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Jeremy Waldron

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Rights in Conflict

*Jeremy Waldron**

INTRODUCTION

This paper is about conflicts of rights. It asks whether, in our moral thinking, we should regard rights as considerations that are capable of conflicting with one another, and, if they are to be thought of in this way, how such conflicts should be resolved. I do not have any definitive answers to these questions, partly because how we answer them depends on how we conceive of rights. However, I shall argue as follows: first, that if rights are understood along the lines of the Interest Theory proposed by Joseph Raz, then conflicts of rights must be regarded as more or less inevitable; second, that rights on this conception should be thought of, not as correlative to single duties, but as generating a multiplicity of duties; and third, that this multiplicity stands in the way of any tidy or single-minded account of the way in which the resolution of rights conflicts should be approached.

COMPETING CONCEPTIONS OF RIGHTS

Questions like these are complicated by the lack of any consensus about the proper conception of rights. Not only do philosophers differ about what rights we have, they differ also on what is being said when we are told that someone has a right to something.

These disagreements have a direct bearing on our question about moral conflicts. Consider the conception of rights put forward by Robert Nozick. According to Nozick, rights are to be thought of as *side constraints*—limits on the actions that are morally available to any agent. They are essentially negative in character, requiring each agent to *refrain* from performing actions of the specified type: they never require anything other than an omission. And they are *agent-relative*, in the sense that each

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agent is taken to be concerned only with her own observance of the constraints. Since each constraint presents itself to her simply as a limit on *her* conduct, she is not required by a concern for rights to try to limit the conduct of others to see that rights are respected by them, and so the question of whether she should violate some rights herself in order to prevent graver violations by others does not arise.¹ On this conception, rights are more or less incapable of conflicting with one another. But, of course, the price for this tidiness is a severe limitation on the types of moral concerns that can be articulated in the Nozickian framework.²

Consider now the conception of rights put forward by Joseph Raz. According to Raz, a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty.³ Thus, when A is said to have a *right* to free speech, part of what is claimed is that her interest in speaking out freely is sufficiently important in itself from a moral point of view to justify holding other people, particularly the government, to have duties not to place her under any restrictions or penalties in this regard.

On this conception, basing duties on rights is quite a different matter from basing them on general utility. For a utilitarian, the government's duty to let someone speak out is never inferred merely from the importance of the interest that the individual person herself has in the matter; rather it is inferred from a calculus that relates the importance of that interest to the importance of every other interest that may be affected by the imposition of the duty. By contrast, a theory of rights bases its commitment to the practice on the good to each individual, taken one by one, of being able to speak her mind freely. In other words, A's right to free speech is based on the importance of A's interest in the matter, B's right is based on the importance of B's interest, C's on that of C, and so on; whereas for the utilitarian, free speech for A may be justified only through a calculus of the interests that A *and* B *and* C *and* everyone else have at stake in the matter.

Clearly not all individual interests have sufficient importance to form the basis of rights. There are some interests such that the utilitarian mode of calculation is the only appropriate basis for determining morally the respect that they require. On Raz's conception, the idea of rights is a discriminating idea, sorting out those interests that merit special attention from those for which utilitarian calculation seems appropriate. It is the task of a substantial *theory* of rights to provide a rationale for this discrimination.

1. Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), pp. 28–29.

2. *Ibid.*, p. 238.

3. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), p. 166.

Unlike Nozick's view, Raz's conception provides no basis for any confidence that rights or the duties they generate will not conflict with one another. A theory of rights singles out certain interests on the basis of their moral importance. We know individual interests often conflict with one another—that is the stuff of moral and political life. It does not always happen: no doubt there is a set S1 of individual interests the members of which are perfectly compossible with one another and can all be served and promoted without posing any hard choices.⁴ But it would be surprising—indeed, a massively improbable coincidence—if the set of interests associated with the special level of concern that rights indicate (call it S2) just *happened* to be coextensive with S1. It is unlikely, not only because we have no reason for thinking that these properties—compossibility and moral importance—are invariably associated but also because what we know of the human condition indicates that many of the areas in which moral conflicts happen are exactly the areas of life in which important individual interests are engaged.

Thus, different ways of setting up a conception of rights lead to quite different conclusions about the possibility of rights conflicting with one another. The negative and agent-relative structure of Nozick's theory more or less precludes such conflicts, even before we ask about the content of Nozickian rights; whereas Raz's Interest Theory indicates that conflicts of rights, though not logically necessary, are in the circumstances of the real world more or less inevitable.

It is tempting to think that we have to decide who is right about rights—those who think of them as side constraints or those who adopt the Interest Theory—before we can answer the questions with which we began. But that may be a mistake, born of the conviction that the phrase 'moral rights' must have a single correct meaning. A more sensible approach may be to say that Nozick and Raz are identifying two quite different types of moral consideration (for all that they use the common term 'rights' to describe them) and that, while there may be interesting questions about which type of consideration matters more or is more important, there is no interesting question about which really captures the essence of *rights*.⁵ Since we are interested above all in moral conflicts, we should focus on the Interest Theory, since the issue is not one that arises for

4. I shall say two or more interests are "compossible" if it is possible for them all to be promoted. More precisely, I shall call two or more duties "compossible" if it is possible for them all to be performed (see Hillel Steiner, "The Structure of a Set of Compossible Rights," *Journal of Philosophy* 74 [1977]: 767–75).

5. See Thomas Nagel, "Libertarianism without Foundations," in *Reading Nozick: Essays on "Anarchy, State and Utopia,"* ed. Jeffrey Paul (Oxford: Basil Blackwell, 1982), p. 198, for the suggestion that a Nozickian concern for side constraints cannot possibly be represented as a concern for the interests which the side constraints purport to protect. Nozick's approach in which each agent is more concerned with not being an attacker than with potential victims' not being attacked (by anyone) seems more focused on issues related to agents' integrity than on issues related to victims' suffering.

the sort of moral concern on which Nozick's conception is focused. If someone wants to insist that the conflicts we are studying are not really conflicts of *rights*, that can be conceded. Though we shall call them "rights," the substantial point is that they are a distinctive type of moral consideration and the conflicts they give rise to are important.

"OUGHT" IMPLIES "CAN"

When we say rights conflict, what we really mean is that the duties they imply are not compossible. Two people, A and B, may be said to have rights which conflict if some interest of A is important enough in itself to justify holding some person, C, to be under a duty whose performance by her will not be possible if she performs some other duty whose imposition is justified by the importance of some interest of B. For example, if we think that A's interest in not drowning is sufficiently important to justify holding others to be under a duty to rescue her when she gets into difficulties, and if we think (for reasons of universalizability) that the same is true of B's interest in not drowning, then we will be faced with a conflict of rights whenever both are in difficulties and there are resources available to rescue only one.

Here is a common objection to the idea of rights conflicts. If we are unable to rescue both A and B then, since "ought" implies "can," it is not the case that we *ought* to rescue both A and B. The objection is fallacious. The conflict arises from the fact that we can and ought to rescue A together with the fact that we can and ought to rescue B. Each "ought" satisfies the requirement of practicability. The situation would not be nearly so awful from a moral point of view if one of the victims could not be rescued anyway (e.g., because she was too far out to sea already); the tragedy of the conflict consists in the fact that we could rescue either of them, but not both. So while it would be a mistake to say that we ought to rescue both A and B, the principle that "ought" implies "can" does nothing to alleviate the fact that we are pulled morally in different and incompatible directions by the generalized duty to rescue.

This point is important for evaluating what critics sometimes say about welfare rights. Sometimes it is said that there is no human right to welfare (education, a decent standard of living, medical care, a job, holidays with pay, etc.) because these are not goods that can be secured in poor countries for everyone. "If it is impossible for a thing to be done, it is absurd to claim it as a right. At present it is utterly impossible, and will be for a long time yet, to provide 'holidays with pay' for everybody in the world. For millions of people who live in those parts of Asia, Africa, and South America where industrialization has hardly begun, such claims are vain and idle."⁶ But for each of the inhabitants of these regions, it is *not* the case that her government is unable to secure holidays

6. Maurice Cranston, "Human Rights—Real and Supposed," in *Political Theory and the Rights of Man*, ed. D. D. Raphael (London: Routledge & Kegan Paul, 1967), p. 50.

with pay, or medical care, or education, or other aspects of welfare, *for her*. Indeed, it can probably do so (and does!) for a fair number of its citizens, leaving it an open question who these lucky individuals are to be. So, for any inhabitant of these regions, a claim might sensibly be made that her interest in basic welfare is sufficiently important to justify holding the government to be under a duty to provide it, and it would be a duty that the government is capable of performing. So, in each case, the putative right does satisfy the test of practicability. The problems posed by scarcity and underdevelopment only arise when we take all the claims of right together. It is not the duties in each individual case which demand the impossible (as it would be, e.g., if we talked about a right to happiness or something like that); rather it is the combination of all the duties taken together which cannot be fulfilled. But one of the important features of rights discourse is that rights are attributed to individuals one by one, not collectively or in the aggregate.⁷

RIGHTS AND TRADE-OFFS

Many philosophers are reluctant to admit claims to the realm of rights if they seem likely to conflict with one another. One reason is that they are simply worried about the proliferation of rights claims. The more interests that are accorded rights status, the more potential for conflict there is. A no-conflict requirement, then, is a good heuristic for keeping the number of valid rights claims down to a decent minimum.

However, a more interesting ground for opposition to the idea of rights conflicts has to do with the fact that much of the impetus toward rights in the first place stemmed from a deep moral unease about the way in which moral conflicts were resolved in the utilitarian tradition.

Utilitarianism is sometimes regarded as the one moral theory that manages to avoid the issue of conflict. Since it is “a single-principle conception with one ultimate standard” it does not face the problem of weighing different principles against one another in the way “intuitionistic” theories do.⁸ However, a better way of looking at the utilitarian standard (“Maximize happiness”) is to see it as a master rule designed precisely to resolve, rather than avoid, the myriad conflicts generated by its positive evaluation of every occurrence of happiness and its negative evaluation of every occurrence of suffering. The much vaunted coherence and completeness of the theory consists, not in the fact that its value theory avoids conflicts, but in its unflinching commitment to a single simple principle for dealing with those conflicts when they arise.

To many theorists of rights, the utilitarian approach to conflict resolution is unpalatable. Utilitarian reasoning involves *trade-offs*: if there

7. Of course, a claim of right must be universalizable. But universalizability demands only that the reasons for holding that there is a duty to serve the interest of one person should also apply to the same effect in the case of any other, if her interests and circumstances are relevantly similar. It does not require compossibility in the sense defined in n. 4 above.

8. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), p. 41.

are two courses of action open to us, one harming A and the other harming B and C (with equal degrees of gravity), we are justified in harming A because her loss can be "traded off" in our moral computations against a commensurate benefit to B (the benefit of not being harmed), leaving the similar benefit to C (of not being harmed) as the determining factor for our decision. But justifying harming A in this way seems a callous and exploitative thing to do. It seems like a way of *using* her for the benefit of others, and as such it seems to violate the Kantian injunction against the exploitation of human beings as means rather than ends in themselves.

The idea of rights was seized on by many as a way of resisting these trade-offs. Rights express limits on what can be done to individuals for the sake of the greater benefit of others; they impose limits on the sacrifices that can be demanded from them as a contribution to the general good. Though we may reasonably be required to accept some losses and frustrations in social life along the lines that the utilitarians suggest, rights are designed to pick out those interests of ours that are not to be traded off against the interests of others in this way. They are, to use Ronald Dworkin's image, our "trump cards," to be played in the last resort to protect the basics of our individual freedom and well-being.⁹

But if rights themselves conflict, the specter of trade-offs is reintroduced. For in identifying those interests that are not to be sacrificed to the utilitarian calculus, we may still be picking out interests that are incompatible with one another and so reproducing in the realm of rights the very issues that we tried to avoid in the realm of social utility. People, we may think, are likely to feel as used and as exploited when a "right" of theirs is traded off against the "rights" of others as they are when a similar choice is made under the blander guise of maximizing satisfaction.

Later I shall argue that brute trade-offs may not be the only option open to a theorist who faces the sort of conflict we have been discussing. But even if it were, there are some points worth making to address the concerns outlined in the previous paragraph.

First, it is important not to saddle the proponent of trade-offs with responsibility for the actual existence of moral conflicts. Whether a given interest of A can be pursued or protected compossibly with a given interest of B is a matter of fact. If it can, then fine. But if it cannot, then a hard choice *has* to be made, on any account, and the only way of mitigating its hardness is to diminish the concern we feel about one or both of the options. It is not the fault of the theorist who proposes trade-offs that there are sometimes several drowning people and only one lifeguard. The theorist's sin (if it is one) is simply that of recognizing the dilemma for what it is, and of refusing in all honesty to say that a consideration loses the status of a right when it happens to conflict with another. Or to put it the other way round, people would still drown in these situations if we refused to countenance the idea of trade-offs; the

9. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), p. xi.

only difference would be that we would no longer say that they had a right to be rescued!

The second point is more conciliatory. There *are* differences between the trade-offs involved in utilitarian theory and the sort of trade-offs that might be adopted as a solution to conflicts of rights. The worry that some of us have about the calculus of utility is not so much that individual interests are traded off against one another: that, as we have just seen, may be inevitable (no matter how it is characterized). The worry is that, in the utilitarian calculus, important individual interests may end up being traded off against considerations which are intrinsically less important and which have the weight that they do in the calculus only because of the numbers involved. For example, a minority's interest in political freedom may be traded off against the satisfaction of the desires of a majority to be free from discomfort and irritation. Or a person's life may be sacrificed in the circus for the sake of a momentary thrill enjoyed by millions.

On this account, what is wrong with utilitarianism is not that it contemplates trade-offs but that it combines the idea of trade-offs with a doctrine of the quantitative commensurability of all values. This means that each distinct value (every interest, every pleasure) can be expressed as an arithmetical function of every other, since all can be reduced to a single metric of satisfaction. So—for the utilitarian—there is an amount (maybe large, but certainly finite) of comfort which it is not worth sacrificing for the sake of someone's life, and there is a quantity of pleasure, let us say, which is worth preserving in a community even at the expense of the abject deprivation of an underclass. All that matters is that the numbers be large enough on the side of the lesser consideration. Now, these are not merely puzzle cases conjured irresponsibly out of the philosophical imagination to embarrass the utilitarian.¹⁰ They are direct consequences of the feature of utilitarian theory on which its proponents most pride themselves: that it is a monistic theory of value, with a single metric and a unified decision procedure, and that it gives no interest or value qualitative precedence over any other. The trade-offs contemplated by the rights theorist are unhappy enough, but probably inevitable: sometimes one life *must* be sacrificed so that a greater number of lives may be saved. But some of the trade-offs that can be based on utilitarian commensurability seem simply obscene, and the rights theorist should be perceived as resisting those, even though she is not necessarily resisting the idea of trade-offs as such.

WAVES OF DUTY

We saw earlier that talking about conflicts of rights is a way of talking about the incompatibility of the duties that rights involve. What we refer

10. See Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), pp. 285–91, for a discussion of the role this sort of example should play in political philosophy.

to as a trade-off of one right against another, then, need not involve the sacrifice of one of the *rights*; rather, it involves a decision not to do what is required by a particular *duty* associated with the right.

That distinction may seem specious until we recognize that—on the Interest Theory, at least—rights are unlikely to stand in a simple one-to-one relation with duties. We talk about rights when we think that some interest of an individual has sufficient moral importance to justify holding others to be under a duty to serve it. But if a given interest has that degree of importance, it is unlikely that it will justify the imposition of just one duty. Interests are complicated things. There are many ways in which a given interest can be served or disserved, and we should not expect to find that only *one* of those ways is singled out and made the subject matter of a duty. For example, if an individual's interest in speaking freely is important enough to justify holding the government to be under a duty not to impose a regime of political censorship, it is likely also to be sufficiently important to generate other duties: a duty to protect those who make speeches in public from the wrath of those who are disturbed by what they say; a duty to establish rules of order so that possibilities for public speech do not evaporate in the noise of several loudspeakers vying for the attention of the same audience; and so on.

Even a particular duty, thought of as associated with a right, itself generates waves of duties that back it up and root it firmly in the complex, messy reality of political life. The right not to be tortured, for example, clearly generates a duty not to torture. But, in various circumstances, that simple duty is likely to be backed up by other duties: a duty to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on. Once it is discovered that people have been tortured, the right generates remedial duties such as the duty to rescue people from torture, the duty on government officials to find out who is doing and authorizing the torture, remove them from office, and bring them to justice, the duty to set up safeguards to prevent recurrence of the abuses, and so on. If these duties in turn are not carried out, then the right generates further duties of enforcement and enquiry with regard to *them*. And so on.

In the case of each of these duties, the argument for imposing it is traced back, via an awareness of the complexities of political life, to the concern for an individual interest that underpinned the right in the first place: we say that the right protects a basic human interest and that in the current circumstances of human life one cannot be said to take that interest seriously if one is content to stop at the *previous* wave of duty and not worry about anything further. A conception of rights which regarded each right as simply a correlative reflection of some independently justified duty might not have this characteristic (though I am inclined to think that any *credible* theory of political rights is likely to be susceptible to the sort of extrapolation sketched out in the previous paragraph). But

certainly the rights contemplated in an Interest Theory will work like this, for our conception of the interest will operate rather like a normative resource base from which a whole array of moral requirements can be developed.

Someone may object that this account of the way rights generate duties depends on a particular view about the individuation of duties. For example, are the duty not to torture and the duty to punish those who do really distinct from one another? Or are they simply different facets of one and the same duty? As with most such issues, it is difficult to know what would count as a way of resolving it, and in the end I do not think it matters. Whether we are dealing with a multiplicity of duties or whether we are dealing with the multiple facets of a single duty correlative to the right, the points I want to establish on the basis of this analysis remain the same.

A first point is that we are unlikely to be able to sustain any simple division between negative and positive rights of the sort that liberals have often tried to work with. Those who criticized the inclusion of “socio-economic” rights in the Universal Declaration, for example, sometimes argued that these were “positive” rights—that is, rights correlative to duties positively to perform some action or render some service—whereas the traditional rights of liberal theory, such as the right to free speech or freedom of religion were “negative” rights—that is, rights correlative to duties that required only omissions of those whom they constrained.¹¹ The chances were much less that “negative” rights would conflict, because a given agent could perform any number of omissions at one and the same time.

If we accept, however, that rights mark the way in which interests generate duties, then the picture is likely to appear much less tidy than this. A duty to refrain from interfering with someone’s freedom is likely to be accompanied by a “positive” (and therefore costly) duty on other agents to protect people from such interference. And a duty positively to provide people with welfare is likely to be accompanied by various “negative” (and thus relatively costless) duties on other agents to refrain from interfering with such provision if it is already underway. One and the same right may generate both negative and positive duties: some will require omissions while others will require actions and the expenditure of resources. This means that it may be impossible to say definitively of a given right that it is purely negative (or purely positive) in character. And since what actually conflict for us are the duties that rights generate from time to time, it means that it is very unlikely that we will be able to pick out in advance any set of rights—liberal or otherwise—and say confidently, “*These* rights will never conflict in any of the requirements that they generate.”¹²

11. See Cranston.

12. See also Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1980), pp. 35 ff.

A second consequence takes us back to the point about trade-offs, with which we began. Once we accept that rights are to be thought of as generating not just one duty but successive waves of duty, then the whole language of trade-offs—the idea of trading off A's right against B's—with its resonance of callous amorality, may begin to seem less drastic. Rights conflicts arise when a duty generated by one right is not compossible with a duty generated by another. But it is most unlikely that, in a given case, *all* the duties generated by the rights in question will be impossible. This means that even while we are "trading off" one duty generated by A's right against one duty generated by B's, we may nevertheless be perfectly well able to fulfill *other* duties owed to A in regard to that right. Consider a conflict between putative rights to medical care held by A and B. A shortage of medical resources may mean that A's primary needs go untreated for a while. But her right to medical care (along with those of others who have missed out) continues to impose other duties. It places constraints on the sort of production and trading decisions we may make in the economy; if we have a choice, we may not produce or import luxury goods at the expense of the medical resources we are short of. It may require us to start training more doctors. It may require us to set up an inquiry into the state of health services. It may even require us to compensate the victims of the trade-offs in other ways if we can. All of this may be owed to the bearer of a right, in virtue of the moral importance of the interest that the right protects, even though what appears to be our primary duty to her in this regard cannot be discharged.

So an individual's right does not simply disappear from view once it has been traded off against the rights of others in the sort of cases we have been imagining. It remains in the picture and must be taken seriously as a residual source of other duties and obligations. Since rights generate not single duties but what I have referred to as successive waves of duty, the trading off of one right against another, in a situation of conflict, is never the end of the story. (It should be obvious that exactly the same points can be made about our ability to satisfy *some aspects* of the [single] duty that a given right entails even when we cannot satisfy all of them, if we prefer to speak of single-duty correlativity.)

THE DIFFICULTY OF AN ORDERING

A third point is less helpful. The existence of successive waves of duty associated with a given right is likely to play havoc with any tidy sense of the priority that the right has over other moral considerations.

The discussion at the end of the fourth section, "Rights and Trade-Offs," suggested that a theory of rights singles out certain interests whose promotion or protection is to be given qualitative precedence over the social calculus of interests generally. We expressed concern about utilitarian commensurability, and we hinted at something like a "lexical priority" of rights over social utility: the interests identified as rights are to be

attended to before any question of attending to other, less important interests arises.¹³ Now, as John Rawls has pointed out, the idea of lexical priority seems ill-suited to principles or moral considerations which are, so to speak, open-ended in the requirements they generate: “unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play.”¹⁴ We surely think that *some* attention is due to considerations of ordinary utility, and while it is reasonable to postpone that until the most striking of the requirements generated by rights have been satisfied, it is not reasonable to postpone it forever while we satisfy duty after duty associated with rights. Maybe there is no limit on the social convenience that should be sacrificed for the sake of the prohibition on torture. But is there equally no limit on the convenience that should be sacrificed for the success of the Commission of Inquiry that has been set up to bring torturers to justice and ensure that torture is made marginally less likely in the future? If the interest is the basis of the moral importance of the duty, and if at least one of the duties generated has priority over some other moral consideration, does that mean that all the duties generated by concern for the interest have the same priority? And if not, why not?¹⁵

One way of answering the last question might be to distinguish those duties whose infringement would lead directly to a palpable harm to the interest in question, from those whose infringement only makes it marginally less likely that the interest will be served. Given an assignment of moral weight to the former, the latter might be treated probabilistically, having some fraction of that weight or importance. But the quantitative image of weight seems unsatisfactory in a number of ways. For one thing, not all of the duties generated are related instrumentally to the interest in the way this approach requires: for some the connection may be symbolic (consider, e.g., a retributive account of the duty to punish rights violators). And anyway, in a lexical ordering, this sort of move is unavailable: there cannot be fractions of lexical priority. On the contrary, if a duty to make it marginally less likely that an important interest will be harmed may be balanced legitimately against lesser considerations of utility, then the logic of the idea of weight suggests that ultimately *any* duty associated with the interest may be dealt with in that way.

RIGHTS AGAINST RIGHTS

The same point applies to any attempt to establish an ordering among rights themselves. Conflicts of rights can be placed initially in two categories: *intraright* conflicts, that is, conflicts between different instances of the

13. The idea of “lexical priority” is explained in Rawls, pp. 42–44.

14. *Ibid.*, p. 43.

15. These questions are discussed also in James Griffin, “Towards a Substantive Theory of Rights,” in *Utility and Rights*, ed. R. G. Frey (Oxford: Basil Blackwell, 1984), pp. 137–60.

same right; and *interright* conflicts, that is, conflicts between particular instances of different rights.

Intraright conflicts are exemplified by the demands made by a number of sick or injured people on a stock of scarce medical resources. If those people are thought to have a right to medical care, some way must be found of resolving the moral conflict that arises when it is found to be impossible to attend to the needs of all. So long as we focus on a single type of duty generated by the right (e.g., the duty to provide emergency treatment), some maximizing approach seems to be in order: if we cannot save all, we should deal with them in a manner that enables us to treat as many as possible, even if this means that some are neglected.¹⁶

Now the existence of other duties generated by the same right both mitigates and complicates the rigors of the trade-offs that maximization may involve. It mitigates them in the sense that we may be able to discharge some duty to a given person even though we cannot discharge others. And it complicates them because we may not know how to balance a duty of one sort generated by a given interest that one person has, against a duty of another sort generated by the same interest that another person has. Simple maximization of duty fulfillment will seem insensitive to the differences between the kinds of duties involved. In some cases, we can assign degrees of importance to different duties generated by the same right. If injuries differ in their seriousness or reparability, we can establish the sort of priorities that, for example, a system of triage involves. Even so, once we concede that different duties generated by the same right have different degrees of importance, we begin to lose our sense of the qualitative precedence this right—as a source of duties—has over other considerations in morality.

Interright conflicts arise when the performance of a duty generated by one right turns out to be incompatible with the performance of a duty generated by a right of a different type: the more resources that we spend on hospitals, for example, the less we can spend on police protection. Once again, we should note that we are unlikely to face any unmitigated trade-offs: there will usually be *something* we can do to promote the interest in education, even though many of the resources that schools are crying out for are diverted to provide citizens with better protection against murder.

But when hard choices arise, it is less easy to see how they should be resolved. The idea that all rights should be put on a par seems implausible. Though we may think that any right should have precedence over considerations of ordinary utility, we may think also that some rights are more important than others. Maybe the right to life is more important than the right to free speech, which is more important, in turn, than the

16. J. L. Mackie suggested that for some rights conflicts, an equalizing rather than a maximizing approach might be appropriate (see "Rights, Utility and Universalisation," in Frey, ed., p. 89).

right to privacy, and so on. Once again, this sense of what is “more important” may be understood in terms of a lexical ordering: different rights have the same sort of priority over one another that rights generally are sometimes given over considerations of mundane utility.¹⁷

But if rights are thought of, not as correlative to single duties, but as generating successive waves of duty, then this ordering will have the same difficulty that we noted in the previous section. Suppose we rank the right not to be tortured ahead of the right to free speech because we think it wrong to torture people no matter how much free speech one could protect in that way. If we believe that, are we also committed to ranking the duty to investigate torture, the duty to compensate victims of torture, and all the other duties associated with the right ahead of any requirement associated with free speech? If police time and resources are limited, is it the case that *any* project associated with the prevention of torture, no matter how marginal, has priority over even urgent action associated with the protection of political freedom? Most of us would not want to accept an order of priorities as rigid as this. Though the right not to be tortured is more important than many other rights, it does not follow that every duty associated with that right is more important than any duty associated with any of the others.

The alternative to a lexical ordering is to think of rights as weighted quantitatively in relation to one another (so that we allow a right to life to be worth five rights to free speech, or whatever). Then the importance of different duties can be expressed as a fraction of the importance of the right from which they flow. The duty to investigate instances of torture will not have the same importance as the duty not to torture but a fraction of that importance, and it may be overridden by some duty connected with free speech on a particular occasion, even though in general free speech is less important than the right not to be tortured.

However, as before, the difficulty with this approach is that it makes it hard for us to sustain *any* sense of the qualitative priority that a given right may have over some other right or over other types of moral consideration. Remember that on the Interest Theory of rights, the imposition of duties is warranted by our sense of the importance of the underlying interest. If that importance can *sometimes* be quantified in relation to other moral considerations, why can it not *always* be so quantified? Once we concede that *some* of the duties associated with one right are commensurable with *some* of the duties associated with another, it is not clear how we can sustain a thesis of incommensurability in relation to *any* pair of the duties that they respectively generate.

17. This approach is adopted by John Rawls in relation to the rights established by his principles of justice: rights of political liberty have lexical priority over rights of equal opportunity in the economic realm, and equal opportunity, in turn, has priority over the social and economic rights generated by the difference principle (see Rawls, pp. 243 and 298).

LEXICAL PRIORITY AND INTERNAL CONNECTIONS

We seem to want to have our cake and eat it too. We want to retain some sense that rights have qualitative priority over considerations of utility and even in regard to one another. But we also want some way of expressing the fact that not all the duties generated by a given right have the same degree of importance.

Part of the difficulty stems, I think, from the fact that we have not fully articulated what we want to capture in the idea of a lexical ordering. It is tempting to think that because we know technically how to work with lexical priority we therefore understand when and why to deploy it. But we cannot just announce or "intuit" that the concern aroused by one type of interest has lexical priority over the concern aroused by another. We ought to be in the business of trying to *justify* such claims. One possibility worth exploring is that lexical priority expresses the fact that a pair of moral considerations are related *internally* to one another, rather than externally in the way that a purely quantitative account of their respective importance would imply.

An example of this sort of relation is Ronald Dworkin's theory of "rights as trumps." According to Dworkin, we say that a person has a right to some benefit if it is the case that any utilitarian argument in favor of denying her that benefit is likely in the real world to have been "corrupted" by the counting of what he calls "external preferences." (Dworkin argues that counting external along with personal preferences undermines any claim that the utility calculus has to be an adequate expression of the principle of equal concern. We shall not attempt to evaluate that controversial argument here.)¹⁸ Since it is impossible in practice to disentangle external from personal preferences in utilitarian calculations, we introduce rights as a corrective. Now for rights set up in this way, the resolution of any conflict with considerations of utility is obvious: rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to "trump" the importance of the first. Instead, our sense of an internal connection between the two establishes the order of priorities.¹⁹

Another example of an "internal relation" argument may be drawn from John Stuart Mill's account of individual liberty. In *On Liberty*, one

18. Dworkin, *Taking Rights Seriously*, pp. 231–38 and 257–58. The argument was attacked by H. L. A. Hart, "Between Utility and Rights," *Columbia Law Review* 79 (1980): 828–46; and defended by Ronald Dworkin in "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), pp. 153–67.

19. The "internal relations" approach is captured in Dworkin's statement: "My aim is to develop a theory of rights that is relative to the other elements in a political theory" (see "Rights as Trumps," p. 165).

of the considerations in favor of freedom of thought and expression is that the challenge of opposing ideas is a useful way of shaking people out of the complacency with which received opinions are held.²⁰ This right to freedom of expression is widely believed to clash with the interest people have in avoiding the distress that arises when their cherished beliefs are contradicted. But, within Mill's framework, that conflict is easily resolved. Since the whole point of free expression is to challenge received opinion and shake up complacency, the discomfiture attendant on that challenge is to be given no weight at all against free speech; rather it is to be regarded as a good sign that free speech is fulfilling its function.²¹ Once again, our conception of the interest's importance already tells us a lot about the sort of consideration to which it is appropriately opposed.

The interesting thing about such approaches is that they do *not* commit us to the troublesome view that all duties generated by a given right have the same moral priority. Take two duties generated by the right to free speech: the duty not to suppress a person's speech and the duty to punish suppressors. On Mill's view, the first has absolute priority over any duty to avoid moral distress because the value of a person's speaking freely is precisely the effect it has on moral complacency. The point of punishing suppressors of free speech, however, is not directly to shake up moral complacency (in the way free speech itself does); though its aim is to vindicate and protect an interest which does have this point, it does not have this internal relation to moral complacency in itself. So balancing the second duty against a concern about moral distress may not be as misconceived as balancing the first duty against that concern would be. Similarly with Dworkin's account. Whether utilitarian concerns ought to be allowed to weigh in the balance against a particular requirement depends on whether the sort of considerations typically brought up against such requirements are antecedently likely to have been corrupted by external preferences. Now two requirements may differ in this regard, even when they are connected in other ways. We may have reason to think that utilitarian arguments for censorship are likely to have been corrupted by external preferences in a way in which arguments of convenience against punishing would-be censors are not. At least, that is a possibility, and it shows how duties generated by the same right may stand in different relations to the concerns that are likely to oppose them.

The examples discussed so far embody views about the priority rights might have over lesser moral concerns. But a similar approach may be sometimes available to establish priorities among rights themselves.

20. John Stuart Mill, *On Liberty*, ed. C. V. Shields (Indianapolis: Bobbs Merrill, 1956), chap. 2.

21. This argument is expanded in Jeremy Waldron, "Mill and the Value of Moral Distress," *Political Studies* 35 (1987): 410-23.

Consider the conflict that exists when one group of people (call them "Nazis") proposes to make inflammatory speeches calling for the suppression of another group of people (call them "Communists"). If we think there is a real danger that the Nazis' speeches will have the effect of inciting people to invade Communist gatherings and prevent Communists from speaking freely, we may have to think in terms of a conflict between the Nazis' right to free speech and the Communists' right to free speech. What we might want to do to secure the latter might be incompatible with what is called for by respect for the former. Now if we think in terms of a quantitative utilitarianism of rights, perhaps what we should do is work out the number of members in each group, work out the probability that the Nazis' speeches will have a rights threatening effect, multiply through, and come up with a strategy that will produce the infringement of the smallest number of rights. But that is not the only way of thinking the issue through. Instead of approaching free speech simply in terms of each individual's interest in expressing her views, we might think of it in a more systemic way—in terms of each person's interest in participating on equal terms in a form of public life in which all may speak their minds. On this account, the conflict between the Nazis and the Communists can be more easily resolved. To count as a genuine exercise of free speech, a person's contribution must be related to that of her opponent in a way that makes room for them both. But though they claim to be exercising that right, the Nazis' speeches do not have this character. The speeches they claim the right to make are calculated to bring an end to the form of life in relation to which the idea of free speech is conceived. We ban their speeches, therefore, not because we think we can necessarily safeguard more rights by doing so, but because in their content and tendency the Nazis' speeches are incompatible with the very idea of the right they are asserting. What looked like a brute confrontation between two rival interests, independently understood, turns out to be resolved by considering the internal relation that obtains between our understanding of the respective rights claims.

The establishment of this sort of internal relation between moral considerations is an attractive way of justifying claims about lexical priority. Instead of announcing peremptorily that a certain interest just *has* absolute priority over some other interest ranked lower than it, we express our sense of a particular priority in our conception of the interest itself. In thinking about it, and singling it out for moral attention, we are already thinking about the type of consideration with which it is likely to conflict.

However, this approach will not deal with all moral conflicts and there is no reason to want it to. Many, perhaps most, conflicts—whether between rights and utility or among rights themselves—are best handled in the sort of balancing way that the quantitative image of weight suggests: we establish the relative importance of the interests at stake, and the contribution each of the conflicting duties may make to the importance of the interest it protects, and we try to maximize our promotion of what

we take to be important. What we were looking for was something to capture our sense that this is not always the whole story—our sense that sometimes, or in some conflicts, the issue is one of qualitative precedence rather than quantitative weight. I think the idea of internal connections helps to capture some of that. And it does so in a way that means we do not have to give up the view that rights entail requirements of different sorts that are ordered in various ways in relation to other moral considerations. We can establish qualitative priorities in some places, without thinking we have to establish qualitative priorities everywhere.