

Problems with some consequentialist arguments for basic rights

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I. Introduction

Most contemporary Anglo-American philosophers are liberal or social democrats. We endorse democratic forms of government that provide all citizens equal rights of political participation, and we also endorse equal rights to basic liberties that protect society's members from majority will and government overreach – such rights as freedom of speech and expression, freedom of conscience, freedom of association, and freedom of tastes and pursuits. We also support the idea of a democratic society without inherited class privilege and freedom of occupation with rights to equal opportunities of some form; and most (though not all) of us endorse some account of economic rights and entitlements owed to all members of society, enabling them to be independent and not economically exploitable by others. Moral philosophers however disagree about the philosophical framework that is best suited to justifying these liberal and social democratic commitments, a framework that best enables us to debate and decide how to resolve the many issues and conflicts regarding rights, interests and the common good that are a normal part of social and political life in a democratic society.

The range of conceptions that are known as 'deontological' is a diverse group of positions, mainly united in their rejection of consequentialism. Many contemporary deontological conceptions assign priority over other social values to principles of justice and the basic rights and liberties that these principles protect. Or if justice and basic rights do not have priority over other values, they are among the class of fundamental moral principles and values (as in W.D. Ross's list of seven *prima facie* principles, or G.A. Cohen's egalitarianism). Consequentialists, by contrast, normally regard individual rights as secondary principles which are justifiable in so far as they are instrumental to creating greater overall good consequences.

Consequentialism involves two basic claims: The first is that what is right and just to do, whether via individual action or general rules and institutions, is to take the *most effective means* to realize ultimately good consequences (including means that are the cheapest, simplest, most probable, requiring the least time and effort, etc.). The second basic claim is that, given available means and resources, we are to create the *greatest sum total* of good consequences. The basic idea that we are to *maximize the good* incorporates both of these conditions.

For many of its adherents consequentialism is grounded in the seemingly obvious claim that we ought to create the greatest good, impartially construed. As Sidgwick says, “It is right and reasonable [...] to do what [is] ultimately conducive to universal Good” (Sidgwick 1981, 507). This is Sidgwick’s principle of benevolence, the unshakeable “philosophical intuition” upon which he grounds his argument for classical utilitarianism. Sidgwick’s philosophical intuition assumes that practical rationality fundamentally involves maximizing something. Since right conduct and just laws must be rational, in ethics practical reason requires that we impartially maximize ultimate good. Non-consequentialists find that, though good consequences surely must matter to morality in some way, it is a mistake to construe the Right as simply maximizing total Good, for this disregards the interpersonal nature of morality. Morality, many deontologists say, concerns not the relationship of persons to states of affairs or impersonal good, but the relationship of persons to persons, where each is regarded as a distinct individual whose fundamental good is not to be subordinated to aggregate or universal good. Consequentialists by contrast appear to assimilate morality to the impersonal pursuit of non-moral values, such as pleasurable experiences or preference-satisfaction or some other account of well-being, or perfectionist values such as knowledge, aesthetic appreciation, love and friendship, or the Vision of God. Non-consequentialists thus object that what matters primarily for consequentialism is not the nature or quality of relationships among persons, but maximizing the sum total of good states of affairs, without regard to the kinds or quality of relations that obtain among the persons who must pursue this good, and without regard to how the good is to be distributed among persons.

Here I will discuss versions of consequentialism which seek to avoid these criticisms regarding the impersonal nature of consequentialist morality, and do so by incorporating into the good consequences to be promoted either distribution-sensitive values such as equality, or moral values of justice, such as individual rights, or fairness of outcomes.

The enduring philosophical attraction of consequentialism, I believe, is that it provides an outline for a *completely rational morality*, or a morality which says that between any two alternatives, one is the more rational choice, and among all feasible alternative actions or norms, there is one that it is most rational to choose. The problem is to find some unambiguous conception of the one rational good that is reasonable enough to play the extraordinary role of serving as the final end of all rational conduct. This is an exceptionally tall order. Sidgwick thought this rational good could only be pleasurable experience, since all other ends – including knowledge and the perfection of human capacities, freedom, justice, enjoyment of beauty, love and friendship and other desirable human relations, and all other values – have unreasonable or irrational consequences when regarded as the sole ultimate good to be maximized. The vast majority of contemporary consequentialists do not endorse Sidgwick's hedonism or his classical utilitarianism, largely because they believe that there are ultimate goods in addition to, or other than, pleasurable experiences or the satisfaction of individual preferences regardless of their object.

Here I examine three ways that consequentialists argue for moral, human, or basic individual rights: first, there is the framework provided by J.S. Mill; second, distribution sensitive accounts of well-being (such as relied on by Philip Pettit, Larry Temkin, and Bill Talbott), and then finally, arguments, such as Amartya Sen's, that directly incorporate rights and other moral concepts into the good that is to be maximized.

II. The Millian argument for individual rights

The upshot of consequentialism's demand that right conduct maximize the good seems to be that there can be no legitimate constraints upon taking the most effective means to achieving the greatest good, nor any limitations upon promoting the sum total of goodness capable of realization. But moral rights, human rights, and other basic rights are normally understood as restrictions upon taking most effective means to realizing desired or desirable ends – “side constraints” (Nozick), “trumps” (Dworkin), or “reasonable constraints” (Rawls) upon the rational pursuit of good consequences. Hence, if basic rights are to have any justification within an orthodox consequentialist position, they cannot really be what to many they seem to be. Rather than constraining pursuit of the ultimate good, consequentialists contend that basic rights

instead concern the very measures that enable the wholehearted pursuit of maximum goodness. As J.S. Mill says, though common opinion regards the just “as generically distinct [...] from the expedient and in idea opposed to it”, in truth the just and the expedient always coincide in the long run (Mill 1979, ch. 5, pts. 1–2).

This was quite a turnaround in thinking within utilitarianism. For Bentham was quite clear that moral rights are “rhetorical nonsense...-nonsense upon stilts”. It was Mill apparently who first endorsed the idea that justice and moral rights are especially effective means to maximizing the good. He said that justice and rights are names for especially important utilities, of such great weight that they warrant special protections. These especially important utilities are “the essentials of human well-being” (ibid., ch. 5, pt. 32, 58). “Justice is a name for certain moral requirements which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others” (ibid., ch. 5, pt. 37, 62). These especially important utilities include, Mill says, “moral rules which forbid mankind to hurt one another”, to which Mill crucially adds “in which we must never forget to include a wrongful interference with each other’s *freedom*” (ibid., ch. 5, pt. 33, 58). This provides the basis for Mill’s argument in *On Liberty* that the rights and liberties that protect individuals’ freedom and autonomous self-determination, or “individuality”, are necessary to realize “the permanent interests of man as a progressive being” (Mill 1978, ch.1, pt.11, 10).

In making this argument Mill draws upon two important insights regarding human nature, or natural human propensities. The first is the anti-paternalist argument¹ that under appropriate conditions each person is in a better position than anyone else to judge what sort of life is the best life to live. A precondition for individuals’ insight into their well-being are social conditions that allow for liberty of conscience, freedom of thought, expression and inquiry, freedom of association, and “freedom of tastes and pursuits”. Individual rights protecting these freedoms are preconditions for “the free development of individuality”, which Mill thought largely constitutive of living a good life.

The Millian claim that people are normally the best judge of their own well-being once they have educated their natural abilities is normally true of people. It may not be true of those brought up in repressive, traditional, or otherwise non-liberal societies, since widespread ed-

1 See Talbott (2005), who relies upon Mill’s argument.

ucation and free flow of information are not available, and the values those societies endorse cannot thrive if individuals have personal freedoms. Cultural relativists might then claim that Mill's utilitarian argument for liberal justice is limited to Western democracies, and that there is no persuasive argument that people in all societies ought to be guaranteed individual rights needed for self-direction.

This criticism is addressed by a second argument of Mill's, which appeals to a fact about human psychology. It is that, other things being equal, humans enjoy engaging in activities that call upon the exercise of their developed capacities; moreover, once they have had the opportunity to develop their "higher" or distinctly human capacities, then, barring unfavorable circumstances, humans will invariably exercise a "decided preference" for pursuits and plans of life that involve the exercise and development of their capacities for intellect, imagination, higher human feelings and relationships, and moral sentiments. Mill's claim strongly resembles Rawls' "Aristotelian principle", which also refers to a tendency of human nature – that people with mature capacities living under favorable conditions normally prefer conditions in which they have the freedom and opportunity to determine their capacities and live their own chosen way of life.

I think there is much to be said in support of the empirical assumptions about natural human propensities that Mill (and Rawls) rely upon in arguing that freedom of action and self-determination (or "individuality") are "essentials of human well-being". Assuming that certain freedoms are essentials of well-being, then it seems also true that individuals generally ought to have the rights of justice that are preconditions for freedom of conscience, thought, association, and freedom of tastes and pursuits. If this is what Mill sought to prove on consequentialist grounds, then I think that, with a few caveats, he makes a credible case for it.

The question however is whether Mill's argument for freedom as an essential of well-being is adequate to argue for *equality* of rights and liberties within a revised utilitarian framework. This after all is the fundamental question of *justice* at issue, for justice concerns primarily the equal or fair distribution of rights, and not simply the question of what rights most individuals normally ought to enjoy to enable them to realize individual well-being or overall good. Even assuming that Mill has shown on consequentialist grounds that normally providing individuals with substantial freedoms is necessary for their individual well-being, this does not warrant the conclusion that *equal* freedom and the *equal* rights

necessary thereto are always or even *ever* necessary to maximizing the sum total of individual well-being (no matter how well-being is construed). For from Mill's claim that having certain freedoms and the political rights to protect them are normally necessary conditions of *each person's* well-being, it clearly does not follow that *equal* rights and *equal* freedoms always, or ever, maximally promote *total* well-being summed across all individuals in society. For the sum total of individual well-beings almost always can be marginally increased by denying some small minority of individuals those freedoms which they would otherwise use in ways a majority find offensive or scandalous. Mill says, in arguing for freedom of thought and expression and freedom of the press: "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind" (*ibid.*, ch. 2, pt. 1, 16). I believe this is true, but I see no way to establish it on Mill's consequentialist grounds. For how can it be that the right of one person to express an opinion which all the world finds dangerous or obnoxious can outweigh in its consequences for aggregate well-being the detrimental effects on the well-being experienced by the rest of the world? How on any understanding of well-being can denial of equal rights to one or more persons not often lead to a greater overall good?

The problem then is not simply to show that respecting certain rights among persons generally is normally a precondition for promoting general well-being (or any other good consequence). The crucial problem rather is to show that those consequentialist rights that are very important and normally ought to be afforded to everyone ought also to be *equally* or fairly distributed among them. That's the question of justice that bedevils traditional consequentialist views, and which the Millian argument does not satisfactorily come to terms with.

One potential way around this problem is to argue for a complicated account of moral psychology that attributes to humans not simply natural sympathy and a desire to take everyone's well-being into account, but also natural predispositions to cooperate with others on terms of equal respect and reciprocity. Rawls finds something like this argument in Mill.² But even if these conjectures regarding human nature are true,

2 Rawls conjectures that Mill's argument for the coincidence of maximum utility and equal justice rests on two further principles of moral psychology Mill invokes. The first is a principle of dignity. Mill says there is "a sense of dignity,

the argument still would have to show that it is only under favorable conditions where people's natural moral sentiments of equality and reciprocity are fully developed and satisfied that aggregate well-being can be maximized. Then, even assuming that is so, it still remains as a question whether these favorable conditions would correspond to the equal rights favored by liberal and social democrats.

III. The good of equality and other values of justice

The main obstacle to justifying equality of basic rights within Mill's framework is that it requires an unlikely coincidence of equal rights of justice with maximizing the sum of general well-being. Perhaps this problem can be addressed by directly incorporating into the good consequences to be promoted certain values normally associated with justice and individual rights – values such as equality of well-being or equal distribution of goods, or individual freedom and autonomy. In an article predating his contractualism, T.M. Scanlon outlines a “two-tiered” consequentialist approach that regards rights and other norms of justice as second-tier principles that promote such first-tier values as freedom, equal distributions of desirable goods, and individuals' ability to control significant aspects of their lives (Scanlon 2003, 26–41).

which all humans possess in one form or another, and in some proportion [...] to their higher faculties, and which is so essential a part of happiness of those in whom it is strong that nothing which conflicts with it could be otherwise than momentarily an object of desire for them” (Mill 1979, ch. 2, pt. 6, 9). Second, Mill says “a natural basis of sentiment for utilitarian morality” is “the desire to be in unity with our fellow creatures, which is already a powerful principle in human nature”. (ibid., ch. 3, pt.9–10, 30–31). Mill says that a person who has developed this “social feeling”, and conceives of himself as a “social being” does not think of others as “struggling rivals with him for the means of happiness”. Rather one of his “natural wants [is] that there should be harmony between his feelings and aims and those of his fellow creatures” (ibid., ch. 3, pt.11, 33). Mill emphasizes that the desire to be in unity with others leads us, not just to take others' interests into account, but also to harmonize our own interests with theirs. Rawls liberally construes this as a desire to act from a principle of reciprocity: “For Mill says in pt. 10 that the feeling of unity with others, when perfect, would never make us desire any beneficial condition for ourselves in the benefits of which others are not also included” (Rawls 2007, 282). Rawls adds: “The fact that Mill says this leads us to ask whether the difference principle is a better expression of Mill's view about equality and distributive justice, than the principle of utility” (ibid., 282 n.).

Scanlon says it is a good thing that individuals are autonomous: that they are able to freely develop their capacities and choose their own aims and commitments, make their choices effective in shaping their own lives, and contribute to the formation of social policy. It is also good that certain resources are equally distributed among individuals. On this account, autonomy and equality seem to be higher-order ultimate goods that apply to the choice and distribution of other ultimate or subordinate goods. For example, assuming self-determination is an ultimate good, equal capacity or equal opportunity for self-determination might be among the goods to be promoted in a pluralist consequentialist view; or perhaps equal welfare on some views.³ Larry Temkin has endorsed a similar consequentialist position that regards equal welfare as an intrinsic good which ought to be promoted. And Bill Talbott refers to “appropriately distributed well-being” as the good consequence to be promoted in his argument for universal human rights.⁴

According to Scanlon’s and similar “two-level” views, equal rights and other principles of justice are second-tier subordinate principles that guarantee the values of justice that they are designed to promote, such as each person’s autonomy, equal welfare, or the proportionate distribution of income and wealth. For example, equal rights to liberty of conscience, freedom of thought, freedom of association, freedom of persons in tastes and pursuits, and other liberal basic liberties are justifiable in that they promote a state of affairs where (normal adult) members of society *each* enjoy autonomous self-determination. This is one way to recast Mill’s account in *On Liberty* that avoids problems mentioned earlier. We might conceive of the good to be promoted as “appropriately distributed well-being” (Talbott) and regard Mill’s Principle of Liberty as among the principles of justice that enable *each* member of society to realize his or her individuality and other components of well-being.

I’ll focus here on the idea that *equality* of some good (or some other preferred distribution) is itself an ultimate good that is to be incorporated into the maximand of a consequentialist view (e.g., equal well-being or equal opportunity thereto, or equal proportionate satisfaction, or

3 Scanlon also suggests that, along with equality, the fairness of certain procedures is a good that ought to be promoted (Scanlon 2003, 30–32). If fairness is describable only by referring to certain rights or moral principles, his claim resembles a different position endorsed by Amartya Sen, which I will take up in section IV below.

4 “For a consequentialist, a just government is one that promotes the (appropriately distributed) well-being of its citizens”; cf. Talbott 2005, 159–160.

maximin well-being on a prioritarian view). Rawls says that distribution is normally considered under principles of right, which suggests that questions regarding the appropriate distribution of goods should involve non-consequentialist principles. But if the goods to be promoted and equalized are definable in non-moral terms that are applicable in the natural or social sciences (equal welfare or well-being, or equal capabilities, for example), then we can regard equal distribution of some natural or social good as an aspect of the consequentialist end-state that is to be maximized. On such distribution-sensitive consequentialist views we would no longer be maximizing simply an aggregate of goods; we would also seek to maximize an aggregate's equal (or maximin, or some other function) distribution according to a consequentialist account of appropriately defined distributive shares of the good.

Now deciding how much weight to assign to equal distributions is a difficult issue within a pluralist consequentialist view. The problem is to construct an index that gives an appropriate weight to equal distribution compared with other intrinsic goods.⁵ Let's assume however that these problems can be resolved satisfactorily and that an index of goods can be suitably constructed that gives each good its proper weight within the consequentialist maximand. To incorporate equal or some other proportionate distribution of goods into the maximand may then seem fitting and a promising avenue for consequentialists who seek to provide a

5 One problem with constructing any such index of ultimate goods in a two-tiered pluralist consequentialist view is that appeals to intuition (or considered convictions) regarding the proper balance of values that constitute the maximand seem unavoidable. By themselves, appeals to considered intuitions or convictions or the balance or reasons are normal in moral thinking. But the main attraction of consequentialism, I have claimed, is that it outlines a method for making rational choices between any alternatives and resolving conflicts between values, duties, and other normative claims. Given a relatively precise measure of greater and lesser good, there should always be a determinate answer to the question of which course of action or rule creates greater sum of goodness? The problem is that, once a plurality of goods is injected into the maximand, that precision is lost and we seem thrown back upon the balancing of intuitions that many sought to avoid by conceiving of rightness and justice as maximizing the one rational good. My belief is that non-utilitarian and pluralist consequentialism often fold all the problems of vagueness, indeterminacy and so on that deontological views are prone to into the maximand, and then fail to confront or address these problems, since they are concealed by the maximizing idiom.

justification for equal rights. But in the end I do not think this strategy can succeed, for at least two reasons.

First, for the sake of simplicity, let's assume that equality is given lexical priority among the plurality of values. Presumably, no one would argue that equal distribution itself is a good, no matter what is being distributed (e.g. punishment, grades, or Nobel Prizes). Rather the argument is that equality of some fundamental good, such as equal well-being, equal opportunities for welfare, equal capabilities, or equal autonomy, is the sole ultimate good that is to be maximized. Any state of equality of a fundamental good that is strongly Pareto superior (in G.A. Cohen's sense) is preferable; thus, situations where each person enjoys greater equal good outranks situations where all have less equal good. Now, it may often be the case that affording each person equal rights of various kinds is a reliable means to realizing the ultimate good of equal distribution of well-being or opportunities thereto, equal autonomy, etc. – often, but not always. For as is well known, because of peoples' different wants and needs, unequal income and wealth normally is required to realize greater equality of well-being; and if this is true of rights to income and wealth, it is as likely to be true of other rights and liberties, including those that liberal and social democrats regard as fundamental. There is no more reason to think that equal well-being, or even equal autonomy, or equal non-domination (Pettit), requires equal rights to liberty of conscience and freedom of thought and expression, or equal rights to freedom of association, choice of occupation, and the political rights of participation, than to think it requires equal income. People's well-being, however defined, is affected by all sorts of social and biological circumstances and contingencies, and regardless of what sort or degree of compensation they are given, there is little reason to think that anything approximating equal well-being can be achieved only when equal basic rights are provided for.

It seems then that we should have to adjust the relative degree to which any person enjoys and exercises the full panoply of basic rights so that equality of well-being (or the opportunity thereto) with others can be approximated and maintained. For each person there should be some distinctive trade-off and mixture of rights and liberties that determines his or her share and that is needed to maintain approximate equality of well-being. For example, equal well-being may require that some people – those who have bad judgment, or care nothing for politics, or have no concern for the public good – have no right to vote, and that others who use their votes wisely enjoy several

times the voting rights that other people enjoy. Or perhaps people who have proven themselves prone to imprudent life-choices must be deprived of a right to make certain crucial life decisions (regarding their career or marriage partner, for example) if there is to be any hope that their well-being is to approximate that of others. Here people deprived of their right to vote or make crucial life decisions might be compensated for the resulting loss to their sense of self-respect and well-being by a greater share of wealth or some other benefit, in order to bring them up to the level of equal well-being others enjoy. Academics, journalists, lawyers, writers, and other wordsmiths may require far more protections of freedom of speech and of expression than farmers, plumbers and electricians, unless of course these wordsmiths are prone to expressing obnoxious views that upset large numbers of people and undermine their fair share of well-being.

The problem then is that there is little reason to believe that equal basic rights and liberties of the kind prized by liberal and social democrats, or advocates of universal human rights, will be justified by a maximand requiring any fixed distribution of well-being, capabilities, autonomous self-determination, non-domination, or any other natural or non-moral good. But now suppose these difficulties can be overcome, and that it is safe to assume that equal rights of a familiar and desirable kind are needed to promote equal well-being, equal autonomy, or some other intrinsically desirable distribution. A further problem is that it is unreasonable to contend that equality of any state of affairs should have lexical priority over all other values, or could serve by itself as a sufficient account of the ultimate good to be maximized. For to contend that equality of some good has lexical priority or is the only ultimate good implies that any state of affairs of equal distribution is better than any other unequal state, regardless of how little each person has and how much better off everyone might otherwise be with an unequal distribution. For example, a state of equal unhappiness would be better than a state where everyone was generally satisfied with their lives to differing degrees. To avoid this undesirable outcome, it is reasonable to incorporate maximum aggregate well-being or some other aggregative value into the consequentialist maximand. Then, equality of good is regarded as but one intrinsic value that is to be put into the balance and weighed off against other intrinsic goods to determine the ultimate combination of goods that are to be maximized. (This seems to be Temkin's position.) Then we have an aggregative-distributive dichotomy of

the kind discussed by welfare economists, now generalized to include not just income and wealth, but the plurality of ultimate goods.

In this event, there is even less reason to believe that equality of basic rights can be maintained at the subordinate level of second-order moral principles. For the plurality of ultimately good ends must be adjusted to determine the right combination of goods – “organic unity” or “fitting” or “weighted end” as it might be – that is to be maximized. And there appears to be very little likelihood that equality of basic rights will be preserved in the end, nor is there any guarantee that some individuals will not lose out entirely in the final distribution of certain basic rights if this is needed to maximize the plurality of goods. Inequalities of rights of many different kinds, even of rights that are regarded as basic, would appear to be unavoidable within virtually any pluralist consequentialist view, including those that are distribution-sensitive.

So it seems that incorporating into the consequentialist maximand equality and other distribution-sensitive values that rights and norms of justice instrumentally promote still does not make the case for *equal* basic rights and liberties. Once again we have the familiar problem that consequentialism faces with respect to justice.

IV. Equal rights as an intrinsic good

It may be then that the only way to guarantee equal basic rights and other norms of justice within a consequentialist framework is to incorporate them directly into the ultimate good that is to be maximized (perhaps giving them lexical priority over other values). This might seem entirely appropriate. For evidently what is behind many consequentialists' concern for distribution-sensitivity of the good is the thought that certain *deontological values* and norms of justice – the equal worth and dignity of persons, equal respect for persons, etc. – are so important and fundamental that they ought to be protected and promoted as intrinsic values. For example, assume that the ideas of equal respect, or respect for persons as free equals, are deontological values – by which is meant, values that can be satisfactorily described and explicated only by reference to moral concepts and principles such as equal rights and other concepts of justice. Suppose that we cannot understand what is involved in the value of equal respect for persons without regarding persons as having, and being recognized as having, certain equal basic rights and liberties. Naturalistic terms would not suffice to

describe or explicate this deontological value, just as they do not suffice to explicate the normative claim that we ought to recognize and treat other humans with the respect due free and equal moral persons. The same may be true of the moral ideal of dignity of persons; it too is a deontological value that can only be explicated by appealing to irreducible moral concepts. If so, then perhaps the best way for a consequentialist to guarantee the dignity of and respect for persons is to directly incorporate the equal rights and other norms of justice needed to explicate these moral concepts into the consequentialist maximand. This goes beyond the “two-tiered” positions discussed earlier, which regard basic rights and other principles of justice as second-order rules instrumental to achieving appropriately distributed well-being, autonomy or some other non-moral value.

Amaryta Sen has proposed a version of this view, which he has called “broad consequentialism”.⁶ He says: “Consequential evaluation that takes note of freedoms, rights, and obligations, and their violations would argue that bad things have happened *precisely because* someone’s freedom has been breached, and some rights and duties have been violated”.⁷ “The fulfillment of rights is a good thing to happen – the more the better – as it would be seen in a consequential perspective [...]” (Sen 2000, 498). Sen suggests as part of consequential evaluation a “consequentialism of rights” that says: (1) “the badness of the violation of rights, or the goodness of their fulfillment” are to be “included among the consequences; (2) there can be ‘trade-offs’ between rights; and (3) there can be ‘trade-offs’ between the goodness of rights fulfillment and other good consequences” (ibid., 499; 499 n.).

Following Sen, I will call such positions “broad consequentialism” – “broad” because they include both natural states of affairs and moral principles (including rights) among the plurality of goods to be maximized, optimized, or otherwise promoted. Unlike the position just discussed, which says that equal distribution of some natural or social good is itself an ultimate good, broad consequentialist positions directly incorporate deontological values and moral concepts and principles of justice

6 ‘Broad consequentialism’ is the term he initially uses in Sen 1982. ‘Consequential evaluation’ or ‘evaluation of comprehensive outcomes’ are used in his recent book, *The Idea of Justice* (Sen 2009), where it is no longer so clear whether he intends a distinct version of consequentialism, or simply a method of individual evaluation not tied to any particular moral conception.

7 Sen (2000), at 494 (emphasis added). This paper develops the position set forth in ‘Rights and Agency’, where Sen also refers to “goal rights systems”.

into the maximand. Now, offhand it seems that even incorporating equal basic rights into the good consequences to be maximized will not solve the problem raised earlier with pluralist consequentialism; the plurality of values still inevitably will compromise the equality of basic rights that liberal democrats contend ought to be maintained. (For example assuming that average well-being and equal rights to basic liberties are the two goods to be promoted, restrictions on a despised or otherwise insular minority's freedom of religion may be required to maximize good consequences.) To avoid inequalities of basic liberal liberties, the broad consequentialist might propose assigning lexical priority to certain equal basic liberties and regard the promotion of other consequentialist values as subject to this priority condition. Thus, for example, we maximize average or equal (opportunity for) well-being, or welfare rights to a threshold of capabilities for all, on condition that everyone's equal basic rights of conscience, expression, association, and freedom and integrity of their person are respected. This may not be Sen's position since he envisions trade-offs between rights, liberties, and other values, but guaranteeing certain basic liberties and "maximizing" (or at least "satisficing") their provision before promoting other values may be one way to maintain the integrity of a liberal democrat position within a consequentialist framework.⁸

Whether or not assigning lexical priority to certain equal basic rights and liberties is acceptable to consequentialists, a potential problem with broad consequentialism of any variety is that it can no longer strictly be maintained that maximizing the good, or promoting the best consequences, is the *sole* ultimate principle of right. For there are already non-consequentialist moral principles built into the ultimate good, and these principles must be balanced off against other ultimate goods and the measures that instrumentally promote them. What are we to do when required to instrumentally promote fair procedures or respect for rights themselves? What if doing so requires that we violate these same rights and procedures (e.g. violate the rights of a few to protect similar or other rights enjoyed by the many)? Which principle has priority then? To say we should decide by maximizing the good provides

8 Since it may not make sense to maximize either basic liberties or two or more things, it may be better to think in terms of "satisficing" basic liberties for all before proceeding to maximize other values. How much such a principle would resemble Rawls' non-consequentialist first principle of justice requiring a "fully adequate scheme" of equal basic liberties is worth considering.

no answer, for we are trying to decide just what that involves. If the moral principles that are part of the maximand are to be given any independent weight at all, then it appears that we have in effect two (or more) separate moral principles at work – a consequentialist principle that tells us to maximize aggregate goodness (and perhaps its distribution), and a deontological one that tells us to observe fair impartial procedures, respect individual rights, or achieve a just distribution for its own sake. These separate moral principles must be somehow weighed against one another to decide what is right to do. If this is done intuitively and without appeal to some further consequentialist principle, then broad consequentialism is really a deontological form of moral intuitionism, or a pluralist deontological view.

My own view is that we might as well give up any pretense of maximizing the good or promoting the best consequences in broad consequentialism, and face the fact that once principles of right and justice (including just distributions, fair procedures, or equal rights, respect for human rights, or fulfillment of duties) are themselves regarded as ultimate intrinsic goods to be realized, then we have a full-fledged intuitionist position requiring the balancing of both teleological and deontological principles. It is only in an attenuated sense that such a broad pluralist position can be said to aim to maximize or promote the best consequences overall. For it can be said of most any moral conception that it promotes or realizes good consequences in the sense it requires that people do the best thing overall by conforming to that conception's principles. For example, W. D. Ross' intuitionism might be said to enjoin that we realize the best consequences. Ross requires balancing a *prima facie* teleological principle of benevolence along with *prima facie* deontological principles of justice, fidelity, gratitude, etc., to come up with a judgment "all things considered". It does not seem that Ross' position formally differs in any significant way from a broad consequentialist position; the structure is the same. And Ross' intuitionism is one standard example of a deontological moral conception.⁹

Here it is important to see that in his account of consequentialist evaluation, Sen's use of 'maximize' – taken from set theory and contemporary axiomatic economic analysis (Sen 2000, 484) – is different from its use within classical utilitarianism and other traditional teleological

9 Here it's noteworthy that Sen recognizes that "the substantive gap between some versions of broad deontology and broad consequentialism may not be very great" (Sen 2000, 479 n. 5).

conceptions. Sen uses the term “optimization” to refer to utilitarianism, and defines ‘maximizing’ so that it involves ordinal rankings of states of affairs, and moreover “does not demand completeness of ranking” (ibid., 483). Among the considerations Sen would take into account in ranking states of affairs as better or worse are the degree to which individuals’ rights and duties are fulfilled, alongside considerations of how much individuals’ capabilities, freedoms, and well-being are promoted.

Now to choose the highest ranked option from among an ordinal ranking of states of affairs which may contain incommensurable elements is quite different from maximizing (or in Sen’s usage, “optimizing”) aggregate goodness, conceived as a measurable state of affairs. There are different ways to “maximize” outcomes in the sense of achieving ordinal rankings of them. There are also different ways to represent peoples’ valuations by choice functions of the kind Sen envisions.

In his lectures on Sidgwick, Rawls says that, to avoid confusion, modern economic analysis and rational choice theory should use a term such as ‘multiple-objective function’ rather than ‘utility function’ or ‘welfare function’:

Anyone’s moral or political judgments can [...] be represented by some mathematical function. In terms of this function, one can say: they judge as if they think that in each case society should maximize this function, promote the *best consequences* (as defined by this function) [...]. [But] mathematically speaking, the representation-function may be such that there is no natural sense in which it describes the agent as *maximizing anything*. E.g. there may be multiple objectives; or lexical orderings (no continuous representative function) [...]. This way of speaking [maximizing a multiple-objective function] implies *no specific* political conception. The question then is: what is the *shape*, or what are the *special features* of this function; and what conceptions and principles stand behind it in the thought and judgments of agents (individuals and society)?¹⁰

The implicit suggestion here is that no specific moral or political conception, consequentialist or deontological, is implied by “maximizing” a “multiple-objective” function of the kind Sen advocates, which contains rights and principles of justice in the maximand. It depends upon what the aims or objectives are that are being pursued or promoted, as well as the role of any principles involved in agents’ deliberations and attitudes towards one another. A further implication, I believe, is that once we uncover these aims and objectives, including the reasons and

10 Rawls 2007, from Sidgwick lecture III, final section. Compare Rawls 1999, 489, where he voices similar thoughts.

moral principles underlying judgments of good consequences and rankings of states of affairs in broad consequential conceptions, it may be that we no longer have a view that says that maximizing good states of affairs is the sole ultimate moral principle. For if we assign any independent weight at all to the moral considerations of justice, respect for rights, etc. that are to be maximized, then it follows that there are moral reasons that constrain the maximization or instrumental promotion of total goodness. And if we do not assign them any independent weight then rights and other moral concepts serve no real purpose in the maximand, but only obscure the good consequences or states of affairs that really inform our judgments about what is the best thing to do.

For example, suppose one of the goods that are part of a broad consequentialist maximand is said to be “equal rights of free expression”. Offhand, the value being promoted here would seem to be individuals’ freedom of expression itself and perhaps their enjoying the opportunity to exercise this freedom equally. If so, then it obscures this fact to incorporate a deontological principle of (respect for) *equal rights* to freedom of expression and claim that “we want to maximize (respect for) equal rights of free expression”. If what Sen really has in mind is maximizing equal (opportunities for) freedom of expression, or equal or adequate capabilities of certain kinds, then his broad “rights-consequentialism” is really just a confused version of the pluralistic distribution-sensitive position discussed in the preceding section. On that account equal rights (to freedom of expression, or adequate capabilities) might be brought in as an instrumental principle that promotes the achievement of a state of affairs where individuals enjoy equal (opportunities for) freedom of expression and adequate capabilities; but in that case, individual rights themselves are no longer part of the maximand to be promoted.

Moreover, there is a serious question whether it is even coherent to include rights, fairness, duties, just distributions, and other moral concepts in the maximand of a consequentialist conception. For if we understand consequentialism as a distinct kind of moral conception that says that the sole ultimate principle of right and justice is to maximize good consequences, then it would seem that there is no conceptual space left for the claim that there are independent reasons of justice to respect others’ rights, or that states of affairs where individuals respect one another’s rights and fair procedures ought to be promoted for their own sake. In so far as requirements of right and justice *are* incorporated into the ultimate good to be promoted and are given any weight independent of their consequences at all, it is no longer the case that the *sole*

ultimate principle of right action is that we maximize the good. For among the good consequences to be maximized are people respecting these antecedent non-maximizing moral principles (of fairness, or recognition of others' rights, and so on). Suppose that we inquire why people ought to conform to these principles. Why should respect for just *these* specific rights be so important? Why should they be equal? It's not as if individuals respect one another's rights without reason, detached from other considerations. The answer to these questions cannot simply be that individuals' compliance with these principles (respect for rights or rules of fairness, etc.) promotes good consequences, for then the argument becomes circular. ("We should respect others' equal basic rights in order to maximize good consequences, which include respecting others' equal basic rights.")¹¹ To avoid this circle, the broad consequentialist would seem to have to concede that respecting these principles of right is intrinsically good and hence the right thing to do for its own sake ("precisely because", as Sen says, rights and duties ought to be respected). In that event, the ultimate good itself cannot be described in the absence of an antecedent non-maximizing moral principle of right; principles of right are part of its very definition. But then it is no longer the case that maximizing the good is the *sole* ultimate principle of right, and thus we do not have strictly speaking a consequentialist view.

Moreover, if we assume that these antecedent principles of right can ever provide sufficient reasons to act independently of their consequences, and we act on them at all for their own sake and the related deontological values they realize (respect for persons, dignity of persons, etc.), then we are no longer acting in order to maximize good consequences; thus we no longer satisfy the consequentialist requirement that requires that we *always* act so as to maximize good consequences. Rather these non-consequentialist principles (respect for others' rights for example) and the deontological values they realize are sufficient justification, and we act upon these principles for their own sake – not for the

11 The charge of circularity here resembles Sidgwick's response to the claim that virtuous conduct is the ultimate good to be rationally promoted, or maximized: "If we mean by Virtue conformity to such prescriptions and prohibitions as make up the main part of the morality of Common Sense, [then] to say that 'General Good' consists solely in general Virtue....would obviously involve us in a logical circle; since we have seen that the exact determination of these prescriptions and prohibitions must depend on the definition of this General Good" (Sidgwick 1981, 392).

sake of further good consequences they promote. To say that we then maximize the good or promote good consequences by acting on these very non-instrumental principles of right is uninformative if not empty.

Perhaps one way to interpret a broad consequentialism that avoids these problems is to contend that it is an intrinsically valuable state of affairs when people, no matter what their reasons or what principles they consciously observe, act in ways that fulfill and do not violate others' rights. If they do so because they think they have a non-consequentialist moral duty (e.g. to respect others as equal moral persons, or to do justice for its own sake), then their reasons for respecting others' rights are false, just as their reasons are false if they think they are under a duty to respect rights because God commands them to do so. But the fact that people might need to falsely believe in fundamental deontological principles and values or the existence of God in order to be sufficiently motivated to not violate others' rights is neither here nor there. The only reason they really have for recognizing others' rights is to do their part in *maximizing the sum total of rights-satisfying actions*. In this event, it cannot be said of people generally that "they ought to respect one another's rights *precisely because* [as Sen says] rights ought to be respected". For the only reason there can be to respect anyone's rights on any occasion is that it results in still greater numbers of rights-respecting actions. This position is suggested (though I do not think intended) when Sen says: "The fulfillment of rights is a good thing to happen – the more the better – as it would be seen in a consequential perspective [...]"¹²

It's hard to know what to make of this suggestion. To begin with, it offers little prospect of guaranteeing *equal* basic rights, for it regards rights as detached from the persons who bear those rights, and demands that we maximize aggregate rights-satisfactions (or minimize rights violations) without regard to their distribution among persons. Thus the rights of some might need to be violated wholesale, in order to minimize total rights-violations overall. More problematic still, this position would seem to have absurd consequences. If rights-fulfillments were themselves among the states of affairs to be maximized, then (for example) it would make sense for us to go about manufacturing rights claims

12 Sen 2000, 498. Sen refers on p.499, n.34, to Nozick's suggestion of a "utilitarianism of rights", which would seem to be prone to this problem since it says that we ought to maximize rights-satisfactions, or alternatively minimize-rights violations. See Nozick 1974, 28–29.

for no other reason than maximizing rights-satisfactions; for example, we might enter into trivial agreements and make legal commitments to fulfill thousands of promises and contracts we otherwise would not dream of making, for no purpose other than creating rights in others with corresponding duties that we fulfill. What could be the point of maximizing rights-fulfillments, so regarded? (Minimizing rights-violations would have opposite effects: we minimize prospective violations of rights by failing to exercise or create those rights; for example, we should avoid entering into legal transactions creating rights others might violate; or we should cease expressing ourselves in controversial ways, to deprive government of opportunities to violate our free expression rights.)¹³ The idea that there is something intrinsically good about the state of affairs of (maximum) rights-fulfillments – where rights are regarded as detached from peoples' projects, relations, and reasons for interacting in a particular way – is peculiar, to say the least.

In any case, I do not think this interpretation of rights-consequentialism solves the problems I've raised earlier, since we still need some explanation of why states of affairs where rights are respected are worth pursuing for their own sake. The answer cannot be: "They just are; it's self-evident"; nor can it be: "Because respecting rights is instrumental to other goods".¹⁴ Moreover, we need an explanation as to which rights are most important and ought to be respected *as* fundamental, why just *these* rights and not others should be *equally* distributed, and so on. I do not see a way to address these questions without invoking deontological reasons and moral principles that explicate such deontological values as respect for persons as free and equal, the dignity of persons, and so on. Once these reasons are invoked, we no longer have a consequentialist view.

13 The position is also prone to the population problems and other excessive numbers problems that consequentialists often confront – for example, if the sum of rights-satisfactions ought to be maximized then offhand we would seem to be under a duty to increase population to as many people as needed to maximize the number of rights-satisfying actions. Minimizing rights-violations would have the opposite effect in requiring extraordinary birth control measures.

14 For example, if the answer is that respecting rights increases individuals' freedom and autonomy, then we have an example of the kind of position discussed in the preceding section that Bill Talbott contends for, and not a position that says that respect for rights is an intrinsically good state of affairs that ought to be maximized.

To conclude, I have argued that broad consequentialist positions and consequentialisms of rights like Sen's are either incoherent, or they are not what they pretend to be. We can make perfectly good sense of what is going on in broad consequentialism within a traditional intuitionist framework where consequentialist principles are combined with and weighed or balanced against deontological principles as well as each other. Depending on the weights or importance assigned to each of the plurality of principles involved, sometimes individual rights may be traded off in order to promote greater rights-fulfillment; sometimes they may be traded off to promote other values; and sometimes individual rights should be enforced simply for their own sake (just as Sen suggests (Sen 2000, 499 n.)). But in striking a balance among these consequentialist and deontological principles, nothing is being maximized in any informative sense, certainly not in the sense of maximizing the "one rational good" that has driven teleological conceptions from Plato's perfectionism to modern forms of utilitarianism.¹⁵ The fact that Sen describes what is going on in terms of maximizing a mathematical function does not alter this fact, even if it might create an illusion to the contrary.

V. Conclusion

I have discussed three common strategies for incorporating the idea of equal rights – which is essential to both liberal and democratic thought – into a consequentialist framework, and have argued that each has serious if not insurmountable problems. This does not mean that all consequentialist efforts to incorporate equal rights must meet with failure. If we abandon the act-consequentialist principle which assesses the rightness of actions solely by their individual tendency to maximize the good, then there may be a way to formulate an indirect-rule-consequentialist conception and defense of equal rights. The kind of rule-utilitarianism implicit in Hume's account of justice, or in Rawls' practice-conception of rules, and perhaps other versions, in effect deny the act-consequentialist assumption that rightness consists in maximizing the good.¹⁶ Instead, they usually begin with the common sense assumption

15 On the doctrine of the one rational good, see Rawls 1999b, 360.

16 See Rawls 1999c. Brad Hooker (2011), section 8, also argues that rule consequentialists reject the assumption that right actions should maximize the good.

that morality is interpersonal, and that the rightness of actions involves obedience to certain impartial rules, including rules that bestow upon individuals the necessary rights and powers needed for each person to safely and freely pursue his or her individual interests. Taking maximally good consequences into account is rarely, if ever, a legitimate reason for individuals or even governments to act upon. Instead it enters into rule consequentialist justifications (if at all), not at the level of deciding rightness of actions, but in the justification of the entire system of rules and specification of the kinds of rights that individuals ought to have. My argument does not address these positions, which on the whole seem to be a more promising way for consequentialists to argue for equal moral rights.

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