

FROM CANNIBALISM TO CAESAREANS: TWO CONCEPTIONS OF FUNDAMENTAL RIGHTS

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I. INTRODUCTION

On September 6, 1884, three British seamen were arrested at the port of Falmouth and charged with the murder of the fourth member of their crew while adrift in a dinghy in the South Atlantic. On June 16, 1987, George Washington University Hospital sought a declaratory order from the District of Columbia Superior Court instructing it whether to perform a Caesarean section on Angela Carder, a young woman in her twenty-sixth week of pregnancy who was dying of lung cancer. These two seemingly unrelated events have much to tell us about the changing concept of rights in Anglo-American jurisprudence. For each gave rise to a case whose resolution required a court to construe the fundamental rights of the parties involved; and, in each case, the construction of these rights was literally a matter of life and death. Yet a radically different conception of rights emerged from each. For this reason, they are ideally designed to illustrate just how much the legal conception of a fundamental right has changed over the last century.¹

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¹I would like to make it clear at the outset that in this article I am restricting my attention to what are usually referred to as "fundamental" rights. Although this phrase has somewhat different

In this article, I intend to argue that this change has not been for the better. To do so, I will suggest that in the case that arose from the first of these incidents, *Regina v. Dudley and Stephens*,² the court was employing a "classical" conception of legal rights; one in which rights are viewed as infeasible, morally fundamental entities that protect individual autonomy. However, in the case that arose from the second incident, *In re A.C.*,³ the court employed a "contemporary" conception in which rights are viewed as means to the achievement of more fundamental moral

meanings within the legal and philosophical communities, I believe my argument to be applicable in either context. Constitutionally speaking, fundamental rights are a special class of "preferred rights," *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), that are entitled to protection "from all but the most compellingly justified instances of governmental intrusion." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 770 (2d ed. 1988). These rights have been defined alternatively as those which embody "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'" *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986), or those which embody "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Id.* at 192. Philosophically speaking, fundamental rights are human or moral rights and constitute a class of important basic rights that individuals possess simply because they are human beings and that any morally legitimate government is bound to respect. These rights are fundamental in the sense that although they limit the ways the state may interfere with the activities of the individual members of society, they do not arise out of either social institutions or individual agreements.

Fundamental legal rights are to be distinguished from "conventional" or "institutional" legal rights "that provide a justification for a decision by some particular and specified political institution," R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 93 (1977). Examples of such institutional rights are the right to receive unemployment compensation upon meeting the legal requirements, the right to repayment of a debt, or the right to a decision in one's favor in a legal dispute.

It is important to appreciate that the assertions and arguments made in this article apply exclusively to fundamental rights. Although it may well be that the conclusions reached have implications for institutional legal rights as well, the current discussion should be seen as directed toward fundamental rights only.

²14 Q.B.D. 273 (1884). This case will be familiar to most of those who have taken a course in criminal law in law school.

³533 A.2d 611 (D.C. 1987) *reh'g granted*, 539 A.2d 203 (D.C. 1988) *vacated*, 573 A.2d 1235 (D.C. 1990).

interests. By tracing the historical development of these differing conceptions, I hope to be able to identify the essential characteristics of each. I will then argue that if Ronald Dworkin is correct that for legal rights to be taken seriously they must protect individuals' freedom of action from governmental efforts to promote the general interest,⁴ the contemporary conception cannot be an appropriate conception of rights for a liberal legal regime. This is because in the pragmatic political and judicial environment in which these rights must function, the contemporary conception will produce a body of legal rights that are ultimately self-defeating and do not, in fact, restrain state power. I will further argue that although the classical conception of rights may be subject to objection on other grounds, it is at least not self-defeating and is therefore better able to protect individual autonomy against the utilitarian interest of the state than the contemporary conception. For this reason, it represents a more appropriate conception of fundamental legal rights.⁵ I will conclude by applying the results of this analysis to the illustrative cases as a concrete demonstration of the advantages of the classical conception.

Let us begin, then, by considering the illustrative cases.

⁴See R. DWORKIN, *Taking Rights Seriously*, in TAKING RIGHTS SERIOUSLY 184 (1977).

⁵I would like to be clear about the limitations of my argument. This article is not intended as a proof that the classical conception constitutes the ideal conception of fundamental legal rights. For that matter, it does not even assume that the idea of fundamental rights makes sense. In this article, I am attempting to show only that of the two conceptions of fundamental rights that have made their way into our legal system, the classical conception is the only one that can possibly do the job that fundamental rights are supposed to do. I am claiming only that the classical conception is not self-defeating in the way the contemporary conception is. It may well be that there are other reasons why the classical conception is itself inadequate. If so, their enumeration is beyond the scope of this article.

II. ILLUSTRATIVE CASES

A. *Regina v. Dudley and Stephens*⁶

On May 5, 1884, the English yacht *Mignonette* put to sea from the village of Tollesbury in Essex bound for Sydney, Australia. On board was a crew of four consisting of Tom Dudley, the captain; Edwin Stephens, the mate; Edmund Brooks, a crewman; and Richard Parker, the ship's boy. The voyage was uneventful until July 5 when, during a gale, a huge swell broke over the yacht, shattering its side. The ship was so badly damaged that it sank within five minutes. The four men managed to lower the ship's dinghy and scramble in, but had no time to provision it properly. As a result, they found themselves adrift in the South Atlantic with no supply of fresh water and only two one-pound tins of turnips for food.

Over the course of the next twenty days, the men had nothing to eat beyond the turnips and a turtle they caught on the fourth day and nothing to drink other than whatever rain water they could catch. After the twelfth day adrift, they had no food at all and after the fourteenth, no water. On the night of July 20, fifteen days after the sinking, Richard Parker drank a large quantity of seawater which was believed by seamen of the time to be poisonous. As a result, he experienced vomiting and diarrhea, which increased his dehydration, and eventually became delirious and then comatose.

By the night of July 24, it was clear that without sustenance death for all was imminent. Parker, who was prostrate and had been gasping for breath for three days, was believed to be near death. For these reasons, Dudley and Stephens agreed that if no sail was in sight in the morning, Parker should be killed so that the others could feed upon his body. When by 8:00 A.M. on July

⁶14 Q.B.D. 273 (1884).

25 no relief was in sight, Dudley went to the boy and with the help of Stephens cut his throat, catching the blood in the ship's chronometer case. The three remaining men then fed upon Parker's blood and body for four days until July 29 when they were spotted and rescued by a passing ship, the *Moctezuma*. This ship returned the seamen to Falmouth in England on September 6 whereupon they faithfully recounted the details of the shipwreck and Richard Parker's death to the authorities, and, quite to their surprise, were arrested for murder.⁷

At their trial,⁸ the jury returned a special verdict finding the facts to be as above described but declaring itself unable to determine whether this situation constituted murder. As a result, the case was referred to the Queen's Bench Division of the High Court of Justice for disposition. This court ruled that the situation clearly did not constitute a case of self-defense and that the killing was not justified by the fact that it was necessary to preserve the defendants' lives. In support of this conclusion, the court stated,

To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, . . . these duties impose upon men the moral necessity, not of preservation, but of the sacrifice of their lives for others It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life.⁹

Since the killing was therefore unexcused, the defendants were found guilty of murder and sentenced to death (although this was later commuted to six months in prison by the Crown).

⁷The facts of this case beyond those that appear in the special verdict rendered by the jury have been derived from A.W.B. SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

⁸Although all three survivors were originally arrested, only Dudley and Stephens were brought to trial.

⁹14 Q.B.D at 287.

B. *In re A.C.*¹⁰

Angela Carder was a young woman who had been fighting medical adversity all her life. At the age of thirteen, she had been diagnosed as having leukemia. In the years that followed, she underwent several major surgical procedures as well as other forms of therapy, including chemotherapy. At the age of twenty-four, her cancer went into remission and three years later she married, becoming pregnant soon thereafter. Because of her medical history, she was referred to George Washington University Hospital's high-risk pregnancy clinic in her fifteenth week of pregnancy. In her twenty-fifth week, she complained of shortness of breath and back pain at her regular prenatal visit. Upon investigation, her physicians discovered a cancerous tumor in her lung and on June 11, 1987, Ms. Carder was admitted to George Washington University Hospital with a terminal prognosis.

Ms. Carder's physicians believed that her unborn child would have a reasonable chance of survival if it could be delivered in the twenty-eighth week and, after being informed of this, Ms. Carder stated that she would be willing to give up her life so that the fetus could survive once that point was reached. However, she expressed no opinion as to what should be done before the twenty-eighth week. Unfortunately, Ms. Carder's condition declined rapidly and, on June 16, she had to be heavily sedated in order to continue breathing.

At this point, the medical situation was as follows. Ms. Carder's physicians estimated that she had between twenty-four and forty-eight hours to live. The fetus was suffering from oxygen starvation and a resultant rapid heart rate, but there was still less than a twenty percent chance

¹⁰533 A.2d 611 (D.C. 1987) *reh'g granted*, 539 A.2d 203 (D.C. 1988) *vacated*, 573 A.2d 1235 (D.C. 1990).

that it would suffer from serious birth defects if born alive. If Ms. Carder died before delivery, the fetus would die, but it had a fifty to sixty percent chance of survival if delivered immediately by Caesarean section. However, because of her weakened condition, this surgery was likely to hasten Ms. Carder's death.

In these circumstances, the attending medical staff elected not to intervene. However, the hospital administration, fearing legal liability for not trying to save a viable fetus, sought a declaratory order from the District of Columbia Superior Court "as to what it should do in terms of the fetus, whether to intervene [by Caesarean section] and save its life."¹¹ The court held that the fetus was viable and that the District of Columbia had a legitimate interest in protecting its potential life, and ordered the hospital to proceed with the surgery. Ms. Carder, informed of this while lucid, at first agreed to the surgery but later withdrew her consent. An appeal was taken to the District of Columbia Court of Appeals requesting a stay. The stay was denied and the surgery was performed. However, the fetus did not survive and Ms. Carder died soon thereafter.¹²

The Court of Appeals subsequently issued an opinion justifying its denial of the stay. The court ruled that Ms. Carder had a right to bodily integrity derived from the Constitutional right to privacy guaranteed by the Ninth and Fourteenth Amendments of the United States Constitution and that this right included the right to refuse medical treatment. However, the court also ruled that the fetus constituted an innocent third party that the state had an interest in protecting. In resolving this conflict in favor of the state's interest, the court stated,

¹¹533 A.2d at 612.

¹²The facts of this case beyond those that appear in the judicial opinion are taken from *Court in Capital Bars Forced Surgery to Save Fetus*, N.Y. Times, April 27, 1990 at 1, col. 3.

The Caesarean section would not significantly affect A.C.'s condition because she had, at best, two days left of sedated life; the complications arising from the surgery would not significantly alter that prognosis. The child, on the other hand, had a chance of surviving delivery, despite the possibility that it would be born handicapped. Accordingly, we concluded that the trial judge did not err in subordinating A.C.'s right against bodily intrusion to the interests of the unborn child and the state, and hence, we denied the motion for a stay.¹³

C. A Comparison of the Cases

What is the significance of these cases? Consider *Dudley and Stephens* first. In that case, the defendants were convicted of murder, i.e., of violating Richard Parker's right to life. This was the case even though killing Parker was clearly the most rational way to preserve the maximum number of lives. For the circumstances in which the men found themselves were so extreme that unless one was killed, all would die. As a result of his having drunk seawater, Parker had virtually no chance of survival. Thus, if someone other than Parker had voluntarily sacrificed himself (as

¹³533 A.2d at 617. Although the decision from which this quote is taken was subsequently reversed at rehearing, *In re A.C.*, 573 A.2d 1235 (D.C. 1990), that reversal did not rule out the kind of balancing of rights against interests here described. The 1990 decision reversed on the grounds that the trial judge improperly failed to determine whether A.C. was competent to make a decision regarding her treatment and, if she was not, to apply a substituted judgment standard. In so ruling, the court explicitly recognized that there may be "extremely rare and truly exceptional" cases in which a "conflicting state interest may be so compelling that the patient's wishes must yield," *Id.* at 1252 (footnote omitted), although it suggested in dictum that the situation in which A.C. found herself was not such a case. "This is dictum because, as the majority points out, '[w]e have no reason to believe that, if competent, A.C. would or would not have refused to consent to a caesarean.'" *Id.* at 1254 (Belson, J., dissenting) (footnote omitted). Further, the court specifically rejected the contention of A.C.'s counsel that "the trial court erred in subordinating A.C.'s right to bodily integrity in favor of the state's interest in potential life," *Id.* at 1238, and explicitly recognized that in cases such as *In re Madyun*, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. July 26, 1986) involving an unconsenting mother at full term who had been in labor for two and a half days, it may be proper to order a Caesarean. *Id.* at 1252 n.23. Thus, it would appear that despite the subsequent decision, the problem of maternal-fetal conflicts is still a live issue in the District of Columbia.

the judges suggested would be his duty),¹⁴ it would have constituted a waste of life. It could not have helped Parker, who was too far gone to recover, and would have resulted in there being only two, rather than three, survivors. Only Parker's death would produce a reasonable likelihood of there being three survivors. Under these circumstances, a murder conviction would have to imply that it is improper to abridge Parker's right to life *even though necessary to maximize the number of lives preserved*.

Now consider *A.C.* Due to Ms. Carder's weakened condition, the Caesarean was extremely likely to result in her death and was virtually certain to at least hasten it. For this reason, ordering the surgery was tantamount to ordering Ms. Carder's death and presented the court with a situation much like that of *Dudley and Stephens* in which the most rational way to preserve the maximum number of lives was to sacrifice one life for another. For without the Caesarean, both mother and fetus would die, while with it, there was at least a chance that the fetus would survive. Thus, only subjecting the mother to a grave risk of immediate death would produce any likelihood of there being a survivor. Under these circumstances, a court order forcing Ms. Carder to undergo the Caesarean would seem to imply that her right to life¹⁵ may properly be abridged *when necessary to maximize the number of lives preserved*.

Note the similarities between the cases. In each case, there was an individual whose

¹⁴Since consent is not a defense to murder, it would seem that if one of the men had so volunteered, he would have had to commit suicide rather than merely submit himself to be killed by the others for the conduct of the survivors to have been judged blameless under the standard employed in this case.

¹⁵The court never explicitly characterizes this case as one in which Ms. Carder's right to life is at stake, focusing instead upon her right to refuse medical treatment. However, since it is the proposed treatment that presents the threat of death, in this case the two rights are coextensive.

remaining life span could be measured in hours. In each case, this individual's immediate death could save the life or lives of others. In each case, the utilitarian considerations clearly favored taking the action that would produce the death of this individual. Yet in *Dudley and Stephens* the defendants were punished as murderers for their actions while in *A.C.* the court itself ordered the doctors to proceed.

Although the cases are not completely analogous,¹⁶ I want to suggest that the apparent inconsistency of outcome is to be explained not on the basis of some distinctive feature of one or the other of the cases, but by the way the legal conception of a fundamental right has changed over the 103 years that separate them. I believe that although both of the courts concerned clearly recognized that all people have a fundamental right to life, what each meant by this phrase is markedly distinct. The *Dudley and Stephens* court could only have been employing the term 'right' in what I have referred to as the "classical" sense; as an absolute, morally fundamental protection for individual autonomy. Clearly, this cannot be the sense in which the *A.C.* court is using the term. That court must have been employing it in what I have called its "contemporary" sense; as a means to the achievement of a more fundamental moral interest. To show that this is indeed the case, let me attempt to draw this distinction out at length.

¹⁶For example, in *Dudley and Stephens* the men were sure their actions would kill Parker whereas in *A.C.* there was at least a chance that Ms. Carder would survive the procedure. Further, Ms. Carder's consent would clearly provide legal justification for the Caesarean whereas Parker's consent would not have legally justified Dudley and Stephens in killing him. Additionally, although neither court referred to them, the cases may be distinguished by the presence of two special duties which are not precisely parallel, in *Dudley and Stephens* that of a captain to his crew and in *A.C.* that of a mother to her child. I am indebted to Robert Veatch for the latter two contrasts.

III. TWO CONCEPTIONS OF RIGHTS

A. THE CLASSICAL CONCEPTION OF RIGHTS

Although the concept of rights has been traced back at least as far as William of Ockham¹⁷ and perhaps as far back as Greek and Roman law,¹⁸ we need not go back so far. The idea that human beings have fundamental rights not derived from or dependent upon the political structure of society originally made its way into English law via the political philosophy of Thomas Hobbes and John Locke. Hobbes, writing during the time of the English civil wars,¹⁹ turned previous political philosophy on its head by deriving the subject's obligation to his or her sovereign directly from the subject's own pre-political natural right. In seeking to place political theory on what he thought to be a more "scientific" footing,²⁰ Hobbes sought for the source of political obligation in the inherent characteristics of the individual human being.²¹ Of these, he found the most significant

¹⁷Golding, *The Concept of Rights: A Historical Sketch*, in BIOETHICS AND HUMAN RIGHTS 44 (1978).

¹⁸J. Roland Pennock, *Rights, Natural Rights, and Human Rights--A General View*, in NOMOS XXIII: HUMAN RIGHTS 1, 1 (J. Roland Pennock & John W. Chapman eds. 1981).

¹⁹LEVIATHAN was originally published in 1651.

²⁰See I. SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 43-48 (1986); J. HAMPTON, HOBBS AND THE SOCIAL CONTRACT TRADITION 11-14 (1986); L. STRAUSS, NATURAL RIGHT AND HISTORY 169-74 (1953).

²¹Hobbes believed that human passions were of two types: those that are innate, "Of appetites and aversions, some are born with men, as appetite of food, appetite of excretion, and exoneration" T. HOBBS, LEVIATHAN 53 (H. Schneider ed. 1958) (1651), and those that are acquired, "The rest, which are appetites of particular things, proceed from experience and trial of their effects upon themselves or other men." *Id.* It is among the former that he sought the ground for his political philosophy.

to be the fear of violent death²² which compelled human beings to act so as to preserve their lives.

Using this as his Archimedean point, Hobbes contended that human beings must possess a natural right of self-preservation. For, if human beings are compelled by their nature to act so as to preserve themselves, it cannot be wrong for them to do so. Hence, they must be entitled to take those actions they believe necessary for the preservation of their lives.²³ Of course, for Hobbes, the existence of this fundamental natural right served as the basic premise in an argument for the subject's duty to submit to an absolute authority.²⁴ However, for our purposes, it is Hobbes' conception of the right rather than the use he made of it that is of interest.

What made Hobbes' right of self-preservation distinctive was his attempt to provide an empirical basis for it. He believed that human beings' rights must be determined by their actual capacities; they must have a right to do that which it is impossible for them not to do. Therefore, the source of rights is not to be found in some pre-existing ethic, but in the observable attributes of human nature.²⁵ And since according to Hobbes' observations, the most basic attribute of

²²Hobbes clearly regarded the fear of death as an innate passion as indicated in his statement that "necessity of nature maketh men . . . avoid that which is hurtful; but most of all that terrible enemy of nature, death . . ." T. HOBBS, *THE ELEMENTS OF LAW, NATURAL AND POLITIC* 71 (F. Tönnies ed. 1928) (1640). *See also* J. HAMPTON, *supra* note 20, at 14-15.

²³The RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man has to use his own power, as he will himself, for the preservation of his own nature--that is to say, of his own life--and consequently of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.

T. HOBBS, *supra* note 21, at 109.

²⁴*See id.* chs. 14, 17-18.

²⁵Ian Shapiro has explained this aspect of Hobbes' thought as follows.

Instead of conceiving of rights and obligations in terms of reciprocal correlative

human nature is the drive to preserve one's own life, human beings must have a right to attempt to do so.²⁶

The interesting thing about this approach is that it implies that the right to self-preservation is absolute; that no other obligation can override it. For if human beings are compelled by their nature to act so as to preserve themselves; if it is impossible for them not to, it would be absurd to claim that they have an obligation not to.²⁷ Since "ought implies can," there

relationships, both being grounded in natural law, or some other theory of the good, rights are conceived of as indicative of the basic human capacity for autonomous action. In the state of nature man's rights are conceived of as whatever he can in fact do

I. SHAPIRO, *supra* note 20, at 60-61.

²⁶Although Hobbes does not consider fear of violent death to be the only innate characteristic of human beings, he plainly regards it as the most powerful and as such the mainspring of human action. Thus, the desire for self-preservation constitutes the fundamental motivating force in human activity. As Leo Strauss has explained Hobbes' thinking,

The most powerful of all passions is the fear of death and, more particularly, the fear of violent death at the hands of others: not nature but "that terrible enemy of nature, death," yet death insofar as man can do anything about it, i.e., death insofar as it can be avoided or avenged, supplies the ultimate guidance. Death takes the place of the *telos*. Or, to preserve the ambiguity of Hobbes's thought, let us say that the fear of violent death expresses most forcefully the most powerful and most fundamental of all natural desires, the initial desire, the desire for self-preservation.

L. STRAUSS, *supra* note 20, at 180-81. It is the irresistibility of this desire that gives rise to the right of self-preservation. "When Hobbes declared that men have a 'right to self-preservation,' he meant not that an individual is entitled by some rule (of law, tradition, or morals) to life but that he cannot be obliged to renounce it because it is psychologically impossible for him to do so." R.S. PETERS, *Thomas Hobbes*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY* 42 (1967).

²⁷Accordingly, Hobbes recognizes both that even those justly condemned to death retain the right to resist the imposition of sentence by all means at their disposal, T. HOBBS, *supra* note 21, at 176, and that a soldier who flees rather than lay down his life in battle does not act unjustly, *id.* at 177.

can be no obligation to do the impossible. It follows then, that an essential characteristic of Hobbes' natural right is its indefeasibility. It simply is not subject to being overridden by a conflicting obligation and hence, is absolute in nature.²⁸

Like Hobbes, Locke sought for the source of political obligation in the nature of the individual human being. He, too, believed that a citizen's duty to the sovereign must derive from pre-existing natural rights.²⁹ However, for Locke the source of these rights was not human beings' inherent fear of violent death, but rather the divinely ordained, rationally accessible law of nature.³⁰

Similarly to earlier natural lawyers such as Aquinas, Grotius, and Pufendorf, Locke saw the law of nature as a manifestation of divine will impressed upon the natural world which human beings could discover via their senses and reason.³¹ Indeed, in his opinion, the natural law was

²⁸Strauss has rather neatly explained how Hobbes' derivation of the right to self-preservation entails its indefeasibility as follows.

If, then, natural law must be deduced from the desire for self-preservation, if, in other words, the desire for self-preservation is the sole root of all justice and morality, the fundamental moral fact is not a duty but a right; all duties are derivative from the fundamental and inalienable right of self-preservation. There are, then, no absolute or unconditional duties; duties are binding only to the extent to which their performance does not endanger our self-preservation. Only the right of self-preservation is unconditional or absolute.

L. STRAUSS, *supra* note 20, at 181.

²⁹J. LOCKE, SECOND TREATISE OF GOVERNMENT § 95 (C.B. MacPherson ed. 1980) (1690).

³⁰"The *State of nature* has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, liberty, or possessions: . . ." *Id.* at § 6.

³¹[T]his law of nature can be described as being the decree of the divine will discernible by the light of nature and indicating what is and what is not in conformity with

accessible to any human being who was willing to employ his or her powers of observation and ratiocination.³² However, whereas his predecessors believed that the law of nature consisted of commands and prohibitions for the direct regulation of human behavior, Locke saw it as instructing human beings as to the existence of and obligation to respect the natural rights of individuals.³³

This conception of the natural law enabled Locke to paint a much richer portrait of natural rights than had Hobbes, consisting in not merely a right to self-preservation or life, but in rights to liberty and property as well. The rights to life and liberty derived from the observation that god

rational nature, and for this very reason commanding or prohibiting. It appears to me less correctly termed by some people the dictate of reason, since reason does not so much establish and pronounce this law of nature as search for it and discover it as a law enacted by a superior power and implanted in our hearts.

JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* 111 (W. von Leyden ed. 1954) (1660).

³²According to Locke, the law of nature could be known by "the light of nature" since it consists in "knowledge of which a man can attain by himself and without the help of another, if he makes proper use of the faculties he is endowed with by nature." *Id.* at 123.

³³*See supra* note 30. Shapiro and Strauss agree that for Locke "natural rights are in some important sense basic and prior to natural laws," I. SHAPIRO, *supra* note 20, at 101. Strauss makes this point as follows.

There is no rule of the law of nature which is innate, "that is, . . . imprinted on the mind as a duty." . . . However, "Nature . . . has put into man a desire of happiness, and an aversion to misery; these, indeed, are innate practical principles": they are universal and unceasingly effective. The desire for happiness and the pursuit of happiness to which it gives rise are not duties. But "men . . . must be allowed to pursue their happiness, nay, cannot be hindered." The desire for happiness and the pursuit of happiness have the character of an absolute right, of a natural right. There is, then, an innate natural right, while there is no innate natural duty. . . . Since the right of nature is innate, whereas the law of nature is not, the right of nature is more fundamental than the law of nature and is the foundation of the law of nature.

L. STRAUSS, *supra* note 20, at 226-27.

created human beings and endowed them with particular characteristics. According to Locke, the fact of divine creation implied divine proprietorship from which it followed that only god was entitled to set the limit of an individual's existence. Hence, no human being could unnecessarily deprive another of his or her life.³⁴ Further, since god created human beings with free will, he intended them to use it, and hence each possesses an "*equal right . . . to his natural freedom*, without being subjected to the will or authority of any other man."³⁵ Finally, the right to property derived from human self-ownership in that, since humans beings own their own bodies, they own

³⁴[F]or men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such *subordination* among us, that may authorize us to destroy one another, Every one, as he is *bound to preserve himself*, and not to quit his station wilfully, so by like reason, when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind*, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, or goods of another.

J. LOCKE, SECOND TREATISE *supra* note 29, at §6.

³⁵*Id.* at § 54. Shapiro explains this as follows.

Within the general limitations of the law of nature, man is free to act as he pleases precisely because God has created him with the capacity to so act. In this way Locke manages to ground his negative libertarian view of civil freedom in his voluntarist theology. God makes man, we are told in the *First Treatise*, "*in his own Image, after his own Likeness*, makes him an intellectual Creature and so capable of *Dominion*." We are free agents because God gave us free will, it is His purpose that we should have it.

I. SHAPIRO, *supra* note 20, at 107.

the labor of their bodies, and hence are entitled to acquire things they labor upon.³⁶

Although Locke's account of natural rights is distinct from Hobbes' in being rooted in theology³⁷ rather than psychology, it is similar in implying that such rights are absolute. Since no legitimate duty can contravene divine will and since the individual possession of natural rights is merely a manifestation of this will, no conflicting obligations can override a natural right. Thus,

³⁶[E]very man has a *property* in his own *person*; this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.

J. LOCKE, *supra* note 29, at § 27. For a fuller explanation of Locke's derivation of the right to property, see C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE*, 200-01 (1962) and I. SHAPIRO, *supra* note 20, at 90-97.

³⁷It should be noted that Locke's derivation of natural rights is not quite as simple as I have made it appear. As Shapiro has pointed out, whereas Hobbes' theory was grounded upon "an egoistic psychology knowable with the certainty of geometry because rooted in intentional action[,] [f]or Locke, its roots are more ambiguous, the appeal being sometimes to nature, sometimes to reason, sometimes to scripture, and usually to some combination of these." I. SHAPIRO, *supra* note 20, at 123. Indeed,

[w]hen we look for the justification offered by Locke for this generalized individual natural right, we find that there are several. Locke tends to shuffle perpetually among arguments from nature, reason, and scripture . . . Sometimes he seems to regard all these terms as synonymous. Thus in the *Essays on the Laws of Nature*, . . . the law of nature is identified as a decree of the Divine Will that reason does not establish but discovers as a law enacted by a superior power and "written in the hearts of men." . . . In the *Second Treatise*, however, . . . the Law of Nature is treated as synonymous with reason itself: . . . In the *First Treatise* we find several attempts to identify reason with nature. . . . Two chapters later we find a further identification of nature and reason with scripture. . . . What is natural is rational and is also God's will.

Id. at 84-85. However, it is reasonable to view Locke's approach as grounded in his "voluntarist theology" because it "had ultimately to rest on the leap of faith that we perceive God's intentions as rational imperatives because He has constituted us so as to perceive them." *Id.* at 124-25.

Locke's natural rights, like Hobbes', are essentially infeasible.³⁸

The concept of infeasible natural rights advanced by Hobbes and Locke³⁹ became extremely influential over the course of the eighteenth century.⁴⁰ Not only did it serve as the

³⁸Once again, this is a bit of an oversimplification. Although the commentators agree that Locke's natural rights were absolute in this sense, they often account for this characteristic in different ways. Thus, Macpherson states, "If it is labour, a man's absolute property, which justifies appropriation and creates value, the individual right of appropriation overrides any moral claims of the society," C.B. MACPHERSON, *supra* note 36, at 221, whereas Strauss derives this from the "universally and unceasingly effective" human desire for happiness. "The desire for happiness and the pursuit of happiness have the character of an absolute right, of a natural right." L. STRAUSS, *supra* note 20, at 226.

³⁹For purposes of brevity, I have associated the notion of natural rights only with Hobbes and Locke. It should be noted, however, that they are certainly not the only sources for this idea. The writings of both Grotius and Pufendorf contain references to natural rights. See Knud Haakonssen, *From Natural Law to the Rights of Man: A European Perspective on American Debates*, in *A CULTURE OF RIGHTS* 19, 24-30 (Michael J. Lacey & Knud Haakonssen eds., 1991). In fact, in the eighteenth century Locke's political, as opposed to his philosophical, influence was considerably less than it is generally assumed to be by contemporary political theorists. His *ESSAYS ON THE LAW OF NATURE* was not published during his lifetime and lay unnoticed until 1946, and Pufendorf's work was probably more frequently cited than his *SECOND TREATISE OF GOVERNMENT*. (I am indebted to Tom Beauchamp for pointing this out to me.) However, even if he was not then regarded as the seminal political thinker that he is today, the *SECOND TREATISE* was widely read and is correctly regarded as one of the fountainheads of eighteenth century natural rights thinking.

⁴⁰The idea was taken up by Francis Hutcheson who was a direct influence on both David Hume and Adam Smith. Hutcheson, writing in 1747, seems to have fully assimilated both the idea of natural rights and their derivation from natural law as evidenced by his statement that,

Private rights are either *natural* or *adventitious*. The former sort, nature itself has given to each one, without any human grant or institution. . . . In this respect all men are originally *equal*, that these natural rights equally belong to all, at least as soon as they come to the mature use of reason, and they are equally confirmed to all by the law of nature, . . .

FRANCIS HUTCHESON, *A Short Introduction to Moral Philosophy* in 4 *COLLECTED WORKS* 141-43 (1969) (1747) (emphasis in original). By 1762, Smith regarded the existence of such rights as self-evident,

philosophical basis of the revolutionary movements in America and France,⁴¹ but, as evidenced by BLACKSTONE'S COMMENTARIES,⁴² it had penetrated the English legal system by the middle of the century. Blackstone clearly recognized that human beings possess "absolute rights" which are those "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."⁴³ And he further asserted that such rights not

Now we may observe that the original of the greatest part of what are called natural rights {or those which are competent to a man merely as a man} need not be explained. That a man has received an injury when he is wounded or hurt any way is evident to reason, without any explanation; and the same may be said of the injury done one when his liberty is any way restrain'd; . . .

ADAM SMITH, LECTURES ON JURISPRUDENCE 13 (... 1978), a belief famously reflected in the Declaration of Independence, "We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness." DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

⁴¹The Lockean version of natural rights can be found almost verbatim in the American Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness," DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), and the French Declaration of the Rights of Man, "The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression." DECLARATION OF THE RIGHTS OF MAN AND CITIZEN ¶ 2 (France 1789), as well as in various state constitutions. *See, e.g.*, PA. CONST. ch. I, ¶ I ("That all men are born equally free and independent, and have certain natural and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."), and THE VIRGINIA DECLARATION OF RIGHTS §1 (Va. 1776) ("That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

⁴²W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (B. Gavit rev. ed. 1941) (1765).

⁴³*Id.* at 68.

only exist independently of enacted law,⁴⁴ but that their protection is the primary purpose of the state.⁴⁵

With the dawn of the nineteenth century, however, the claim that all individuals possessed these absolute rights was increasingly subject to attack. In the philosophical realm, the utilitarians were highly critical of the concept of natural rights as exemplified by Bentham's famous condemnation of the idea as "nonsense on stilts."⁴⁶ Within the legal world, the movement to place law on a more "scientific" footing represented by the historical jurisprudence of Friedrich Karl von Savigny⁴⁷ and the legal positivism of John Austin⁴⁸ could find no room for natural rights. Thinkers within these schools attacked the foundations from which natural rights had been derived. Hobbes' approach was criticized as based on faulty psychology⁴⁹ while Locke's could not withstand the

⁴⁴The absolute rights of man, considered as a free agent, are denominated the natural liberty of mankind, which consists in a power of acting, as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, when God endowed man with free will.

Id. at 68-69.

⁴⁵"The primary end of human laws is to maintain and regulate these absolute rights of individuals." *Id.* at 68.

⁴⁶Jeremy Bentham, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed. 1843).

⁴⁷FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Heywood trans. London, Littlewood 1831).

⁴⁸1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE (Robert Campbell ed., 5th ed., London, John Murray 1885).

⁴⁹Typically, Hobbes was accused of subscribing to psychological egoism; the doctrine which contends that human beings are psychologically compelled to act in an exclusively self-interested manner. This was attacked with counter-examples of those who had sacrificed their lives for others or for a cause, and was supposedly thoroughly refuted by Bishop Butler in his sermon "Upon the Love of Our Neighbor." JOSEPH BUTLER, FIFTEEN SERMONS ON HUMAN NATURE 34-

attacks on its theological underpinnings.⁵⁰ Further, both theories were accused of violating the Humean proscription on deriving a normative conclusion from purely empirical premises.⁵¹ As a result of these attacks, natural rights thinking went into decline throughout the nineteenth and much of the twentieth century. However, although the arguments Hobbes and Locke offered in support of the existence of natural rights had been putatively refuted, it had never been shown that there was anything incoherent in the idea that human beings inherently possess such inalienable rights. Thus, this idea was always available for rehabilitation through the provision of new, more successful supporting arguments.

A few contemporary adherents of the classical conception of rights have undertaken this rehabilitation by replacing the flawed psychological and theological arguments of Hobbes and Locke with others derived from ethical theory. For example, Tibor Machan and Eric Mack have both presented arguments to show that such rights can be derived from a specified form of ethical egoism.⁵² Another notable recent attempt along these lines is that of Douglas Rasmussen and Douglas Den Uyl who claim to derive a set of absolute, natural rights from an Aristotelian ethical basis.⁵³ However, by far the most influential of the contemporary arguments for this conception of

35 (1958). *See also* C.B. MACPHERSON, *supra* note 36, at 12.

⁵⁰*See, e.g.*, Pennock, *supra* note 18, at 3; I. SHAPIRO, *supra* note 20, at 124-25.

⁵¹*See e.g.*, Jeremy Waldron, *Introduction*, in THEORIES OF RIGHTS 1, 3 (Jeremy Waldron ed. 1984); Susan Moller Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, in NOMOS XXIII: HUMAN RIGHTS, *supra* note 18, at 233-34.

⁵²*See, e.g.*, TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989); Eric Mack, *How to Derive Libertarian Rights*, in READING NOZICK 286 (Jeffery Paul ed. 1981).

⁵³*See* DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER (1991). For other examples of contemporary

rights is that of Robert Nozick who attempts to derive them from the Kantian principle of respect for persons.⁵⁴

Kant derived all moral obligation from one fundamental moral principle, the categorical imperative, which requires that all human beings be treated with the respect due entities that are inherently valuable, i.e., as ends in themselves and never merely as means to the ends of others.⁵⁵

What Nozick has argued is that respecting individuals' rights is precisely what it means to treat them as ends.⁵⁶ The essence of this argument is that in instructing us to treat all human beings as

attempts to provide support for the classical conception of rights, see Fred D. Miller, Jr., *The Natural Right to Private Property*, in *THE LIBERTARIAN READER* 275 (Tibor R. Machan ed. 1982); and H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHILOSOPHICAL REV.* 175 (1955).

⁵⁴See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 30-33 (1974). Nozick is by no means the only theorist to support this approach. However, his presentation is extremely clear and straightforward, and thus often serves as its exemplar.

⁵⁵Kant stated his second formulation of the categorical imperative as "Act so that you treat humanity, whether in your own person or that of another, always as an end and never as a means only." IMMANUEL KANT, *THE FOUNDATIONS OF THE METAPHYSICS OF MORALS* 9-10 (Lewis White Beck trans. 1959).

⁵⁶This argument is not unique to Nozick or, for that matter, to supporters of the classical conception of rights. The Kantian basis for individual rights has been recognized by many of those I describe below as contemporary conception theorists. One of these, Joel Feinberg, has given what is perhaps the most elegant expression of this idea as follows.

Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims.

JOEL FEINBERG, *The Nature and Value of Rights*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF*

ends in themselves, Kant is merely recognizing that humans are autonomous moral agents, beings with goals and desires of their own and the ability to act upon them. Thus, treating others as ends requires that we respect their autonomy, i.e., that we recognize them as authors of their own actions and allow them to make choices for themselves. This, Nozick argues, is exactly what rights are designed to do. Rights are "side constraints,"⁵⁷ inescapable restrictions on the actions others may take toward the rightholder that are necessary to protect the rightholder's autonomy. Rights are guarantees that the rightholder will be treated with the morally requisite respect.⁵⁸

Like Hobbes and Locke, Nozick's Kantian approach implies that fundamental rights are absolute. Since they derive immediately from the categorical imperative, which is *the* fundamental requirement of morality, there exist no more significant or fundamental moral considerations that can override them. Thus, Nozick, too, views fundamental rights as indefeasible.⁵⁹

Whether derived from the naturalistic arguments of the natural rights theorists or the Kantian argument of contemporary libertarian theorists, the conception of rights being advanced has an essentially deontological character. Under it, rights are not regarded as means to the achievement of more fundamental moral ends. Rather, respect for rights is itself a fundamental requirement of morality. This deontological aspect is the defining feature of what I am calling the

LIBERTY 143, 151 (1980).

⁵⁷NOZICK, *supra* note 54, at 29.

⁵⁸"Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable." *Id.* at 30-31.

⁵⁹As do the other modern classical conception theorists who argue from an egoistic or Aristotelian basis.

classical conception of rights. Under the classical conception, rights are themselves fundamental moral entities.

B. THE CONTEMPORARY CONCEPTION OF RIGHTS

The nineteenth-century critics of natural rights did not argue that individuals do not possess fundamental rights entitled to respect by the law, but rather that the nature of such rights had been fundamentally misconceived by the natural rights thinkers. The most influential early critic of natural rights was Jeremy Bentham. As a utilitarian, Bentham saw the principle of utility as the foundation of morality.⁶⁰ Accordingly, he viewed a thing's moral quality as determined solely by its tendency to produce the greatest good for the greatest number. Thus, in his moral universe, there was simply no room for indefeasible, morally fundamental rights. For Bentham, rights were necessarily conventional and derivative; they were created by the law and justified only insofar as they promoted utility.⁶¹ According to Bentham, to say that an individual has a right

⁶⁰Bentham's version of the principle of utility is often referred to as the greatest happiness principle. He expressed it as follows.

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or, what is the same thing in other words, to promote or oppose that happiness.

1 JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 1 (John Bowring ed. 1843).

⁶¹ I know of no natural rights except what are created by general utility: and even in that sense it were much better the word were never heard of. All such language is at any rate false: all such language is either pernicious, or at the best an improper and fallacious way of indicating what is true. . . .

Of a natural right who has any idea? I, for my part, I have none: a natural right is a round square [or] an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me a right and a legal right are the same thing, for I know no other. Right and law are correlative

is simply to say that someone else has a duty to act in his or her interest.⁶² Far from being morally fundamental, Bentham viewed rights merely as means by which to provide the benefits to individuals demanded by the principle of utility.⁶³ Rights simply protected these more fundamental moral interests.

Bentham's utilitarian philosophy had a profound effect on subsequent jurisprudential thought. His conception of rights, often referred to as the "benefit" or "interest" theory of rights,⁶⁴ began to make its way into Anglo-American law through the work of John Austin. Austin, a personal friend of Bentham who was directly influenced by his thinking, incorporated Bentham's conception of rights into his lectures on jurisprudence. According to Austin,

rights are conferred (and their correlating duties imposed) with the direct or immediate purpose of promoting the general good; (as, for example, the rights of judges and other political subordinates): and rights are conferred indirectly to the same extensive purpose, although their proximate end be the advantage of the parties entitled, or of other determinate parties for whom they are conferred in trust. For instance, the right of property,--whether the proprietor is simply owner, or is a trustee for other determinate persons who have what is called the beneficial interest.⁶⁵

Although subsequent jurisprudential theorists may have dropped the direct connection to the

terms: as much so as son and father. Right is with me the child of the law: from different operations of the law result different sorts of rights. A natural right is a son that never had a father.

1 JEREMY BENTHAM, *Supply Without Burden*, in *ECONOMIC WRITINGS* 333-34 (W. Stark ed. 1952).

⁶²See Waldron, *supra* note 51, at 9.

⁶³See H.L.A. Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS IN JURISPRUDENCE* 171, 178 (2d series, A.W.B. Simpson ed. 1973).

⁶⁴See *id.*; Waldron, *supra* note 51.

⁶⁵JOHN AUSTIN, *supra* note 48, at 403.

principle of utility, they otherwise adopted Bentham's interest theory wholesale. Rudolf von Jhering echoed Bentham's account of rights as conventional and derivative in defining them as legally protected interests.⁶⁶ Sir John Salmond also embraced this approach defining a right as "an interest recognized and protected by a rule of right . . . respect for which is a duty, and the disregard for which is a wrong,"⁶⁷ as did Hans Kelsen who defined a right as a "legally protected interest" that was merely "the reflex of a legal obligation."⁶⁸ John Chipman Gray who also adopted the interest theory was a bit more precise in pointing out that "[t]he right is not the interest itself; it is the means by which the enjoyment of the interest is secured."⁶⁹ As a result, by early in the twentieth century, the interest theory represented a conventionally accepted view of rights within the Anglo-American legal community.

The key feature of this approach is, as Gray points out, that rights are regarded as means. Under it, rights are not valuable in themselves, but as devices to secure other morally valuable ends. Consider, for example, the right to life. Human beings clearly have an interest in their continued existence. Under the interest theory, to say that one has a right to life is to recognize

⁶⁶Referring to life and property, von Jhering stated that

[t]he form by which law, or right regarded objectively, affords its protection to both interests, is as is well known, by right in the subjective sense. To have a right means, there is something *for us*, and the power of the state recognizes this and protects us.

RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* 49-50 (Isaac Husik trans. 1921).

⁶⁷SIR JOHN SALMOND, *JURISPRUDENCE* § 72 at 237 (8th ed. 1930).

⁶⁸HANS KELSEN, *THE PURE THEORY OF LAW* 132 (Max Knight trans. 1970).

⁶⁹JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 18 (Bernard D. Reams, Jr. ed., 2d ed. 1983).

that this interest is morally valuable and therefore entitled to protection. The right is merely the mechanism designed to afford this protection. Similarly, the right to freedom of speech would be the means by which the morally significant interest of individuals in being able to express themselves would be protected. It is this view of rights as means to the achievement of more fundamental moral ends that I am calling the contemporary conception of rights.

In addition to its acceptance by legal scholars, the contemporary conception of rights finds widespread support in the current philosophical literature. For example, David Lyons views rights as "designed or intended to serve, secure, promote, or protect [the] interests or an interest of [others],"⁷⁰ while Neil MacCormick has defined a right as "the legal (or moral) protection or promotion of one person's interests as against some other person or the world at large, by the imposition on the latter of duties, disabilities, or liabilities in respect of the party favored."⁷¹ One particularly useful representation of the contemporary conception has been supplied by Joseph Raz. Like other contemporary rights theorists, Raz views rights as "based on the interest which

⁷⁰David Lyons, *Rights, Claimants, and Beneficiaries*, 6 AM. PHIL. Q. 173, 176 (1969).

⁷¹D.N. MacCormick, *Rights in Legislation*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART 189, 192 (P.M.S. Packer & J. Raz eds. 1977). Support for the contemporary concept of rights in the philosophical community is widespread. For additional examples, see, e.g. Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 56 (1977) ("[I]f [rights] do not issue from interests, what on earth do they issue from?"); Michael Freedman, *Human Rights and Welfare: A Communitarian View*, 100 ETHICS 489, 490 (1990) (A right is a device that "signals that special status and invulnerability should be accorded to those valuable goods, attributes, or acts that are considered essential to human and social well-being" and asserts "that the realization of those values or interests - which may be liberties, acts, conditions, powers - is of particular importance to the rights-bearer . . ."). See also, H.J. McCloskey, *Rights*, 15 PHIL. Q. 115 (1965); JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 159 (1980); R.G. FREY, INTERESTS AND RIGHTS: THE CASE AGAINST ANIMALS (1980).

figures essentially in the justification of the statement that the right exists."⁷² However, Raz makes explicit the purely instrumental role that rights play under this approach. As he puts it,

The proposed definition of rights identified the interest on which the right is based as the reason for holding that some persons have certain duties. Later on I referred to the rights themselves as being the grounds for those duties. The explanation is simple: The interests are part of the justification of the rights which are part of the justification of the duties. Rights are intermediate conclusions in arguments from ultimate values to duties.⁷³

What makes Raz's formulation so helpful is that it makes explicit the essentially teleological character of the contemporary conception of rights. Many, if not most, theorists who subscribe to the contemporary conception recognize the moral importance of the Kantian demand for respect for individual autonomy.⁷⁴ However, unlike classical theorists such as Nozick, they view the autonomy of individuals as one among many morally significant human interests rather than as *the* fundamental requirement of morality. For example, the reason why Ronald Dworkin, an adherent of the contemporary conception, believes that rights "trump" considerations of social utility⁷⁵ is because rights protect the Kantian interest in human dignity as well as the interest in political equality, both of which he regards as of greater moral significance than the interest in material welfare. However, the rights themselves have value only insofar as they promote these underlying interests. Dworkin explicitly recognizes that rights may be abridged either when "the values protected by the original right are not really at stake in the marginal case, or are at stake

⁷²Joseph Raz, *On the Nature of Rights*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 44, 47 (Morton E. Winston ed. 1989).

⁷³*Id.* at 55.

⁷⁴*See, e.g.,* source cited *supra* note 56.

⁷⁵*See* discussion *infra* part V, §A.

only in some attenuated form"⁷⁶ or when "the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved."⁷⁷

It is this teleological nature that constitutes the essential characteristic of the contemporary conception of rights. Under the contemporary conception, rights are valuable only insofar as they aid in the realization of more basic moral values. They have instrumental, but no intrinsic, value. As such, the duty to respect rights is always conditional. One has an obligation to respect rights as long as doing so helps realize the underlying interests they are designed to establish or preserve. However, if doing so would either not serve the underlying interests or would impede the realization of other interests of greater moral significance, there would be no duty to respect the right. Under the contemporary conception, rights are always means to the achievement of more fundamental moral ends, always "intermediate conclusions" in arguments from these ultimate ends; they are never the ends themselves.

IV. FEATURES OF THE TWO CONCEPTIONS

A. TWO TERMINOLOGICAL CONVENTIONS

There are several distinguishing features of the two conceptions of rights that should be highlighted. This can more easily be done if I first clarify the meaning of two sets of contrasting terms. The first of these involves the distinction between absolute and *prima facie* rights. Calling a right absolute is sometimes taken to mean that the right is unlimited in scope. This is not the sense in which I am presently employing the term, however. Rather, in this discussion, the term

⁷⁶DWORKIN, *supra* note 4, at 200.

⁷⁷*Id.*

'absolute' means only that the right being described cannot justifiably be abridged by appeal to other moral considerations. Joel Feinberg has given a clear illustration of this sense of the term in his explanation of what it would mean to regard First Amendment rights as absolute. As he put it,

First Amendment rights, then, are not "absolute" in the sense of "unlimited in scope": the scope of free speech must necessarily be narrower than the range of all possible speech. But that is no reason why these rights, as qualified by exceptive clauses, cannot be absolute in the sense of laying *unconditionally incumbent* duties of respect and enforcement upon the courts. A rule with exceptive clauses may itself have no exceptions. A First Amendment right, in short, may be limited in extent by the definition of established judicial rules, yet unconditionally obligatory within its proper domain.⁷⁸

In contrast to this, a right may be said to be *prima facie* if it is subject to defeat when in conflict with moral concerns of greater significance. A *prima facie* right may be thought of as a provisional right or a right "all other things being equal." Feinberg has described a *prima facie* right as a right "*unless* some stronger claim shows up," possession of which "creates only a *presumption* in a given case at a given time that one also has a specific right normally derivable from it."⁷⁹

The second distinction that needs clarifying is that between option rights and welfare rights.⁸⁰ An option right is a right that protects autonomy, that guarantees that certain choices will be left up to the rightholder. An option right "corresponds to a sphere of freedom, a sphere of action subject to the options--choices--of the individual who possesses the right. Within this

⁷⁸JOEL FEINBERG, SOCIAL PHILOSOPHY 80-81 (1973).

⁷⁹*Id.* at 73-74. *See also*, RICHARD BRANDT, ETHICAL THEORY 437-38 (1959).

⁸⁰The distinction between option rights and welfare rights is perhaps more frequently cast as that between negative and positive rights. However, I find the more descriptive appellations have a tendency to reduce confusion and facilitate discussion. Hence, my preference for this means of expression.

sphere the individual is a kind of 'sovereign,' and he may act as he chooses."⁸¹ For example, the right to freedom of religion viewed as an option right would provide the rightholder with the ability to determine whether and how to practice his or her religion free from the interference of others. On the other hand, a welfare right is a right to be provided with something, an entitlement to "some good or benefit."⁸² For example, a right to an education viewed as a welfare right would mean that the rightholder is entitled to an education that must be provided by others.⁸³

With these terminological matters behind us, we may now proceed to examine the features of the two conceptions of rights.

B. FEATURES OF THE CLASSICAL CONCEPTION

As discussed above, the essential characteristic of the classical conception of rights is its deontological nature. In its modern form in which it is derived from the Kantian requirement of respect for persons rather than some aspect of human or divine nature, this means that rights ensure that there are certain things that simply may not be done to a person regardless of the

⁸¹M. GOLDING, *supra* note 17, at 44.

⁸²*Id.*

⁸³At this point I must issue a very important disclaimer. In this section, I have referred to rights to freedom of religion and to an education. Throughout the remainder of this article, I will refer to these and various other rights to illustrate the features of the two conceptions under discussion. It is essential to keep in mind that I introduce these rights *for illustrative purposes only*. I am claiming neither that these rights actually exist nor that they should be regarded as among the set of fundamental rights. What rights people truly possess and which of these should be regarded as fundamental is a question well beyond the scope of the present work. This article is addressing the question of which of the two presently available conceptions of fundamental rights is more appropriate for a liberal legal regime, *whatever these rights may be*, and carries no commitment to the existence of any particular set of such rights. Indeed, I have specifically chosen *Dudley and Stephens* and *A.C.* as my illustrative cases because they implicate only the right to life which, on the assumption that there are such rights, would be the one most readily accepted as a fundamental right.

consequences to the larger society. Let us examine the particular features such a conception of rights must possess.

First of all, as already noted, under the classical conception fundamental rights must be viewed as absolute. There can be no *prima facie* fundamental rights. Since under the classical conception, fundamental rights are viewed as the embodiment of *the* fundamental moral requirement that all human beings be treated as ends in themselves, there can be no more significant moral considerations that can override them.

To a classical theorist, fundamental rights have inherent, not instrumental, value. They are not means to more fundamental moral ends, but constitutive parts of the end itself. This can perhaps be illustrated by thinking of rights as the pieces of a jigsaw puzzle. When assembled, the puzzle presents a picture of what it means to treat individuals as ends in themselves, to respect them as autonomous moral agents with free will and goals and desires of their own. Just as in a jigsaw puzzle, where each piece is both necessary to fully present the picture and itself a constitutive element of it, under the classical conception, each fundamental right is both necessary to the full protection of human autonomy and itself a part of that end. Since this end, when fully assembled, represents the essential purpose of morality, there exist no more significant moral concerns that could override a fundamental right. Hence, such rights are absolute.

Secondly, under the classical conception, all fundamental rights must be option rights. Since the proponents of the classical conception view fundamental rights as existing to ensure that human beings are treated with the respect due entities that are ends in themselves, and since this entails respect for their autonomy, the purpose of such rights must be to provide a sphere within which individuals may exercise their autonomy. Thus, these rights are designed to protect

individuals' choices from outside interference. Were a classical theorist to assert that there is a fundamental right to die, he or she could only be understood to be claiming that individuals are entitled to choose whether or not to end their lives at any given time and that no one else is entitled to contravene this choice. Under the classical conception, the job of fundamental rights is to create zones of non-interference.

This leads directly to the third feature of the classical conception of fundamental rights which is that such rights do not conflict. Under the classical conception, fundamental rights are essentially negative injunctions which instruct us not to interfere with other people's choices. But obligations of non-interference do not conflict with each other. Our duty not to interfere with others' choices of what religion to practice, for example, does not conflict with our duty not to interfere with their choices of how to express themselves artistically or of what occupation to pursue or of what personal information to reveal about themselves. All such duties of non-interference are fully satisfied by mere inaction. But inaction does not conflict with inaction. Thus, compliance with one right never requires an individual to violate another. This is sometimes expressed by saying that under the classical conception the set of fundamental rights is compossible.⁸⁴

The jigsaw puzzle analogy may again prove helpful in elucidating this feature of the classical conception. Just as the pieces of a jigsaw puzzle which each present only one aspect of the picture can be fitted together without overlap to produce a coherent whole, under the classical conception, fundamental rights which each protect only one aspect of autonomy can be fitted

⁸⁴See Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. PHIL. 767 (1977). See also, Randy Barnett, *Pursuing Justice in a Free Society*, 4 CRIMINAL JUSTICE ETHICS 50, 58 (1985).

together without conflict to protect the full range of autonomy necessary to ensure that human beings are treated as ends in themselves. This analogy illustrates that under the classical conception, each fundamental right is viewed merely as an instantiation of the general injunction to treat human beings with respect. As such, each describes one aspect of what is required to do so. But, of course, since each represents merely the application of the same general injunction to a different particular context, the individuated rights could never prescribe conflicting obligations.⁸⁵

The fourth feature of the classical conception of fundamental rights is that such rights can be possessed only by individual human beings. This is because such rights are regarded as merely an expression of the underlying Kantian principle of respect for *persons*. Since fundamental rights are merely particular applications of the general principle that all human beings must be treated as ends in themselves, obviously, only human beings can possess such rights.⁸⁶

⁸⁵There is a common confusion about this point that it is essential to avoid. Human actions obviously conflict. A group of people may all decide to exercise their right to free speech by speaking at the same time so that no one is heard and the speech is valueless. However, this does not imply that the individuals' *rights* to free speech are in conflict. Rights conflict when in order to respect one, an individual is required to act so as to violate another. This is not the case in the above example. The right to free speech understood in the classical sense requires only that others not interfere with an individual's decision as to whether or not to speak. There is no additional requirement that they guarantee that the speech will have value or even that it will be heard.

It is a fact that human beings frequently choose to exercise their rights in such a way as to produce conflict. However, this unfortunate aspect of human psychology will be true under any conception of rights. It certainly does not imply that the rights themselves are in conflict. This is the case only when two (or more) rights impose obligations which cannot be jointly satisfied.

⁸⁶This is not, strictly speaking, accurate. A true Kantian approach would not be limited to human beings, but would view all *rational* beings as ends in themselves and hence worthy of respect. For Kant, it is not our humanity, but our rationality that makes us inherently valuable. Any being capable of having ends of its own could object to being used merely as a means to the ends of another. Hence, any being capable of forming desires and deliberating about and choosing among various courses of action to achieve them, i.e., any rational being, is entitled to be treated as an end in itself. The distinction between rational beings and human beings has greater significance in theological discussions than in the present one, but it is relevant to the question of

This, of course, implies that under the classical conception neither groups nor animals can possess fundamental rights. A group is a collection of persons, not a person itself.⁸⁷ Although each of its members is an autonomous moral agent and thereby entitled to respectful treatment, the group is not. A group has no independent existence separate from that of its members. It has no independently-existing desires, will, or reasoning ability and is neither autonomous nor an agent. Since under the classical conception, the purpose of fundamental rights is to protect the autonomy of moral agents, groups are simply not the type of entities that can possess such rights.

The same is, of course, true of animals. Animals function instinctually. Without the ability to form concepts, they cannot achieve self-awareness. Hence, they cannot set goals, engage in deliberation or reasoning, or exercise free will. Animals simply do not have the level of mental functioning that would allow us to regard them as autonomous agents. With no autonomy to need protecting, animals are not the type of beings who can benefit from rights designed to protect autonomy. Hence, under the classical conception, they cannot be the bearers of fundamental rights.⁸⁸

Finally, under the classical conception, fundamental rights are necessarily limited in number. Since the purpose of such rights is limited to protecting individuals from human

whether animals have rights discussed below. *See infra* note 88.

⁸⁷Although groups such as corporations or labor unions are sometimes legally invested with artificial personalities, this is clearly a fiction instituted for explanatory convenience. It does not reflect any belief that corporations or labor unions actually have personalities.

⁸⁸This is, of course, not true for all animals. It has been shown that some of the higher primates do form concepts. To the extent that it can be shown that certain animals are able to reason and choose among various courses of action, such animals can possess fundamental rights in the classical sense. Although not human, such animals are *rational* beings which is all that is required to be a bearer of rights under this approach. *See supra* note 86.

interference with their choices, there simply cannot be a large number of them. There are only so many ways to say "Do not interfere," only so many ways to characterize the range of choices to be protected. However, although few in number, such rights may be extremely extensive in application. For example, an adherent of the classical conception could argue that there exists a general right to liberty that allows individuals to act in any way they please as long as they do not harm others.⁸⁹ Thus, classical theorists typically envisage a small set of fundamental rights that jointly provide a broad range of protection for individual autonomy.

C. FEATURES OF THE CONTEMPORARY CONCEPTION

Unlike the classical conception, the defining characteristic of the contemporary conception of rights is its teleological nature. Recall that in Raz's terminology rights play the role of "intermediate conclusions in arguments from ultimate values" to the duties required to achieve them.⁹⁰ As such, rights are always subservient to these more fundamental moral interests. Let us see what this implies about the features of this conception of fundamental rights.

⁸⁹The classic argument for such a right was made by John Stuart Mill in his essay *On Liberty* where he stated,

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

JOHN STUART MILL, ON LIBERTY 10-11 (David Spitz ed. 1975) (1859)

⁹⁰*See supra* p. 28.

In the first place, under the contemporary conception, rights are always *prima facie*. Since rights have no inherent value, but are valuable only as instruments for the attainment of underlying interests, they may be overridden whenever doing so would better serve those interests. In fact, an adherent of the contemporary conception would contend that rights should be curtailed whenever necessary to either preserve a more important moral interest than the one being protected by the right or protect the interest that underlies the right more effectively. Oliver Wendell Holmes provided the classic example of the former ground for overriding a right when he stated that the right to free speech "would not protect a man in falsely shouting fire in a theatre and causing a panic."⁹¹ Thus, in circumstances in which the interest in preserving human beings from bodily injury morally outweighs the interest in free speech, the right to free speech is properly overridden. An example of the latter ground is the practice during a fire of destroying one of a series of adjacent buildings to create a fire break in which the interest in the preservation of property is most effectively served by abridging one party's right to property.⁹²

The second feature of the contemporary conception of fundamental rights is that such rights may be either option rights or welfare rights. The contemporary conception views fundamental rights as means to the achievement of underlying moral interests. But both being free from outside interference with their choices and having others provide them with goods or benefits can aid human beings in attaining their ends. Thus, both option rights and welfare rights can serve as effective means for the realization of fundamental moral interests. For example, under the contemporary conception, the right to free speech may be seen as a right designed to further

⁹¹Schenck v. United States, 249 U.S. 47, 52 (1919).

⁹²See, e.g., Surocco v. Geary, 3 Cal. 69 (1853).

the human interest in effective self-expression. Being free from others' attempts to suppress one's speech certainly promotes this end, but so does having others provide one with access to the broadcast media. Thus, a theorist who subscribes to the contemporary conception could consider the right of free speech as encompassing both an option right to be free from prior restraint and a welfare right to television or radio time to respond to personal attacks or political editorials.⁹³

This characteristic helps explain the third feature of the contemporary conception which is that fundamental rights can conflict with one another. Since under the contemporary conception rights may be either option or welfare rights, they are not limited to injunctions of non-interference. Welfare rights require that positive actions be taken for the benefit of the rightholder. But such required actions will necessarily restrict the sphere of activities over which individuals can exercise autonomous control. Should the positive actions required by a welfare right intrude upon a sphere of autonomy protected by an option right, one might simultaneously be entitled to decide for oneself whether to perform an action and be required to perform that action whether one wants to or not. In such a case, the only way to enforce the welfare right would be by violating the option right, and the only way to enforce the option right would be by violating the welfare right. In other words, the rights would conflict.

As an example, consider that under the contemporary conception it makes sense to assert that individuals have both an option right to freedom of expression and a welfare right to an educational environment free of racial harassment and insult. If such were the case, a student who was a member of the Ku Klux Klan at a racially mixed university would simultaneously be entitled

⁹³For a fuller discussion of the fairness doctrine from which this example was loosely drawn, see *Red Loin Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

to and prohibited from expressing his or her belief in the genetic superiority of white people. Further, the enforcement of an African-American student's right to an educational environment free of racial insult would require the violation of the white student's right to express his or her opinion, and the enforcement of the white student's right to express his or her opinion would require the violation of the African-American's right to be free of racial insult. The rights of the students would conflict.⁹⁴

The fourth feature of the contemporary conception is that the class of entities that can possess fundamental rights is not necessarily limited to that of individual human beings. Under the contemporary conception, rights are means to the realization of underlying interests. As such, they may logically be possessed by any entity that can have interests. Since both groups and animals can have interests, it follows that they may possess rights as well.

For example, a community can be said to have an interest in maintaining a peaceful environment free of random violence. If so, under the contemporary conception there would be nothing inconsistent about asserting that the community had a right to security. Similarly, it makes perfect sense to say that African-Americans have an interest as a group in having employers hire on an affirmative action basis. Thus, under the contemporary conception there is nothing logically

⁹⁴It should be noted that welfare rights can conflict not only with option rights, but with other welfare rights as well. For example, under the contemporary conception, the right to life may be seen as encompassing not only the option right not to be murdered, but also the welfare right to those things necessary to sustain one's life including access to health care. However, many theorists who hold this view also assert that there is a fundamental right to affordable health insurance. Under current conditions in which the costs of providing health care to the indigent and terminally ill is one of the main factors driving up the cost of health insurance, it appears that providing everyone with affordable health insurance requires the rationing of access to health care. But this implies that the obligations these rights impose, i.e., to provide people with both affordable health insurance and guaranteed access to health care services, cannot be simultaneously satisfied. Hence, the rights conflict.

objectionable about arguing that African-Americans have a right to affirmative action. Under the contemporary conception, there is nothing inconsistent about the idea of group rights.

This is true with regard to animal rights as well. Although most animals may be incapable of the level of consciousness that would allow them to be aware of their interests, this does not imply that they do not have interests. For example, there is nothing obviously absurd in asserting that it is in an animal's interest not to be subjected to gratuitous pain or cruelty. But if animals can have an interest in humane treatment, under the contemporary conception it can make sense to assert that they have a right to such treatment.

The final feature of the contemporary conception of rights is that there may be a great many of them. Specifically, there may be as many fundamental rights as there are fundamentally important human interests for them to serve. Under the contemporary conception, the number of fundamental rights will be limited only by the number of interests that can be shown to hold great significance for their possessors.

V. THE ARGUMENT

We are now ready to address the central question of this investigation. Given that there are two distinct conceptions of fundamental rights, which one is appropriate for the Anglo-American legal system? I wish to suggest that as long as one of the essential functions of fundamental legal rights is to protect individuals against state power, the contemporary conception cannot be. This is because the contemporary conception generates a body of fundamental rights that is not only less effective at protecting individuals against state interference with their activities than that generated by the classical conception, but also one in which the more fundamental rights individuals have, the less such protection they receive.

A. THE MINIMUM CONTENT OF RIGHTS

To see how this can be, I would like to begin by considering the essential characteristics something must have to function as a legal right. What is it that gives a legal right its substance? What is the minimum content that a right must possess for it to be a meaningful entity, or, more informally, what is required for a right to be taken seriously? Ronald Dworkin has supplied an answer to this question within the political context that I believe to be correct.⁹⁵ He has argued that for a right against the government to be meaningful, considerations of general social utility alone must be inadequate to authorize the state to override it. In other words, the essential characteristic of a right is that the state may not abridge it on the basis of purely utilitarian considerations of what will be beneficial for society as a whole.

The basis of his argument is the observation that even when respect for individual rights is not at issue, any morally legitimate government must function under utilitarian constraints. This means that a proper government is always under the obligation to justify its proposed actions by showing that they serve the common good; that, considering the interests of all members of society, these actions are likely to produce more good than harm. Therefore, even when rights are not present, individuals are entitled to be protected against governmental actions that are not designed to serve the common good.⁹⁶

Dworkin does not argue for this contention explicitly since he apparently regards it as a

⁹⁵See DWORKIN, *supra* note 4.

⁹⁶It is important to note that Dworkin is not claiming that any governmental action which does produce more overall good than harm is thereby morally justified, but that only actions which have this feature can be morally justified. His claim is that any proposed governmental action must be designed to do more good than harm to be in the "moral ballpark."

matter of common sense.⁹⁷ After all, governmental actions which are designed to be detrimental to society or to advance the interests of the few at the expense of the many represent the model of tyrannical behavior. However, it should also be noted that on the practical level utilitarianism is virtually the only ethical theory simple and definite enough to serve as a political morality.⁹⁸ Governments, which are rarely comprised of moral philosophers, typically consist of politicians and bureaucrats charged with making and justifying decisions which will affect the lives of large masses of people. Such a body cannot conveniently avail itself of complex and open-ended pluralist or noncognitivist ethical theories.⁹⁹ Therefore, when the issue of respecting rights is left

⁹⁷Widespread support for this proposition can be found throughout the history of political thought however. The natural lawyers clearly believed the purpose of government was to promote the common good. Thus, Aquinas states, "Now the end of law is the common good; because, as Isidore says, 'law should be framed, not for any private benefit, but for the common good of all the citizens.' Hence, human laws should be proportionate to the common good." THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 66 (D. BIGONGIARI ed. 1953) (footnote omitted). And, of course, the very purpose of the social contract was to provide for the common good. Thus, Locke states that whenever one joins civil society "he authorizes the society, or which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require" and that "the power of the society, or *legislative* constituted by them, can *never be supposed to extend farther, than the common good.*" LOCKE, SECOND TREATISE OF GOVERNMENT §§ 89, 131 (1690). This is reinforced by Rousseau who declares that the general will "is always right and always tends toward the public utility" and that an act of sovereignty "can have only the general good for its object." ROUSSEAU, ON THE SOCIAL CONTRACT bk. II, chs. III, IV (1762). For the utilitarians, the pursuit of the common good was the centerpiece of their theory. Thus, for Bentham the purpose of any governmental act must be "to augment the happiness of the community," BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. 1, § 7 (1789), while Mill saw "as the test of good or bad government, so complex an object as the aggregate interests of society." MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT ch. 2 (1861).

⁹⁸Again, leaving aside rights-based, deontological theories for the moment.

⁹⁹As examples, consider the pluralist theories of G. E. Moore, which regards "good" as a primary indefinable property whose presence must be apprehended intuitively, and W. D. Ross, which posits several potentially conflicting *prima facie* obligations whose relative importance must be determined on the basis of our moral intuitions. See G. E. MOORE, PRINCIPIA ETHICA (1903); W. D. ROSS, THE RIGHT AND THE GOOD (1930). Both require the decisionmaker to

out of the equation, a utilitarian approach is necessarily the standard operating procedure for a morally legitimate government.

To this initial assertion, Dworkin adds what he believes to be the obvious truth that for a right to be a meaningful entity, it must provide its possessors with something they would not otherwise have. Specifically, it must provide them with more protection against governmental interference with their activities than they would have without the right. In making this point, Dworkin is concerned to highlight the difference between treating rights as substantive objects and merely paying lip service to them. For no matter how vociferously one proclaims his or her adherence to rights, if these rights do not provide their possessors with any protection that they do not already have, they simply are not significant entities. In Dworkin's words, they are not being taken seriously.

These two initial premises give rise to an immediate implication. For if rights must provide individuals with more protection than they would ordinarily have and if individuals ordinarily have the amount of protection afforded by the government's obligation to act only for the common good, then it must follow that rights provide individuals with more protection than is afforded them merely by the government's obligation to act only for the common good. In other words, for rights to mean anything at all, they must mean that the government is not justified in interfering

exercise a type of personal intuitive judgment that is antithetical to the impersonal decisionmaking typically demanded of the political functionary. Further, it is not clear how, or even whether, a noncognitivist theory could be adapted to provide specific guidance with regard to practical political matters. Theories that assert that ethical statements are simply expressions of personal attitudes of approval or disapproval, *see, e.g.*, A. J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1948), or universal prescriptions, *see, e.g.*, R. M. HARE, *FREEDOM AND REASON* (1963), are ill-suited to the type of practical reasoning the politician is called upon to do.

with the activities the rights protect *solely* because such interference would be beneficial for society as a whole. Taking rights seriously means that the benefit of society as a whole can never be a sufficient ground for their abridgement. Dworkin neatly summarizes his argument for this point as follows.

Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility--that it is calculated to produce more over-all benefit than harm. . . . When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim.¹⁰⁰

From this we can see that the essential logical feature of a right is that it may not properly be overridden merely to serve the common good. Therefore, it is this quality of being proof against the force of utilitarian considerations that constitutes the minimum content that must be present for something to qualify as a meaningful, substantive right.¹⁰¹

B. THE UNSUITABILITY OF THE CONTEMPORARY CONCEPTION

¹⁰⁰R. DWORKIN, *supra* note 4, at 191. It is worth noting that this argument is purely formal in nature. It says nothing about what rights human beings have or even that they have any at all. It simply says that if, in fact, there are any rights, the government is not morally justified in violating them merely to gain a general benefit for society.

¹⁰¹This implies that legal rights demarcate and protect a set of values of greater moral significance than the general benefit of society. A thorough-going utilitarian would, of course, find this unacceptable since he or she believes that nothing is of greater significance than general utility. However, he or she would not be claiming that there is anything wrong with my analysis of legal rights, but rather, that no such rights in fact exist.

Note once again that to this point no claim has been made about what rights exist. What has been asserted is that *if* any exist, then they must protect things of greater moral value than general utility to have any significance. Which, if any, rights exist will depend entirely on whether there are any values more important than general utility, and if so, what they are. However, as noted earlier, any attempt to resolve this matter is beyond the scope of the present enterprise.

With this in mind, let us recall that fundamental rights are those important basic rights that individuals possess independently of any political structure and which all morally legitimate governments are bound to respect.¹⁰² As we have just seen, respect for rights requires, at a minimum, that the government not abridge them solely on utilitarian grounds; solely because doing so will be, on balance, beneficial for society as a whole.¹⁰³ Therefore, we may take as our starting point that for fundamental rights to serve their purpose, it must not be the case that the government may override them merely to increase general utility.

Now consider the situation when fundamental rights are interpreted in accordance with the contemporary conception. To begin with, the rights can conflict; they can prescribe incompatible obligations such that respect for one requires violation of others. For example, if an adherent of the contemporary conception believed that individuals have fundamental rights both to strike and to a public education, then he or she would characterize the situation in which public school teachers went on strike during the school year as one that presents a conflict of rights. The same would be true of one who believed that although individuals have a fundamental right to privacy, the community also has a fundamental right to protect itself against infectious diseases and so may require AIDS testing, or that although individuals possess a fundamental right to equal employment opportunity, African-Americans also possess a fundamental right to affirmative action.¹⁰⁴

¹⁰²*See supra* note 1.

¹⁰³In the parlance of Constitutional law this is expressed by saying that such rights may be abridged only when doing so is necessary to the achievement of a compelling state interest. *See* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

¹⁰⁴For other examples of conflicts of rights, *see supra* note 94 and accompanying text.

At first glance, the fact that fundamental rights can prescribe incompatible obligations does not appear problematic. This is because under the contemporary conception all such rights are *prima facie* rights. As such, they are subject to being overridden whenever doing so would advance more important interests than the ones they protect. This would suggest that when there is a conflict of rights, the right that protects the less important interest must be overridden for the sake of the more important interest protected by the conflicting right. This is in fact precisely the line taken by the proponents of the contemporary conception. For example, Dworkin, himself a leading proponent of the contemporary conception of rights, is quick to point out that the fact that rights may not properly be abridged to increase general utility does not imply that they may not be abridged when in conflict with another right. As he puts it,

I must not overstate the point. Someone who claims that citizens have a right against the government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and public major benefit . . . What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community.¹⁰⁵

In fact, when rights conflict, the government has a positive obligation to resolve the conflict so as to preserve the underlying interest of greater moral significance.

The most important - and least well understood - of these other grounds [of overriding or limiting rights] invokes the notion of *competing rights* that would be jeopardized if the right in question were not limited. . . .

The individual rights that our society acknowledges often conflict in this way, and when they do it is the job of the government to discriminate. If the Government makes the right choice, and protects the more important at the cost of the less, then it has not weakened or cheapened the notion of a right; on the contrary it would have done so

¹⁰⁵DWORKIN *supra* note 4, at 191-92.

had it failed to protect the more important of the two. So we must acknowledge that the Government has a reason for limiting rights if it plausibly believes that a competing right is more important.¹⁰⁶

Thus, although the government may not abridge fundamental rights on utilitarian grounds, when rights conflict it may do so to preserve the more important underlying interest.¹⁰⁷

So far, so good. But consider now that if the government is required to resolve conflicts of rights, it must first determine which of the interests underlying the conflicting rights is of greater moral significance. What basis does the government have for making such value judgments?

As we have previously seen, the only ethical theory that is definite and simple enough to serve as a practical political morality is utilitarianism.¹⁰⁸ The government is comprised not of philosophers, but of practically-minded lawyers, economists, statisticians, and other social scientists who are neither trained in nor familiar with the vagaries of moral philosophy. Whether politician, bureaucrat, or judge, virtually all government officials have been trained that when their actions are not constrained by people's rights or other Constitutional barriers, their duty is to attempt to produce the greatest good for the greatest number, i.e., to promote general utility. Furthermore, because governmental decision-making must be capable of objective justification to the public, the nature of the job simply precludes any approach that relies primarily upon a

¹⁰⁶*Id.* at 193-94.

¹⁰⁷To state the matter in the language of Constitutional law, when fundamental rights conflict, there is a compelling state interest in the preservation of the more important right. Thus, the less important fundamental right may legitimately be abridged since doing so is necessary to the achievement of a compelling state interest.

¹⁰⁸*See supra* p. 43.

person's moral intuitions. Therefore, as a practical matter, the only basis the government has for making comparative assessments of value is its judgment as to what will best serve the common good. As remarked earlier, for the government, utilitarian analysis is necessarily standard operating procedure.¹⁰⁹

This means that when the government is called upon to resolve a conflict of rights by deciding which of the underlying interests are of greater relative importance, it will appeal to the only basis for making comparative value judgments that is available to it, utilitarianism. Thus, this determination will be made on the basis of which interest is more productive of general utility. As a result, conflicts of rights will typically be resolved by an appeal to what will best promote social welfare.

Consider the implications of this. When there are no fundamental rights at stake, the government resolves conflicts among human interests on a utilitarian basis by instituting the policy that will most effectively promote general utility. The essential purpose of fundamental rights and the thing that makes them morally significant is that they prevent the government from interfering with the interests they protect simply to increase general utility. These rights identify those human interests that are of special moral significance and thus are too important to be left to the mercy of the ordinary governmental processes of cost-benefit analysis. But when fundamental rights conflict, as they can under the contemporary conception, the government will resolve the conflict on the basis of what will be most beneficial for society as a whole. In other words, it will employ precisely the same decision procedure as it would if there were no rights involved. Thus, when rights conflict, they play no substantive role. They simply drop out of consideration.

¹⁰⁹*Id.*

If there are, in fact, only a small number of fundamental rights, this may not be an overwhelming problem. In such a case, most of the human disputes in which a fundamental right is at stake will involve a conflict between the rightholder's protected interest and the government's attempt to increase general utility. The total number of disputes in which interests protected by fundamental rights conflict may be relatively small, and hence, the number of times the rights "drop out" relatively few. However, if there are any significant number of fundamental rights, the picture changes dramatically.

Because the contemporary conception recognizes welfare and group rights as well as individual option rights, as the number of fundamental rights that individuals are considered to have grows, so necessarily must the number of conflicts among them. Welfare rights carry with them obligations to provide people with the things the rights entitle them to. As their numbers grow, it becomes increasingly likely that these obligations will violate some of the spheres of individual autonomy protected by the option rights of those who must do the providing. Thus, as the welfare right to be provided with a working environment free of private racial and sexual discrimination or harassment joins the option rights of freedom of association and speech and the welfare rights to a minimally decent standard of living, an education, and health care join the option right to own property, an ever greater proportion of interpersonal disputes will be characterized by a conflict of rights. This outcome will be further magnified to the extent that group interests are deemed worthy of the protection of fundamental rights. If minority groups have fundamental rights to proportionate interest representation¹¹⁰ or affirmative action while

¹¹⁰See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) and Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991).

individuals have rights to vote and equal opportunity, an even higher percentage of human disputes will involve conflicts of rights. But as more and more human disputes present conflicts of rights, there are more and more cases in which the rights drop out and the government must resolve the disputes on the basis of the utilitarian weighing process it ordinarily employs.

It should be noted that it is extremely difficult to see how the number of fundamental rights could be restricted so as to minimize conflicts when they are interpreted according to the contemporary conception. Since under this interpretation the purpose of fundamental rights is to provide protection for interests of great moral significance, it would seem that there would have to be as many fundamental rights as there are such interests. Our continued existence, our ability to express ourselves, to worship as we please, to associate with whomever we desire, and to have a zone of privacy are clearly interests of fundamental moral significance. But so are having a minimally decent standard of living, an education, access to health care, and freedom from discriminatory treatment. In the absence of any definite standard of relative moral significance, it appears quite likely that a proponent of the contemporary conception of rights who believes that there are any fundamental rights would believe that there are a significant number of them.¹¹¹

¹¹¹On this point, it is important to keep in mind the context of the present analysis. It is entirely conceivable that there exists a small core of human interests of privileged moral status that generates a set of fundamental rights that optimizes the protection afforded those interests. It may even be the case that moral philosophers can supply the principle that identifies this core although the lack of agreement among ethical theorists on this point provides some ground for skepticism. However, because the subject of this inquiry is fundamental *legal* rights, the standards we employ must be applicable in the practical political realm. It seems extremely unlikely that the lawyers, judges, politicians, and bureaucrats who must make judgments concerning fundamental rights will be aware of or able to utilize subtle philosophical distinctions or limitations. For this reason, I believe that in the political realm the class of interests that will be recognized as worthy of special protection will tend to be liberally construed. The legal history of the past half century tends to bear this out.

The irony of the situation should now be apparent. The essential purpose of fundamental rights is to restrain the government's power to interfere with certain interests of individuals merely to increase general utility. But the more fundamental rights there are, the more conflicts of rights there are. And the more conflicts of rights, the more the government is called upon to intervene which it does on the basis of a utilitarian standard. Thus, the more fundamental rights there are, the more the government is empowered to interfere with the interests of individuals in order to increase general utility. Simply put, the more fundamental rights individuals possess, the less effectively these rights serve their purpose. Under the contemporary conception, unless their numbers are severely circumscribed, fundamental rights are essentially self-defeating.

The problem with the contemporary conception of fundamental legal rights is that as soon as there are any significant number of them, they become transformed from restraints on the state exercise of power into authorizations for its use. Dworkin has shown that fundamental rights are meaningful only to the extent that they curtail the government's ability to act for the common good. They are taken seriously only if the interests they protect "trump" the societal interest in general utility. However, when fundamental rights are interpreted under the contemporary conception, the situation is essentially reversed. Whenever rights conflict, as they do in an ever-increasing number of situations, they drop out and the government is empowered to act for the common good. In these cases, it would not be unfair to characterize the situation as one in which considerations of general utility "trump" the fundamental rights. And since under any even moderately powerful configuration of fundamental rights, most of the truly controversial and significant cases of human dispute would present a conflict of rights, it appears that under the

contemporary conception, fundamental rights would only rarely be taken seriously.¹¹²

C. THE SUPERIORITY OF THE CLASSICAL CONCEPTION

The above described situation does not exist when fundamental rights are interpreted according to the classical conception. To the classical theorist, rights are not means to the realization of more fundamental moral interests, they are themselves the instantiation of the fundamental moral requirement that human beings be treated with the respect due entities that are ends in themselves. Under this interpretation, there is simply no way that rights can be converted from restrictions on the exercise of state power to authorizations for its use.

In the first place, since the rights each embody one aspect of the fundamental moral requirement of respect for persons, there is nothing of greater moral significance that can override them. Therefore, under the classical conception, rights constitute absolute rather than *prima facie* prohibitions against interfering with certain activities of individuals. As such, they act as a complete ban on state action that would interfere with those activities.

Secondly, since the only entities entitled to be treated as ends are autonomous agents, and since treating them as ends requires respecting their autonomy, under the classical conception rights are necessarily option rights possessed exclusively by individual human beings.¹¹³ As such, the rights consist in negative injunctions that create zones of non-interference around individuals. Such rights do not conflict with each other since the obligations they impose not to interfere with

¹¹²Ironically, since the fundamental rights Dworkin discusses in *Taking Rights Seriously*, *supra* note 4, are construed in accordance with the contemporary conception, this argument seems to suggest that taking rights seriously means that we cannot take the rights of "Taking Rights Seriously" seriously.

¹¹³or animals with a level of cognitive functioning that permits self-awareness.

various activities of individuals can be conjointly satisfied by mere inaction. And since there are no welfare or group rights to impose positive obligations to act, there will never be a need for the government to step in to resolve conflicts of rights.

What this shows is that under the classical conception, fundamental rights do not "drop out." Although there may be considerably fewer such rights than under the contemporary conception, each right always contains the minimum content required for it to be a meaningful entity; each always does, in fact, trump considerations of general utility. As a result, under this interpretation, fundamental rights are much more effective at protecting individuals against state encroachment on their prerogatives than are the much larger number of rights available under the contemporary conception. Under the classical conception, rights are always taken seriously.

VI. APPLICATION TO THE CASES

I have argued that in order for fundamental rights to play their proper role within our legal system they cannot be interpreted according to the contemporary conception of rights. Due in large part to the practical limitations of the legal environment, when fundamental rights are construed in this way, they almost inevitably conflict with each other and drop out of consideration. Thus, they cannot serve their basic purpose of limiting the state's power to interfere with the activities of individuals simply to increase general utility. Since this is not the case when fundamental rights are interpreted according to the classical conception, I have concluded that this is a superior conception of rights for the Anglo-American legal system. To see whether this is in fact the case, let us return to our illustrative cases.

Recall that both *Dudley and Stephens* and *A.C.* present life or death situations in which the survival of one (or more) parties requires that death or the grave risk thereof be imposed on

another. In each case, the fundamental right which is at stake is the most basic of all, the right to life. In each case, the outcome will depend upon the construction the court gives this right. Let us examine what the courts' analyses would be under each of the available conceptions of rights.

Consider *Dudley and Stephens* first. In this case, the right to life was obviously construed in the classical sense. This means that it was viewed as an absolute option right not to be killed. Because it was an option right, it surrounded its possessor with a zone of non-interference that placed an obligation on all others not to end the rightholder's existence. Because it was absolute, it could not be overridden; there could be no morally acceptable justification for impinging upon that zone.¹¹⁴ However, under this interpretation, the right to life could not be construed as a welfare right. It did not provide its possessor with an entitlement to the things that are necessary to sustain his or her life.

This view of the right to life clearly mandated a murder conviction. Parker's right to life created a zone of non-interference around him which Dudley and Stephens patently violated by taking his life. Further, since Parker's right was absolute, there could be no justification for the violation. Thus, the fact that killing Parker was the most rational way to maximize the number of lives saved could not justify Dudley and Stephens' action. Parker's right to life simply "trumped" the considerations of general utility that recommended his death. Furthermore, although it is true that Dudley and Stephens themselves possessed rights to life, these rights merely cloaked them

¹¹⁴Recall that describing the right to life as absolute does not imply that it is unlimited in scope, but only that within its properly defined boundaries, it is entitled to unconditional respect. *See supra* note 78 and accompanying text. In the Anglo-American legal system, the right to life is limited to those who have not been convicted of a capital offense. Thus, the fact that a convicted murderer may properly be executed does not serve as a counterexample to the claim that the right to life is absolute. To a proponent of the classical conception, the murderer's right to life has not been overridden when he or she is executed, it simply never extended so far.

with protection against being killed by others. It did not entitle them to take whatever action was necessary to preserve their own lives. Under the classical conception, the rights to life of the men in the lifeboat did not and could not conflict with each other. Therefore, Dudley and Stephens had absolutely no ground for depriving Parker of his remaining hours. Given the dire nature of the circumstances in which the men were placed, this shows that under the classical conception, the right to life is taken very seriously indeed.¹¹⁵

Now consider what the result would have been had the right to life been interpreted according to the contemporary conception of rights. Under this conception, the right to life is merely a means to the realization of the underlying human interest in continued existence. Since being protected against having one's life taken by others helps advance this interest, the right to life will certainly include a *prima facie* option right not to be killed. However, being provided with the things necessary to one's survival clearly helps advance one's interest in continued existence as well. Thus, under the contemporary conception, the right to life would also include a *prima facie* welfare right that entitled the rightholder to the things necessary to sustain his or her life.

When the case is analyzed on the basis of this interpretation of the right to life, a very different result is derived. As in the previous analysis, Parker's right to life created a zone of non-interference around him which Dudley and Stephens clearly violated. However, because under the contemporary conception Parker's right was only a *prima facie* right, Dudley and Stephens' action

¹¹⁵Although this may seem to be a harsh result given the facts of the case, keep in mind that the issue being addressed is culpability, not punishment. This analysis indicates only that Dudley and Stephens are, in fact, guilty of murder, not that they should be condemned to death. It is probably impossible to think of a case in which mercy in sentencing would be more appropriate. In the actual case, the Crown commuted the death sentence to six months' imprisonment.

could be justified if it was necessary to resolve a conflict of rights so as to best preserve the underlying moral interests. Given the facts of the case, this was precisely the nature of their action.

When construed according to the contemporary conception, each of the four sailors had a right to life which provided him with both a zone of non-interference that prohibited others from ending his life and an entitlement to the things necessary to sustain his life. However, in the circumstances in which the men found themselves, the only thing that could possibly sustain their lives was the dead body of one of their members. In this situation, the aspect of each man's right to life that protected him against being killed by others conflicted with the aspect of the others' rights to life which entitled them to the things necessary for their survival. In other words, the sailors' rights to life conflicted with each other.

Since under the contemporary conception rights have value only as means to the realization of the interests that underlie them, conflicts among rights are properly resolved in the way that best advances those interests. In the instant case, since the conflict is among the sailors' rights to life, the proper resolution would be the one that best advances the interest in the preservation of human life that underlies these rights. In the circumstances of this case, killing Parker is the action that would result in the maximum preservation of life. Therefore, when this case is analyzed under the contemporary conception of rights, Dudley and Stephens' action constituted the proper resolution of the conflict of rights and, thus, was morally appropriate.

Notice that this resolution is identical to the one that would have been arrived at had there been no rights involved. Assuming none of the sailors possessed a right to life, the proper action would clearly be the one that would maximize the number of lives that could be saved; in this

case, killing Parker. But this is precisely the standard that was used to resolve the conflict among the sailors' rights to life. What this shows is that when the sailors' rights to life conflict, they simply drop out of consideration and the decision as to what to do is left to the same utilitarian weighing process that would have been employed had the rights never existed. In other words, the sailors' rights to life provide no more protection for their interests than that ordinarily afforded by considerations of general utility. In this case, it would seem that when the right to life is interpreted according to the contemporary conception, it is not taken very seriously.

Let us now turn our attention to *A.C.* The court order requiring Angela Carder to undergo the Caesarean can be explained by the assumption that the court was interpreting the right to life in the contemporary sense. As we have just seen, this means that it was regarded as encompassing both a *prima facie* option right not to be killed and a *prima facie* welfare right to the things necessary for survival. Ms. Carder's right to life surrounded her with a zone of non-interference which the court ordered the doctors to violate by performing an operation likely to end her life. However, because Ms. Carder's right was merely *prima facie*, this violation could be justified if it was necessary to properly resolve a conflict of rights. And since the court regarded the fetus as a bearer of rights, there was such a conflict.

Like Ms. Carder, the fetus also had a right to life which entitled it not only not to be killed, but also to the things necessary for its continued survival. However, in this case, the thing that was necessary for the fetus' survival was that the Caesarean be performed on Ms. Carder. Since this operation was precisely the thing likely to kill Ms. Carder, the aspect of her right to life that protected her against being killed by others conflicted with the aspect of the fetus' right which entitled it to what was necessary for survival. Thus, there was a conflict of rights which the court

had to resolve so as to best promote the interest underlying the rights, the preservation of human life. Since Ms. Carder "had, at best, two days left of sedated life"¹¹⁶ while the fetus had the opportunity for a full life, ordering the Caesarean was the best way to maximize the preservation of life. Thus, the court ordered the operation.

Note once again that this is precisely the same outcome that would result if neither party had a right to life and the situation were resolved on the basis of purely utilitarian considerations. As in the *Dudley and Stephens* case, the parties' rights to life simply drop out of consideration and thus provide them with no protection they do not already possess. Once again, under the contemporary conception, the rights do not seem to have the minimum content they need to be significant moral entities.

Now let us consider how the *A.C.* case would have been resolved had the court employed the classical conception of rights. Under this interpretation, Ms. Carder's right to life would have provided her with an absolute option right not to be killed by others. Because this right is absolute, the fact that the Caesarean represented the best way to maximize the number of lives that could be saved would not justify the court in ordering it. Further, although the fetus too could be regarded as having a right to life, this would be limited to an option right not to be killed and would not include a welfare right to what was necessary for its survival; in this case, the Caesarean. Thus, there is no conflict between the rights to life of the fetus and Ms. Carder. Under the classical conception, the court would simply have no ground for depriving Ms. Carder of her remaining two days of sedated life. From this we can see that even in a case as poignant as this one, interpreting fundamental legal rights according to the classical conception ensures that they

¹¹⁶533 A.2d at 617.

fulfill their essential function of protecting individuals against the exercise of state power.

VII. CONCLUSION

In this article, I have argued that fundamental legal rights should be understood as absolute, individual, option rights in accordance with the classical conception of rights. For this argument to be effective, it is important to appreciate its limitations. In the first place, no attempt has been made to identify the set of fundamental legal rights that individuals actually possess or even to show that there are any such rights. Utilitarian or other theorists who wish to argue that fundamental rights are, in fact, chimerical will find nothing in this article to stand in their way. What I have argued is that *if there are any fundamental rights*, then they can better serve their purpose of restraining state power if interpreted according to the classical conception. In fact, in choosing *Dudley and Stephens* and *A.C.* as my illustrative cases, I have consciously attempted to avoid the issue of what fundamental rights actually exist by focusing on the least controversial such right, the right to life.

Secondly, I have offered no proof that the classical conception constitutes a fully adequate understanding of fundamental rights. It may be that the Kantian argument offered in support of it is as flawed as were those of Locke and Hobbes,¹¹⁷ or that the conception of rights that can be derived from such a basis does not in fact have the features I have ascribed to it. If such is the case, there is clearly the need for further philosophical consideration of this conception of rights. In the present article, all that has been argued is that in the context of the Anglo-American legal system, the contemporary conception is self-defeating in a way that the classical conception is not,

¹¹⁷The same is of course true for the egoistic and Aristotelian arguments presented by other present-day rights theorists.

and therefore, the classical conception constitutes a superior interpretation of fundamental *legal* rights.

Finally, I have not attempted to and certainly have not demonstrated that there is any *logical* inconsistency in the contemporary conception of rights. What I have argued is merely that this conception is not an appropriate interpretation of fundamental rights within the Anglo-American legal system. It may well be that moral philosophers can identify a set of fundamentally important interests and devise either a hierarchy among them or some other decision procedure that would allow conflicts among the rights that protect these interests to be resolved without emptying them of meaning. However, such a theory of fundamental rights is unlikely to be one which can be successfully applied by political functionaries who have no sophisticated philosophical training or which can produce legal judgments capable of objective justification to the ordinary citizens whose behavior the law regulates.

Law is a practical enterprise in which the behavior of the mass of error-prone, morally imperfect human beings is to be regulated by a smaller set of equally error-prone, equally morally imperfect human beings. The purpose of fundamental rights is to provide the larger class with some protection against the excesses of the smaller. In this context, what is needed is not a theoretically perfect concept of fundamental rights that will produce the ideal set of relationships among all individuals, but rather one which can effectively restrain state power given the practical limitations of political and legal institutions. A conception of fundamental rights that both permits frequent conflicts among these rights and authorizes the very individuals whose power is to be restrained to resolve them simply cannot serve its purpose as effectively as one that allows no conflicts among rights. Thus, despite generating a much smaller set of fundamental rights, the

classical conception of rights nevertheless protects the autonomy of the citizenry to a much greater degree than does the contemporary conception, and hence, represents a superior model for the legal interpretation of fundamental rights.