausible that, had they been able to express a collective will by voting rather than by individually entering their separate contracts, many of the groups would overwhelmingly have chosen to restrict themselves as the legislation eventually did. If so, then governments eventually took the side of one party against the other after long having defended the other. In these cases government action did not better the lot of the members of the relevant class against the members' own judgment, as paternalistic actions generally are supposed to do but, rather, in support of their judgment of their interests. How one should morally judge such a government change of heart turns on how one would evaluate the distributive justice of the two arrangements. To judge it as a violation of rights would be uninformative because either way, before and after the change of heart, a presumptive right was violated.

INSTITUTIONALIZATION OF RIGHTS

Once we have justified the creation of institutional safeguards for individuals rights we face the problem of individuals who have institutional and not merely act-utilitarian norms to follow. In “The Adventure of the Abbey Grange,” Sherlock Holmes explains this problem to Watson when he speaks of why he does not share his clues with Inspector Stanley

Hopkins: "You must look at it this way: what I know is unofficial, what he knows is official. I have the right to private judgment, but he has none. He must disclose all, or he is a traitor to his service. In a doubtful case I would not put him in so painful a position, and so I reserve my information until my own mind is clear upon the matter."²⁰ Those who know Holmes may be wont to ask why then he withholds from Watson and from us, who do not share Hopkins's disability. But we can nevertheless grant that there is a valid moral point in his withholding from Hopkins (as there is a literary point in his withholding from us and, hence, from Watson). Hopkins is rightly not free to act simply on his own momentary judgment of what is best on the whole; rather, he must act according to the norms or rules of his role as a police official. We would not trust a police force whose officers chose to act for justice on their own interpretations. Indeed, in the United States, perhaps justifiably more than in many nations, we want stringent controls on police practice.

There are several utilitarian reasons for wanting such controls, which give officials incentives to act in relevant ways (the incentives are therefore strategic—they focus on actions and not on kinds of outcomes). For one, we may not trust many police officers and others in the criminal and civil justice system. For another, we may suppose from our own behavior that people in such roles are apt to suffer from a professional deformation that might incline them to overzealousness. More generally, we simply want the officers of that system to carry out their charge as we have defined it and not some other way. In a meaningful sense we do not want such role holders to act in their roles as though they were fully autonomous. We create a system to make judgments of guilt or innocence and it cannot sensibly be left up to the individuals within the system to make those judgments on their own.

A commonplace criticism of utilitarianism has been that it cannot in fact justify merely the punishment of the proven guilty but must go further and demand the fraudulent punishment of anyone when the action produces better results on the whole. For instance, Carritt argues, it might be supposed that hanging an innocent after a well-publicized trial would deter actual murderers from killing many other innocents. Surely, then, as utilitarians we would want the one innocent hanged.²¹ This argument has been given perhaps its most cogent rebuttal by Rawls in "Two Concepts of Rules."²² Rawls writes that

the failure of Carritt's argument lies in the fact that he makes no distinction between the justification of the general system of rules


which constitutes penal institutions and the justification of particular applications of these rules to particular cases by the various officials whose job it is to administer them. This becomes perfectly clear when one asks who the "we" are of whom Carritt speaks. Who is this who has a sort of absolute authority on particular occasions to decide that an innocent man shall be "punished" if everyone can be convinced that he is guilty? Is this person the legislator, or the judge, or the body of private citizens, or what? It is utterly crucial to know who is to decide such matters, and by what authority, for all of this must be written into the rules of the institution. Until one knows these things one doesn't know what the institution is whose justification is being challenged; and as the utilitarian principle applies to the institution one doesn't know whether it is justifiable on utilitarian grounds or not.\textsuperscript{23}

Rawls goes on to underscore his argument by supposing that we had an institution for fraudulently punishing innocents—an institution of "delishment"—when such actions would produce better outcomes on the whole. The complaint that utilitarians must want such actions withers in the face of such apt ridicule.

It was prescient of Rawls to present an argument defending the creation of institutions on a particular moral ground and defending practices within the institutions on the ground of their coherence with the structure of the institutions. His theory of justice requires a similar move: it is not about particular actions but about the structure of society. To criticize his principles as inapplicable to particular actions in practice would be to miss the point of the principles.

If utilitarianism recommends an institution for punishment of properly convicted persons, then that is the kind of institution a utilitarian would want. We must create institutions to achieve utilitarian ends because individual actions unconstrained and unguided by institutional structures will not achieve them as well. There is perhaps no more grievous limit to individual human reason than this. It is precisely the point of such an institution as that for criminal justice to override individual reason for the social good.

Suppose more generally that one believes, as liberals generally do, that the way to secure the best results for individuals in their own lives is to protect them in their freedom of action from infringements by others and by the state. It follows that the relevant freedoms should probably be protected by law. But this means that, if a certain right may in a particular application override the general utility, the utilitarian who defends the institutionalization of the relevant right must also defend its apparently perverse applications. If enforcing the right of private ownership of property is generally better than not doing so, then it should be enforced. If there are specifiable classes of infringement of property that

\textsuperscript{23} Ibid., pp. 10–11.
would be utilitarian, however, these may also be institutionalized and
enforced. But it is implausible that we can design institutions, comparable
to Rawls’s institution of telishment, that could be used to make exceptions
from our generally institutionalized rules. There is likely to be no one
or no institution we would be willing to empower to decide to take A’s
property to benefit B simply because that would make the world better.
We can, however, easily imagine laws and institutions to tax all property
to benefit all those in B’s class. The capricious sorts of individual inter-
ventions that many moral theorists pose as counterexamples to institutional
utilitarianism can have no institutional home.

But note that Rawls’s argument is almost exclusively at the institutional
level (although he goes on to apply it to “practices”). One might still ask,
what of individuals? Suppose Holmes were Inspector Sherlock Holmes.
Should he, acting as a utilitarian in an official role, ever violate the rules
of his office? It is at least conceivable that he should. For instance, he
might come upon a case in which his private knowledge and judgment
of some aspects of an apparently criminal action recommended against
punishment. Yet he might well know that his knowledge would have
little weight in a trial court and that his reporting the case would likely
result in severe punishment. There might be no reason to expect any
external bad effects of his failing to report the case other than the slight
risk that he himself would be caught derelict in his duty and would be
punished with, perhaps, some exceedingly slight effect on the general
institution of criminal justice. As a utilitarian, Holmes might conclude
both that he should be derelict and that if he be caught he should be
punished as a “traitor to his service.” His view, as Hume, Bentham,
Austin, and presumably Rawls would hold, would not be incoherent.

Incidentally, one suspects that Carritt and other critics of institutional
utilitarianism would agree with Holmes’s judgment here. To that extent,
it seems likely that they have no real objection to individual action on
utilitarian grounds contrary to one’s official role. Rather, their objection
is probably to the kinds of actions they portray, which are actions harming
one innocent in order to prevent harm to others. Their real complaint,
that is to say, is the usual complaint that utilitarianism violates our concern
for fairness. This is generally an issue in distributive justice and as such
it goes beyond the present concern. These are not easy issues, but I think
any utilitarian would think it right to override fairness in sufficiently
gruesome circumstances. One suspects that Carritt would have to agree,
as Williams finally does after first implying that utilitarianism is particularly
grim on this score.24

Another complaint against the unjust action in such cases is more
pertinent here: that it violates the rights of someone. But this complaint

24. Bernard Williams, “A Critique of Utilitarianism,” in Utilitarianism: For and Against,
75–150, pp. 98–99, 117.
must assume some grounding for the affected rights. If rights are derivative from general utility, there can be no objection to overriding them in favor of general utility if there is no institutional complication such as that discussed above. That is to say, there may be no institutional way to override institutionalized rights, but an individual actor may act for the better outcome by violating someone’s rights. She may then justifiably suffer institutional sanction, with Inspector Holmes, but she may nevertheless think it morally justifiable to violate the right. Hume, who recognizes that the institutions of justice are artificial, which is to say, in large part contingent and conventional, says that those who use the word right “before they have explain’d the origin of justice, or even make use of it in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation.”

An individual may support the creation of institutions for the protection of rights, be unable to imagine an associated institution for overriding rights to produce outcomes better on the whole, think it right to act individually to override them for that reason, and also think it right that those who do violate rights even to produce outcomes better on the whole should still be punished for the violation just because there can be no sensibly designed institutional way to exempt them. This account is familiar from a standard view of civil disobedience, according to which one should disobey a law one thinks bad only if one were then prepared to suffer legal punishment for the disobedience.

The point of the institutionalization of various protections is not to spare us as individuals of the need to make judgments of right and wrong but to secure certain outcomes that would otherwise not be secured. Institutional arrangements must inherently have a certain uniformity. That is a characteristic of their great value, but it can also be the source of their rigidity in cases in which particular knowledge available to some individuals and not to others recommends against rigid adherence to their norms. Sometimes relevant knowledge is not usably available to an institution because the institutional safeguards on collecting knowledge prevent its using the knowledge. Typically this is a problem in American criminal law for the prosecution, which is strategically prevented from collecting information in certain ways by being prevented from using any collected in those ways. As a result, there must be many police officers and prosecutors who are morally certain of the guilt of many legally unconvictable miscreants. In such a case of regularly recurring failure of the system to bring people to justice, it would be wrong to commend to individual police officers that they should see that “justice” is done. In such a case, we design the institution to build in a greater likelihood

of one kind of failure in order to prevent too great a likelihood of another kind of failure.

If it is supposed that it is utilitarian to fail, specifically for reasons of blocked information, to convict some suspects, then it would be wrong for individuals in the criminal justice system to act against that norm—in large part because such action in standard, recurrent cases would destroy the system. The system that would easily survive the occasional dereliction by an Inspector Holmes on behalf of an accused would soon succumb to the recurrent excess of duty by its several officials against unconvictable miscreants. In some abstract sense one might wish to say that the latter actions would be just, but the sense is one that cannot be brought down to ground in a plausible institutional structure. In a meaningful sense, then, the actions would not be just.

CONFLICTS BETWEEN RIGHTS

Obviously, if there are several rights to be protected, their exercise may come into conflict. There are two general classes of conflicts of rights that are sufficiently common as to cause serious problems for a theory of rights. The first, and more widely understood, is the class in which the protected actions of one party coincidentally bring harm to another party, typically because of external effects of the actions. The second is that in which the protected dyadic right of contract conflicts with collective rights that would deny members of relevant collectivities the right to enter certain dyadic contracts. The first of these problems has historically been the focus of much of Anglo-Saxon common law. The second has more generally been handled by legislation or by default of either legislative or judicial intervention.

Both these classes of conflicts between rights are fundamentally problematic for a rights theory that begins with rights and that therefore has no prior principle from which to resolve the conflict. A utilitarian theory of rights would resolve either kind of conflict in principle by settling on that distribution of rights that produced better results overall. However, in practice, it might be nearly impossible to decide how best to allocate rights in particular classes of conflict. Some rights theorists might resolve conflicts that result from harmful externalities in favor of the harmed party on the presumption that harms and benefits are not morally symmetric. Coase, who counts them as strictly symmetric in his general concern with efficiency of production, argues that overall efficiency is not affected by the allocation of rights.26 His argument is remarkably simple. He supposes that, if on the one hand, I have a right to prevent you from undertaking a certain activity, you will bargain with me to allow you to undertake it nevertheless—if it is worth more to you to do it than

to me to prevent you from doing it. On the other hand, if you have the right to do it, I will bargain with you to get you to refrain—if preventing you from doing it is worth more to me than doing it is to you. Hence, irrespective of where the right lies, the activity will either be undertaken or not according as it is more valuable to undertake it or to prevent it.

The only effect choosing the one or the other allocation of rights will have is to determine which of the parties in the conflict has the initial advantage in bargaining for the gains from undertaking or not undertaking the relevant activity. Hence, the rights assignment is exclusively a matter of distributive, not productive, concern. Insofar as Coase's argument is correct, a utilitarian who thinks that money per se is an adequate measure of utility has no ground on which to allocate simple rights in conflict. Of course, a utilitarian who thinks money isn't everything faces a tough analytical problem of deciding which allocation of rights produces the better outcome.

Coase's analysis, which has considerable force for the allocation between two individuals, typically fails for the allocation of a right between an individual and a collective. His conditions of perfect information and no bargaining costs are far more unrealistic for a group than for an individual and his analysis fails to consider problems of collective action that undercut the hope that the parties in a collective can simply bargain their way to an efficient outcome.

The more interesting of the two classes of problems in the conflict between rights is conflicts between dyadic and collective rights. Such conflicts can arise either as simple problems of external effects of dyadic exercises of rights or as inherent conflicts between certain collective protections and the exercise of dyadic rights. Since little additional complexity follows from the consideration of the conflicts that arise from simple externalities and since these have been discussed at great length by many moral, political, and legal philosophers while the conflicts between dyadic and collective rights have been less well discussed, I will only briefly consider the former before turning more extensively to the latter.

The general problem of external effects of the exercise of rights may be exemplified by the following. A pattern of exchanges may produce incentives to coercion apart from that inherent in the relative power of the parties to the exchanges. For example, one might argue that free traffic in, say, drugs or prostitution will spawn violence and that, since the state cannot protect innocents against the consequent harms in any other way, it must do so by prohibiting or controlling the relevant exchanges. Such an argument turns, of course, on complex facts and causal relations and often cannot easily be supported. Many of the apparently paternalistic regulations of modern states may be motivated at least in part by such concerns and they are therefore not in principle illiberal—although they may be in fact. To decide whether to regulate, one would need an ordering principle to say which right takes precedence or a value judgment about which rights violation produces the greater harm.
Turn now to conflicts between dyadic rights, especially of contract, and collective rights when the latter are secured by directly infringing the former. Much of the politics of the nineteenth century in England and the United States over regulation of contract arose from such conflicts. Ironically, when Maine put the case for the shift from status to contract, it was already being succeeded by a contrary development. As Toynbee put the corrective argument, "The real course of development has been first from status to contract, then from contract to a new kind of status determined by the law,—or, in other words, from unregulated to regulated contract."27 The latter shift is the result of interventions by the state, partly to protect certain parties to contractual relations against others and partly to protect some of us from contractual (and noncontractual) actions by others. If we protect the rights of renters against landlords or of workers against employers, we generally do so by restricting what can be dyadically contracted. For example, workers may be secured the right collectively to negotiate a wage level with a given employer by blocking the "right" of others to contract with that employer to work for a lower wage. Rental and other contracts have implied clauses that cannot be signed away by mutual agreement, and many clauses in actual contracts are unenforceable.

Because the interests protected by collective rights are inherently subject to problems of the logic of collective action, we cannot generally expect to have relevant classes express their own interests with the force and clarity with which an abused individual or corporation might be expected to express its interests. Hence, if the rights of collectives are to be secured, they will commonly have to be secured by state action on behalf of the affected classes without the kind of general, in-principle agreement that we might expect to support the simpler dyadic rights of freedom of contract. We might suppose that establishing the right of dyadic contract is a very nearly Pareto-superior move from a crude status quo, in which restrictions on contract substantially suppress free exchange and even economic development. But then to establish certain collective rights that infringe the right to dyadic contracts is likely not to be even a nearly Pareto-superior move because it will enhance the power of one group at the expense of another without an offsetting substantial impact on general economic productivity. While libertarians and utilitarians may agree on the establishment of the freedom of contract, they are likely to part company over the establishment of collective rights.

RIGHTS VERSUS UNANIMITY

Rights theorists should perhaps be seen as the original strategic or game theorists. To have a right is to be free to take some particular kind of action in the context of actions by others. Rights are therefore ideally

suited to game theoretic representation. To say that I have the right to a certain kind of action is to say that my set of available strategies must include that of taking the action. To say that I have an inalienable right such as the right to freedom from slavery is to say that I cannot have available any strategy that includes the possibility of my entering into slavery. When we set up an institution to support particular rights, we basically arrange for outlawing any effort to change the relevant characterization of individual strategy sets. Conflicts of rights occur when the constraints on my strategies constrain your strategies against your rights. For example, your freedom of contract is restricted not to include freedom to contract with me for my perpetual servitude to you.

Sen has argued that liberalism is logically even more muddled than our discussion of conflicts between rights suggests. According to his theorem of the "liberal paradox," or the "impossibility of a paretian liberal," the existence of even one right each for two persons is potentially in conflict with the simple principle of unanimity, or the so-called weak Pareto principle, according to which, if everyone prefers \( x \) to \( y \), then \( x \) should be preferred by society to \( y \). Assuming an adequate understanding of what \( x \) and \( y \) imply for everyone, any utilitarian seemingly must accept the weak Pareto principle. Hence, if Sen's theorem is correct, any theory of rights must potentially conflict with utilitarianism. As he says, "The fact that unqualified use of the Pareto principle potentially threatens all rights gives the conflict an extraordinarily wide scope."  

It happens that Sen's motivating example for his theorem is, in game theoretic representation, a Prisoner's Dilemma because it is a simple problem of exchange. A slightly mean, lewd fancier of such (somewhat old-fashioned) pornographic literature as *Lady Chatterley's Lover* would sooner have her prudish neighbor read the novel than read it herself. Prude, the self-appointed protector of society's morals, would sooner read it than have Lewd read it. Lewd has the right to read it and Prude has the right not to read it. But, by unanimous preference they choose to have Prude read it in return for Lewd's not reading it. Hence, Sen concludes, both rights are violated.

Sen's conclusion is transparently wrong for this example. Sen seems to have confused rights with obligatory actions. Liberals do not insist that one must exercise one's rights except in cases of inalienable rights. Indeed, it is obvious that among the most important of all rights in the liberal canon are the right of exchange and its correlative right of contract, rights whose exercise is required for the result of Lewd's and Prude's bargain to work. When I exchange something I own for something you own, I do what I have a right not to do. It is not sensibly said that I

therefore violate my right of ownership. As Lindsay says, the exchange "relation is a peculiar one. In it, A gives B what B wants, in return for B giving A what A wants. . . . A is not responsible for B's wants, nor B for A's; and therefore—in this curious relation not A but B decides what A should do: and not B but A decides what B should do."30 Sen would have it be not only peculiar but wrong.

For a relevantly chosen example, however, there might be some force to Sen's theorem. Suppose Lewd and Prude struck a bargain to exchange their inalienable rights or even merely to override Lewd's inalienable right. This would be a unanimous choice (at least of the two parties most immediately concerned) and yet it would violate a right. On the account of inalienable rights given above, it should be clear why such a violation is blocked even though it might be preferred by the most immediately affected parties. Indeed, on that analysis it is clear that the strategic structure of a utilitarian inalienable right cannot be represented with only two people: it requires consideration of the stake of the larger class of which at least one of the two is a member. If the right is inalienable on other grounds, there is no paradox in a conflict between that right and the Pareto principle. Of course, liberalism is fundamentally a rejection of such notions of right, as is its close relative, utilitarianism. Therefore, we should not jump to conclusions so quickly merely from a consideration of unanimous preferences in the matter of Lewd and Prude to say that liberalism is in logical difficulty. Again, we should realize, with Rawls, that there are two kinds of justification at issue here and that the kind on which Sen is relying is ruled out in advance. Having a right at all is like an institution in that it is justified in general. Actions under the right are then judged not simply by preferences but also by conformity with the right.

In the inalienable rights instance of Sen's liberal paradox, it is easily seen that the relevant right is in conflict with the preferences of the two actors. But the point of such rights in a contingent theory, as in the utilitarian theory of rights, is to afford us protections against certain kinds of actions that we could not individually guarantee for ourselves. This is necessary in many cases precisely because relevant preferences in particular moments will lead to a result that, on the whole, we consider worse than if the actions of all parties were restricted in such a way as partly to violate their momentary preferences. It is therefore no surprise that Sen finds his supposedly paradoxical conflict between preferences and—inalienable—rights. Indeed, his paradox boils down to a special case of the more general logic of collective action. All prefer cooperation (the maintenance of a certain right, for example) by all to noncooperation, but each prefers not to cooperate because there are benefits to be had from going against the general agreement. That is why we choose to

enforce the general agreement against our own momentary preferences in specific cases. There is surely no paradox in the action of strategically constraining our own actions in advance in order to make ours a better world, considered from our own interests, in which to live.

Perhaps part of the reason for the confusions of Sen's liberal paradox is that it is expressed in the formulations of Arrowian social choice theory. Hence, it is not about strategy choices but only about actual outcomes. In the Arrowian literature, one simply ranks states of affairs and concludes from rankings of all parties what should be the social or collective ranking of the states of affairs. If this were our business in actual life, we would have no need of rights since we would simply produce a social choice and that would be the end of it (or, in light of all the impossibility results, we might reach impasse and that, alas, would be the end of it). But in actual life we do have need of institutions for getting things done and for ensuring certain rights because we bumble along from day to day and generation to generation trying to make the best of things for ourselves. Since your efforts to make things best for you may tend to make them worse for me, and vice versa, when a little coordination or cooperation might have been better for both, we may both agree to establish certain protections in advance that, in particular moments later on, we might one or the other or both prefer to violate. That is part of the logic of the rights of liberalism.

Consider for a moment the form of Sen's example and ignore the content of it. He shows that unanimity conflicts with two rights in a society of two people. Now put questions like those Rawls put to Carritt to Sen. Who is concerned with the supposed rights violations in Sen's two-person society? Why would anyone in that society have conceived of a need for inalienable rights? And if they ever did establish rights for their society, why would they then object to having an override clause in any case in which they both wanted it? Against whom are they protecting themselves with inalienable rights that block them from acting when they unanimously agree on some action?

If theirs were not a two-person society, we could give sensible answers to these questions. If Lewd's and Prude's rights in a larger society are and ought to be inalienable, that is because of the effects of their violation on others. In our larger society, with our need for protections against certain individually rational but often collectively destructive actions, we need such rights. Once we have them, we may be no more able to design the institution for making specific exceptions for ourselves than we can design a sensible institution for telishment. That present agreements may not seem attractive in the future is so far from being a paradox that it is among the most important of all reasons for law and by far the

most important reason for the law of contracts. When the constraints of
our general agreement are further exacerbated by the logic of collective
action, we get Sen's odd paradox, so called. It seems paradoxical only
because he imposes rights to deal with the kinds of constraints that real
societies face—strategic interactions and severe limits to reason and in-
formation that require that we create institutional devices to handle them—
on a peculiar society or partial society of two people in which such
constraints cannot meaningfully be resolved by institutional arrangements,
in which rights have no reasonable basis.

CONCLUSION

Rather than summarize the foregoing arguments, I wish briefly to do
two things: first, to suggest how this account of rights may clarify confusing
aspects of rights theories that often have a claim on our understanding
because they seem generally right in certain circumstances; and second,
to state one caveat on the apparent claims here.

Against much of this argument, one may still wish to assert that
rights are fundamental, that they are not derivative from other consid-
erations, such as consequences. I do not wish to take on such a view here
other than to note some advantages of a derivative account of rights. If
rights are viewed as metaphysical or abstract rather than contingent, they
must be defined very simply without many subclasses, distinctions, or
exceptions. Legal rights, as opposed to moral or human rights, do not
suffer from this disability. They can be modified to meet new situations
or conditions and they can be highly articulated with manifold subclasses,
distinctions, and exceptions. If a situation occurs in which the application
of a particular right leads to undesirable outcomes, perhaps because
suboptimal, then the right can be redefined or slightly altered to fit the
relevant situation. Hence, in an institutional system of rights, the persistent
occurrence of bad outcomes should be rare, or at least only short-lived
until the relevant modifications can be made.

Similarly, on the derivative, utilitarian account of rights presented
here, rights may change through time as the conditions of social interaction
change, and they may differ across societies in understandable ways to
adapt to strategic considerations. What set of rights should be defended
will depend on what set will produce desirable results under the circum-
stances. For example, the right of contract should change as economic
conditions change. Perhaps at one time the right of contract should
have been nearly untrammeled in order to encourage productive activities
under the conditions of the nascent industrial economy and early market
of, say, eighteenth-century England. Today, perhaps, the right of contract
should be restricted in certain systematic ways to prevent imbalances of
economic power from grievously affecting certain kinds of transactions
and to prevent certain kinds of external effects, such as air and water
pollution and neighborhood destruction. Anyone who tries to defend an
unvarnished right of contract for any two parties to do whatever they want to do under any circumstances will be met with vacant stares from most moral and political theorists today.

The derivative, utilitarian view of rights is largely an account of what institutional protections we should have. Hence, it is a normative account of what legal rights we should have. To some extent it may also seem to give an explanation of the system of legal rights and institutional protections we have—if we further assume that desirability somehow produces relevant causal forces. To some extent such an assumption may be compelling. If we have constructed institutions that work against individuals' interests, we may expect them under certain circumstances to try to change those institutions. Hence, if some of our legal rights are not utilitarian, we may expect some pressure to change them toward more utilitarian rights. No one could sensibly suppose that such pressure would be overwhelming or that there might not be powerful countervailing pressures toward less utilitarian rights. Therefore we cannot sensibly suppose that a normative and largely conceptual account, such as that presented here, yields easy explanations of actual rights.