

the law of double-effect have sometimes objected that it is strange to make the permissibility of an action depend on quite subtle features of its rationale. In the context of the present theory, however, the distinction just proposed is not formally anomalous. Conferrals of authority and limitations on it often take the form not simply of allowing certain actions or barring them but rather of restricting the grounds on which actions can be undertaken. Freedom of expression embodies restrictions of this kind, for example, and this is one factor responsible for the distinction between real and apparent violations mentioned above.⁹

Reasons for such a restriction in the present case are easy to come by. People have such powerful and tempting reasons for wanting others removed from the scene that it is obviously a serious step to open the door to calculations taking these reasons into account. Obviously, what would be proposed would be a qualified restriction, allowing consideration of the utilitarian, but not the purely self-interested, advantages to be gained from a person's death. But a potential agent's perception of this distinction does not seem to be a factor worth depending on.

The restriction proposed here may appear odd when compared to our apparent policy regarding mutual aid. If, as seems to be the case, we are prepared to allow a person to fail to save another when doing so would involve a moderately heavy sacrifice, why not allow him to do the same for the sake of a much greater benefit, to be gained from that person's death? The answer seems to be that, while a principle of mutual aid giving less consideration to the donor's sacrifice strikes us as too demanding, it is not nearly as threatening as a policy allowing one to consider the benefits to be gained from a person's death.

These appeals to 'conservatism' and mistrust do not seem to me to provide adequate justification for the distinctions in question. They may explain, however, why these distinctions have some appeal for us and yet remain matters of considerable controversy.

⁹ For a view of freedom of expression embodying this feature, see Scanlon, 'A Theory of Freedom of Expression', *Philosophy and Public Affairs*, 1 (1972), pp. 204-26.

VII RIGHTS AS TRUMPS RONALD DWORKIN

I. RIGHTS AND UTILITY

RIGHTS are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.¹ If someone has a right to publish pornography, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did. Of course, there are many different theories in the field about what makes a community better off on the whole; many different theories, that is, about what the goal of political action should be. One prominent theory (or rather group of theories) is utilitarianism in its familiar forms, which suppose that the community is better off if its members are on average happier or have more of their preferences satisfied. There are, of course, many other theories about the true goal of politics. To some extent, the argument in favour of a political right must depend on which of these theories about desirable goals has been accepted; it must depend, that is, on what general background justification for political decisions the right in question proposes to trump. In the following discussion I shall assume that the background justification with which we are concerned is some form of utilitarianism which takes, as the goal of politics, the fulfilment of as many of people's goals for their own lives as possible. This remains, I think, the most influential background justification, at least in the informal way in which it presently figures in politics in the Western democracies.

Suppose we accept then that, at least in general, a political decision is justified if it promises to make citizens happier, or to fulfil more of their preferences, on average, than any other decision could. Suppose

Adapted by the author from Ronald Dworkin, 'Is There a Right to Pornography?', *Oxford Journal of Legal Studies*, 1 (1981), pp. 177-212. Copyright © Ronald Dworkin 1981.

¹ See Ronald Dworkin, *Taking Rights Seriously* (London, 1978).

we assume that the decision to prohibit pornography altogether does in fact, meet that test, because the desires and preferences of publishers and consumers are outweighed by the desires and preferences of the majority, including their preferences about how others should lead their lives. How could any contrary decision, permitting even the private use of pornography, then be justified?

Two modes of argument might be thought capable of supplying such a justification. First, we might argue that, though the utilitarian goal states one important political ideal, it is not the only important ideal, and pornography must be permitted in order to protect some other ideal that is, in the circumstances, more important. Second, we might argue that further analysis of the grounds that we have for accepting utilitarianism as a background justification in the first place—further reflection of why we wish to pursue that goal—shows that utility must yield to some right of moral independence here. The first form of argument is pluralistic: it argues for a trump over utility on the ground that though utility is always important, it is not the only thing that matters, and other goals or ideals are sometimes more important. The second supposes that proper understanding of what utilitarianism is, and why it is important, will itself justify the right in question.

I do not believe that the first, or pluralistic, mode of argument has much prospect of success, at least as applied to the problem of pornography. But I shall not develop the arguments now that would be necessary to support that opinion. I want instead to offer an argument in the second mode, which is, in summary, this. Utilitarianism owes whatever appeal it has to what we might call its egalitarian cast. (Or, if that is too strong, would lose whatever appeal it has but for that cast.) Suppose some version of utilitarianism provided that the preferences of some people were to count for less than those of others in the calculation how best to fulfil most preferences overall either because these people were in themselves less worthy or less attractive or less well-loved people, or because the preferences in question combined to form a contemptible way of life. This would strike us as flatly unacceptable, and in any case much less appealing than standard forms of utilitarianism. In any of its standard versions, utilitarianism can claim to provide a conception of how government treats people as equals, or, in any case, how government respects the fundamental requirement that it must treat people as equals. Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit. The corrupt version of utilitarianism just described, which gives less weight to some persons than to others, or discounts

some preferences because these are ignoble, forfeits that claim. But if utilitarianism in practice is not checked by something like the right of moral independence (and by other allied rights) it will disintegrate, for all practical purposes, into exactly that version.

Suppose a community of many people including Sarah. If the constitution sets out a version of utilitarianism which provides in terms that Sarah's preferences are to count for twice as much as those of others, then this would be the unacceptable, non-egalitarian version of utilitarianism. But now suppose that the constitutional provision is the standard form of utilitarianism, that is, that it is neutral towards all people and preferences, but that a surprising number of people love Sarah very much, and therefore strongly prefer that her preferences count for twice as much in the day-to-day political decisions made in the utilitarian calculus. When Sarah does not receive what she would have if her preferences counted for twice as much as those of others, then these people are unhappy, because their special Sarah-loving preferences are unfulfilled. If these special preferences are themselves allowed to count, therefore, Sarah will receive much more in the distribution of goods and opportunities than she otherwise would. I argue that this defeats the egalitarian cast of the apparently neutral utilitarian constitution as much as if the neutral provision were replaced by the rejected version. Indeed, the apparently neutral provision is then self-undermining because it gives a critical weight, in deciding which distribution best promotes utility, to the views of those who hold the profoundly un-neutral (some would say anti-utilitarian) theory that the preferences of some should count for more than those of others.

The reply that a utilitarian anxious to resist the right to moral independence would give to this argument is obvious: utilitarianism does not give weight to the truth of that theory, but just to the fact that many people (wrongly) hold that theory and so are disappointed when the distribution the government achieves is not the distribution they believe is right. It is the fact of their disappointment, not the truth of their views, that counts, and there is no inconsistency, logical or pragmatic, in that. But this reply is too quick. For there is in fact a particularly deep kind of contradiction here. Utilitarianism must claim (as I said earlier any political theory must claim) truth for itself, and therefore must claim the falsity of any theory that contradicts it. It must itself occupy, that is, all the logical space that its content requires. But neutral utilitarianism claims (or in any case presupposes) that no one is, in principle, any more entitled to have any of his preferences fulfilled than anyone else is. It argues that the only reason for denying the fulfilment of one person's desires, whatever these are, is

that more or more intense desire must be satisfied instead. It insists that justice and political morality can supply no other reason. This is, we might say, the neutral utilitarian's *case* for trying to achieve a political structure in which the average fulfilment of preferences is as high as possible. The question is not whether a government can achieve that political structure if it counts political preferences like the preferences of the Sarah-lovers² or whether the government will in fact then have counted any particular preference twice and so contradicted utilitarianism in that direct way. It is rather whether the government can achieve all this without implicitly contradicting that case.

Suppose the community contains a Nazi, for example, whose set of preferences includes the preference that Aryans have more and Jews less of their preferences fulfilled just because of who they are. A neutral utilitarian cannot say that there is no reason in political morality, for rejecting or dishonouring that preference, for not dismissing it as simply wrong, for not striving to fulfil it with all the dedication that officials devote to fulfilling any other sort of preference. For utilitarianism itself supplies such a reason: its most fundamental tenet is that people's preferences should be weighed on an equal basis in the same scales, that the Nazi theory of justice is profoundly wrong, and that officials should oppose the Nazi theory and strive to defeat rather than fulfil it. A neutral utilitarian is in fact barred, for reasons of consistency, from taking the same politically neutral attitude to the Nazi's political preference that he takes to other sorts of preferences. But then he cannot make the case just described in favour of highest average utility computed taking that preference into account.

I do not mean to suggest, of course, that endorsing someone's right to have his preference satisfied automatically endorses his preference as good or noble. The good utilitarian, who says that the push-pin player is equally entitled to satisfaction of that taste as the poet is entitled to the satisfaction of his, is not for that reason committed to the proposition that a life of push-pin is as good as a life of poetry. Only vulgar critics of utilitarianism would insist on that inference. The utilitarian says only that nothing in the theory of justice provides any reason why the political and economic arrangements and decisions of society should be any closer to those the poet would prefer than those the push-pin player would like. It is just a matter, from the standpoint of political justice, of how many people prefer the one to the other and how strongly. But he cannot say that about the conflict between the

² Though there are obvious dangers of a circle here. See Dworkin, 'What is Equality? Part I: Equality of Welfare', *Philosophy and Public Affairs* (1981).

Nazi and the neutral utilitarian opponent of Nazism, because the correct political theory, his political theory, the very political theory to which he appeals in attending to the fact of the Nazi's claim, does speak to the conflict. It says that what the neutral utilitarian prefers is just and accurately describes what people are, as a matter of political morality, entitled to have, but that what the Nazi prefers is deeply unjust and describes what no one is entitled, as a matter of political morality, to have. But then it is contradictory to say, again as a matter of political morality, that the Nazi is as much entitled to the political system he prefers as is the utilitarian.

The point might be put this way. Political preferences, like the Nazi's preference, are on the same level—purport to occupy the same space—as the utilitarian theory itself. Therefore, though the utilitarian theory must be neutral between personal preferences like the preferences for push-pin and poetry, as a matter of the theory of justice, it cannot, without contradiction, be neutral between itself and Nazism. It cannot accept at once a duty to defeat the false theory that some people's preferences should count for more than other people's and a duty to strive to fulfil the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences. The distinction on which the reply to my argument rests, the distinction between the truth and the fact of the Nazi's political preferences, collapses, because if utilitarianism counts the fact of these preferences it has denied what it cannot deny, which is that justice requires it to oppose them.

We could escape this point, of course, by distinguishing two different forms or levels of utilitarianism. The first would be presented simply as a thin theory about how a political constitution should be selected in a community whose members prefer different kinds of political theories. The second would be a candidate for the constitution to be so chosen; it might argue for a distribution that maximized aggregate satisfaction of personal preferences in the actual distribution of goods and opportunities, for example. In that case the first theory would argue only that the preferences of the Nazi should be given equal weight with the preferences of the second sort of utilitarian in the choice of a constitution, because each is equally entitled to the constitution he prefers, and there would be no contradiction in that proposition. But of course the neutral utilitarian theory we are now considering is not simply a thin theory of that sort. It proposes a theory of justice as a full political constitution, not simply a theory about how to choose one, and so it cannot escape contradiction through modesty.

Now the same argument holds (though perhaps less evidently) when

the political preferences are not familiar and despicable, like the Nazi theory, but more informal and cheerful, like the preferences of the Sarah-lovers who think that her preferences should be counted twice. The latter might, indeed, be Sarahocrats who believe that she is entitled to the treatment they recommend by virtue of birth or other characteristics unique to her. But even if their preferences rise from special affection rather than from political theory, these preferences nevertheless invade the space claimed by neutral utilitarianism and so cannot be counted without defeating the case utilitarianism provides. My argument, therefore, comes to this. If utilitarianism is to figure as part of an attractive working political theory, then it must be qualified so as to restrict the preferences that count by excluding political preferences of both the formal and informal sort. One very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted utilitarianism. A society committed to utilitarianism as a general background justification which does not in terms disqualify any preferences might achieve that disqualification by adopting a right to political independence: the right that no one suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not, or that others care less for him than they do for other people. The right of political independence would have the effect of insulating Jews from the preferences of Nazis, and those who are not Sarah from the preferences of those who adore her.

The right of moral independence can be defended in a parallel way. Neutral utilitarianism rejects the idea that some ambitions that people might have for their own lives should have less command over social resources and opportunities than others, except as this is the consequence of weighing all preferences on an equal basis in the same scales. It rejects the argument, for example, that some people's conception of what sexual experience should be like, and of what part fantasy should play in that experience, and of what the character of that fantasy should be, are inherently degrading or unwholesome. But then it cannot (for the reasons just canvassed) count the moral preferences of those who do hold such opinions in the calculation whether individuals who form some sexual minority, including homosexuals and pornographers, should be prohibited from the sexual experiences they want to have. The right of moral independence is part of the same collection of rights as the right of political independence, and it is to be justified as a trump over an unrestricted utilitarian defence of prohibitory laws against pornography, in a community of those who find offence just in the idea that their neighbours are reading dirty books,

in much the same way as the latter right is justified as a trump over a utilitarian justification of giving Jews less or Sarah more in a society of Nazis or Sarah-lovers.

It remains to consider whether the abstract right to moral independence, defended in this way, would nevertheless permit restriction of public display of pornography in a society whose preferences against that display were backed by the mixed motives we reviewed in the last part. This is a situation in which the egalitarian cast of utilitarianism is threatened from not one but two directions. To the extent to which the motives in question are moral preferences about how others should behave, and these motives are counted, then the neutrality of utilitarianism is compromised. But to the extent to which these are the rather different sort of motives we reviewed, which emphasize not how others should lead their lives, but rather the character of the sexual experience people want for themselves, and these motives are disregarded, the neutrality of utilitarianism is compromised in the other direction, for it becomes unnecessarily inhospitable to the special and important ambitions of those who then lose control of a crucial aspect of their own self-development. The situation is therefore not an appropriate case for a prophylactic refusal to count any motive whenever we cannot be sure that the motive is unmixed with moralism, because the danger of unfairness lies on both sides rather than only on one. The alternative I described in the last part is at least better than that. This argues that restriction may be justified even though we cannot be sure that the preferences people have for restriction are untainted by the kind of preferences we should exclude, provided that the damage done to those who are affected adversely is not serious damage, even in their own eyes. Allowing restrictions on public display is in one sense a compromise; but it is a compromise recommended by the right of moral independence, once the case for that right is set out, not a compromise of that right.

II. HART'S OBJECTIONS

There are, then, good grounds for those who accept utilitarianism as a general background justification for political decisions also to accept, as part of the same package, a right of moral independence. I shall end this essay by considering certain objections that Professor H. L. A. Hart has made, in a recent article,³ to a similar argument that I made some years ago about the connection between utilitarianism and these rights.⁴

³ Hart, 'Between Utility and Rights', *Col. L. Rev.*, 79 (1980), pp. 828, 836 ff.

⁴ See Dworkin, *Taking Rights Seriously*, Introduction, ch. 12, and Appendix,

Hart's objections show what I think is a comprehensive misunderstanding of this argument, which my earlier statement, as I now see, encouraged, and it might therefore be helpful, as insurance against a similar misunderstanding now, to report these objections and my reasons for thinking that they misconceive my argument.

I suggested, in my earlier formulation of the present argument, that if a utilitarian counts preferences like the preferences of the Sarah-lovers, then this is a 'form' of double-counting because, in effect, Sarah's preferences are counted twice, once on her own account, and once through the second-order preferences of others that incorporate her preferences by reference. Hart says that this is a mistake, because in fact no one's preferences are counted twice. and it would *undercount* the Sarah-lovers' preferences, and so fail to treat them as equals, if their preferences in her favour were discarded. There would be something in this last point if votes rather than preferences were in issue, because if someone wished to vote for Sarah's success rather than his own, his role in the calculation would be exhausted by this gift, and if his vote was then discarded he might well complain that he had been cheated of his equal power over political decision. But preferences (as these figure in utilitarian calculations) are not like votes in that way. Someone who reports more preferences to the utilitarian computer does not (except trivially) diminish the impact of other preferences he also reports; he rather increases the role of his preferences overall, compared with the role of other people's preferences, in the giant calculation. So someone who prefers Sarah's success to the success of people generally, and through the contribution of that preference to an unrestricted utilitarian calculation secures more for her, does not have any less for himself—for the fulfilment of his more personal preferences—than someone else who is indifferent to Sarah's fortunes.

I do not think that my description, that counting his preferences in favour of Sarah is a form of double-counting, is misleading or unfair. But this description was meant to summarize the argument, not to make it, and I will not press that particular characterization. (Indeed, as Hart notices, I made it only about some of the examples I gave in which unrestricted utilitarianism produced obviously inegalitarian results.) Hart makes more substantial points about a different example I used, which raised the question of whether homosexuals have the right to practice their sexual tastes in private. He thinks I want to say 'that if, as a result of [preferences that express moral disapproval of

pp. 357-8. See also Dworkin, 'Liberalism', in Hampshire (ed.), *Public and Private Morality*, (Cambridge, 1978); and Dworkin, 'Social Science and Constitutional Rights: the Consequences of Uncertainty', *J of L & Educ*, 6 (1977), p. 3.

homosexuals] tipping the balance, persons are denied some liberty, say to form some sexual relations, those so deprived suffer because by this result their concept of a proper or desirable form of life is despised by others, and this is tantamount to treating them as inferior to or of less worth than others, or not deserving of equal concern, and respect'.⁵

But this misstates my point. It is not the result (or, as Hart later describes it, the 'upshot') of the utilitarian calculation that causes or achieves the fact that homosexuals are despised by others. It is rather the other way round: if someone is denied liberty of sexual practice by virtue of a utilitarian justification that depends critically on other people's moralistic preferences, then he suffers disadvantage in virtue of the fact that his concept of a proper life is already despised by others. Hart says that the 'main weakness' in my argument—the feature that makes it 'fundamentally wrong'—is that I assume that if someone's liberty is restricted this must be interpreted as a denial of his treatment as an equal. But my argument is that this is not inevitably or even usually so, but only when the constraint is justified in some way that depends on the fact that others condemn his convictions or values. Hart says that the interpretation of denial of liberty as a denial of equal concern is 'least credible' in exactly the case I discuss, that is, when the denial is justified through a utilitarian argument, because (he says) the message of that justification is not that the defeated minority or their moral convictions are inferior, but only that they are too few to outweigh the preferences of the majority, which can only be achieved if the minority is in fact denied the liberty it wishes. But once again this ignores the distinction I want to make. If the utilitarian justification for denying liberty of sexual practice to homosexuals can succeed without counting the moralistic preferences of the majority in the balance (as it might if there was good reason to believe what is in fact incredible, that the spread of homosexuality fosters violent crime) then the message of prohibition would, indeed, be only the message Hart finds, which might be put this way: 'It is impossible that everyone be protected in all his interests, and the interests of the minority must yield, regrettably, to the concern of the majority for its safety' There is (at least in my present argument) no denial of treatment as an equal in that message. But if the utilitarian justification cannot succeed without relying on the majority's moralistic preferences about how the minority should live, and the government nevertheless urges that justification, then the message is very different, and, in my view, nastier. It is exactly that the minority must suffer

⁵ Hart, *supra*, p. 842.

because others find the lives they propose to lead disgusting, which seems no more justifiable, in a society committed to treating people as equals, than the proposition we earlier considered and rejected, as incompatible with equality, that some people must suffer disadvantage under the law because others do not like them.

Hart makes further points. He suggests, for example, that it was the 'disinterested' political preferences of liberals that tipped the balance in favour of repealing laws against homosexual relationships in 1967 in England, and asks how anyone could object that counting *those* preferences at that time offended anyone's rights to be treated as an equal. But this question misunderstands my point in a fundamental way. I do not argue—how could anyone argue?—that citizens in a democracy should not campaign and vote for what they think is just. The question is not whether people should work for justice, but rather what test we and they should apply to determine what is just. Utilitarianism holds that we should apply this test: we should work to achieve maximum possible satisfaction of the preferences we find distributed in our community. If we accepted this test in an unrestricted way, then we would count the attractive political convictions of the liberals of the nineteen-sixties simply as data, to be balanced against the less attractive convictions of others, to see which carried the day in the contest of number and intensity. Conceivably the liberal position would have won this contest. Probably it would not have.

But I have been arguing that this is a false test, which in fact undermines the case of utilitarianism, if political preferences of either the liberals or their opponents are counted and balanced to determine what justice requires. That is why I recommend, as part of any overall political theory in which utilitarianism figures as a background justification, rights to political and moral independence. But the liberals who campaigned in the interests of homosexuals in England in the nineteen-sixties most certainly did not embrace the test I reject. They of course *expressed* their own political preferences in their votes and arguments, but they did not *appeal* to the popularity of these preferences as providing an argument in itself for what they wanted, as the unrestricted utilitarian argument I oppose would have encouraged them to do. Perhaps they appealed instead to something like the right of moral independence. In any case they did not rely on any argument inconsistent with that right. Nor is it necessary for us to rely on any such argument to say that what they did was right, and treated people as equals. The proof is this: the case for reform would have been just as strong in political theory even if there had been very few or no heterosexuals who wanted reform, though of course reform would not then

have been practically possible. If so, then we cannot condemn the procedure that in fact produced reform on the ground that that procedure offended anyone's rights to independence.

Hart's misunderstanding here was no doubt encouraged by my own description of how rights like the right to moral independence function in a constitutional system, like that of the United States, which uses rights as a test of the legality of legislation. I said that a constitutional system of this sort is valuable when the community as a whole harbours prejudices against some minority or convictions that the way of life of that minority is offensive to people of good character. In that situation, the ordinary political process is antecedently likely to reach decisions that would fail the test we have constructed, because these decisions would limit the freedom of the minority and yet could not be justified, in political theory, except by assuming that some ways of living are inherently wrong or degrading, or by counting the fact that the majority thinks them so as itself part of the justification. Since these *repressive* decisions would then be wrong, for the reasons I offer, the constitutional right forbids them in advance.

Of course, the decision for reform that Hart describes would not—could not—be a decision justified only on these offending grounds. Even if the benign liberal preferences figured as data rather than argument, as I think they should not, no one would be in a position to claim the right to moral or political independence as a shield against the decision that was in fact reached. But someone might have been led to suppose, by my discussion, that what I condemn is any political process that would allow any decision to be taken if people's reasons for supporting one decision rather than another are likely to lie beyond their own personal interests. I hope it is now plain why this is wrong. *That* position would not allow a democracy to vote for social welfare programmes, or foreign aid, or conservation for later generations. Indeed, in the absence of an adequate constitutional system, the only hope for justice is precisely that people will vote with a disinterested sense of fairness. I condemn a political process that assumes that the fact that people have such reasons is itself part of the case in political morality for what they favour. Hart's heterosexual liberals may have been making the following argument to their fellow citizens. 'We know that many of you find the idea of homosexual relationships troubling and even offensive. Some of us do as well. But you must recognize that it would deny equality, in the form of moral independence, to count the fact that we have these feelings as a justification for penal legislation. Since that is so, we in fact have no justification for the present law, and we ought, in all justice, to reform it.' Nothing

in this argument counts the fact that either the liberals or those they address happen to have any particular political preferences or convictions as itself an argument: the argument is made by appeal to justice, not to the fact that many people want justice. There is nothing in that argument that fails to treat homosexuals as equals. Quite the contrary. But that is just my point.

I shall consider certain of the remaining objections Hart makes together. He notices my claim, that the rights people have depend on the background justification and political institutions that are also in play, because the argument for any particular right must recognize that right as part of a complex package of other assumptions and practices that it trumps. But he finds this odd. It may make sense to say, he remarks, that people *need* rights less under some forms of government than others. But does it make sense to say that they *have* less rights in one situation rather than another? He also objects to my suggestion (which is of course at the centre of the argument I made in the last section) that rights that have long been thought to be rights to liberty, like the rights of homosexuals to freedom of sexual practice or the right of pornographers to look at what they like in private, are in fact (at least in the circumstances of modern democracies) rights to treatment as an equal. That proposition, which Hart calls 'fantastic', would have the consequence, he says, that a tyrant who had forbidden one form of sexual activity or the practice of one religion would actually eliminate the evil rather than increase it if he broadened his ban to include all sex and all religions, and in this way removed the inequality of treatment. The vice in prohibitions of sexual or religious activity, he says, is in fact that these diminish liberty, not equal liberty; adding a violation of equality to the charge makes equality an empty and idle idea with no work to do.

These different objections are plainly connected, because they suppose that whatever rights people have are at least in large part timeless rights necessary to protect enduring and important interests fixed by human nature and fundamental to human development, like interests in the choice of sexual partners and acts and choice of religious conviction. That is a familiar theory of what rights are and what they are for, and I said that I would not give my reasons, in this essay, for thinking that it is in the end an inadequate theory of rights. I did say that this theory is unlikely to produce a defence of the right I have been considering, which is the right of moral independence as applied to the use of pornography, because it seems implausible that any important human interests are damaged by denying dirty books or films. But that is not much of an argument against the general

fundamental-interests theory of rights, because those who accept that theory might be ready to concede (or perhaps even to insist) that the appeal to rights in favour of pornographers is an error that cheapens the idea of rights, and that there is nothing in political morality that condemns the prohibition of pornography altogether if that is what will best fulfil the preferences of the community as a whole.

My aim is to develop a theory of rights that is relative to the other elements of a political theory, and to explore how far that theory might be constructed from the exceedingly abstract (but far from empty) idea that government must treat people as equals. Of course that theory makes rights relative in only one way. I am anxious to show how rights fit into different packages, so that I want to see, for example, which rights should be accepted as trumps over utility if utility is accepted, as many people think it should be accepted, as the proper background justification. That is an important question because, as I said, at least an informal kind of utilitarianism has for some time been accepted in practical politics. It has supplied, for example, the working justification of most of the constraints on our liberty through law that we accept as proper. But it does not follow from this investigation that I must endorse (as I am sometimes said to endorse)⁶ the package of utilitarianism together with the rights that utilitarianism requires as the best package that can be constructed. In fact I do not. Though rights are relative to packages, one package might still be chosen over others as better, and I doubt that in the end any package based on any familiar form of utilitarianism will turn out to be best. Nor does it follow from my argument that there are no rights that any defensible package must contain—no rights that are in this sense natural rights—though the argument that there are such rights, and the explanation of what these are, must obviously proceed in a rather different way from the route I followed in arguing for the right to moral independence as a trump over utilitarian justifications.

But if rights figure in complex packages of political theory, it is both unnecessary and too crude to look to rights for the only defence against either stupid or wicked political decisions. No doubt Hitler and Nero violated whatever rights any plausible political theory would provide; but it is also true that the evil these monsters caused could find no support even in the background justification of any such theory. Suppose some tyrant (an Angelo gone even more mad) did forbid sex altogether on penalty of death, or banned all religious practice in a community whose members were all devout. We should say that what

⁶ See, e.g., Hart, *supra*, p. 845 n.43.

he did (or tried to do) was insane or wicked or that he was wholly lacking in the concern for his subjects which is the most basic requirement that political morality imposes on those who govern. Perhaps we do not need the idea of equality to explain that last requirement. (I am deliberately cautious here.) But neither do we need the idea of rights.

We need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off on some plausible account of where the community's general welfare lies. But the most natural source of any objection we might have to such a decision is that, in its concern with the welfare or prosperity or flourishing of people on the whole, or in the fulfilment of some interest, widespread within the community, the decision pays insufficient attention to its impact on the minority; and some appeal to equality seems a natural expression of an objection from that source. We want to say that the decision is wrong, in spite of its apparent merit, because it does not take the damage it causes to some into account in the right way and therefore does not treat these people as equals entitled to the same concern as others.

Of course, that charge is never self-validating. It must be developed through some theory about what equal concern requires, or, as in the case of the argument I offered, about what the background justification itself supposes that equal concern requires. Others will inevitably reject any such theory. Someone may claim, for example, that equal concern requires only that people be given what they are entitled to have when their preferences are weighed in the scales with the preferences, including the political and moral preferences, of others. In that case (if I am correct that the right to sexual freedom is based in equality) he would no longer support that right. But how could he? Suppose the decision to ban homosexuality even in private is the decision that is reached by the balance of preferences that he thinks respects equality. He could not say that, though the decision treats homosexuals as equals, by giving them all that equal concern for their situation requires, the decision is nevertheless wrong because it invades their liberty. If some constraints on liberty can be justified by the balance of preferences, why not this one?⁷ Suppose he falls back on the idea that sexual freedom is a fundamental interest. But does it treat people as equals to invade their fundamental interests for the sake of minor gains to a very large number of other citizens? Perhaps he will say that it does, because

⁷ See Dworkin, *Taking Rights Seriously*, pp. 266-72.

the fundamental character of the interests invaded have been taken into account in the balancing process, so that if these are outweighed the gains to others, at least in the aggregate, were shown to be too large in all fairness to be ignored. But if this is so, then deferring to the interests of the outweighed minority would be giving the minority more attention than equality allows, which is favouritism. How can he then object to the decision the balancing process reached? So if anyone really does think that banning homosexual relationships treats homosexuals as equals, when this is the decision reached by an unrestricted utilitarian balance, he seems to have no very persuasive grounds left to say that that decision nevertheless invades their rights. My hypothesis, that the rights which have traditionally been described as consequences of a general right to liberty are in fact the consequences of equality instead, may in the end prove to be wrong. But it is not, as Hart says it is, 'fantastic'.