Although most people in the world today profess belief in universal human rights, the theory of human rights faces many problems. First, whether such rights actually exist, and assuming they exist, what is (the nature of) those rights and what exactly do they include? Many of the clashes over human rights concern the priority of what is often referred to as the conflict of “freedom” versus “equality.” The early eighteenth-century individual liberties rights “negatively” protecting the individual from governmental interference (e.g., freedom of speech) are often lumped together as rights of “freedom.” The later nineteenth-century social welfare rights “positively” ensuring individuals a more equal share of the economic pie (adequate food, shelter, medical care, and so on) are often lumped together as rights of “equality.” Where rights of the first sort clash with those of the second sort, which they often do, the controversy is referred to as the debate between “freedom” and “equality.” Since the defenders of eighteenth-century rights of individual “freedom” as well as nineteenth-century economic rights of “equality” are both confusingly called “liberals,” the conflict between “freedom” and “equality” is often considered an inherent tension or contradiction within the liberal tradition. In today’s political debates, conservative, often Republican, politicians (the extreme ones of which are often called “libertarians”) generally defend “freedom” over “equality,” while liberal, often Democratic politicians (the extreme ones of which are often referred to as “socialists”) typically defend “equality” over “freedom.”

Ronald Dworkin, professor of law at Harvard and Oxford Universities, argues that the fundamental tension in weighing equality against freedom or liberty, which seems to some to be inherent in liberalism, is an illusion. Nonetheless, conservatives will think Dworkin is privileging equality over freedom. He argues that the right to be treated as equal to other community members is a fundamental right that all citizens can legitimately claim and which governments must protect, but that there is no such general right to freedom, or liberty. Rights to special liberties, such as freedom of speech, arise only when the right to treatment as an equal requires them.
“Equality” is a notoriously tricky term. Politically do we mean that everyone has a right to equal treatment before the law? Or that everyone has a right to equal opportunity in education and jobs, for instance? Or that everyone has a right to equal dignity, worth and respect? Or that everyone has a right to an equal share of the economic pie? Conservatives will certainly support the idea of political equality in all of the above senses except the last one (since that conflicts with the right to private property and implies taking from the rich to give to the poor). Many liberals like Dworkin argue that these are inseparably linked notions of equality, that you can’t have equal opportunity, dignity and worth without equal (or more nearly equal) income. A homeless person living on the streets is free to apply to Harvard or run for public office or open a newspaper or apply for a recently advertised executive position, but she is hardly in a position to take advantage of these “equal opportunities” without a more equitable income (for education, clothing, transportation, and so on).

As you read Dworkin consider how you come down on these issues, which, after all, affect all of us today. Do you think everyone has certain basic rights and do you think these rights cannot be enjoyed without a more equal distribution of the nation’s wealth—and are you willing to pay your share of this (assuming upon graduation you earn an above-average salary)? If you think human rights requires some equalization, how far are you willing to go (and to argue for)—that everyone should have a bare minimum (enough to eat, some shelter, basic education, and so forth), or would you go further and argue that everyone ought to have what most Americans would consider a decent lifestyle, including some adequate income regardless of earning capacity in the “free market”?

The language of rights now dominates political debate in the United States. Does the Government respect the moral and political rights of its citizens? Or does the Government’s foreign policy, or its race policy, fly in the face of these rights? Do the minorities whose rights have been violated have the right to violate the law in return? Or does the silent majority itself have rights, including the right that those who break the law be punished? It is not surprising that these questions are now prominent. The concept of rights, and particularly the concept of rights against the Government, has its

most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless.

It is much in dispute, of course, what particular rights citizens have. Does the acknowledged right to free speech, for example, include the right to participate in nuisance demonstrations? In practice the Government will have the last word on what an individual’s rights are, because its police will do what its officials and courts say. But that does not mean that the Government’s view is necessarily the correct one; anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.

All this is sometimes obscured in the United States by the constitutional system. The American Constitution provides a set of individual legal rights in the First Amendment, and in the due process, equal protection, and similar clauses. Under present legal practice the Supreme Court has the power to declare an act of Congress or of a state legislature void if the Court finds that the act offends these provisions. This practice has led some commentators to suppose that individual moral rights are fully protected by this system, but that is hardly so, nor could it be so.

The Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems, like the problem of whether a particular statute respects, the inherent equality of all men. This fusion has important consequences for the debates about civil disobedience.

Does an American ever have the moral right to break a law? Suppose someone admits a law is valid; does he therefore have a duty to obey it? Those who try to give an answer seem to fall into two camps. The conservatives, as I shall call them, seem to disapprove of any act of disobedience; they appear satisfied when such acts are prosecuted and disappointed when convictions are reversed. The other group, the liberals, are much more sympathetic to at least some cases of disobedience; they sometimes disapprove of prosecutions and celebrate acquittals. If we look beyond these emotional reactions, however, and pay attention to the arguments the two parties use, we discover an astounding fact. Both groups give essentially the same answer to the question of principle that supposedly divides them.

The answer that both parties give is this. In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even, though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But this general duty cannot be an absolute
duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation.

But there seems to be a monstrous contradiction here. If a man has a right to do what his conscience tells him he must, then how can the State be justified in discouraging him from doing it? Is it not wicked for a state to forbid and punish what it acknowledges that men have a right to do?

In order to explain this, I must call attention to the fact, familiar to philosophers, but often ignored in political debate, that the word “right” has different force in different contexts. In most cases when we say that someone has “right” to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference. I use this strong sense of right when I say that you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worthwhile way. I mean that it would be wrong for anyone to interfere with you even though you propose to spend your money in a way that I think is wrong.

There is a clear difference between saying that someone has a right to do something in this sense and saying that it is the “right” thing for him to do, or that he does no “wrong” in doing it. Someone may have the right to do something that is the wrong thing for him to do, as might be the case with gambling. Conversely, something may be the right thing for him to do and yet he may have no right to do it, in the sense that it would not be wrong for someone to interfere with his trying. If our army captures an enemy soldier, we might say that the right thing for him to do is to try to escape, but it would not follow that it is wrong for us to try to stop him. We might admire him for trying to escape, and perhaps even think less of him if he did not. But there is no suggestion here that it is wrong of us to stand in his way; on the contrary, if we think our cause is just, we think it right for us to do all we can to stop him.

Ordinarily this distinction, between the issues of whether a man has a right to do something and whether it is the right thing for him to do, causes no trouble. But sometimes it does, because sometimes we say that a man has a right to do something when we mean only to deny that it is the wrong thing for
him to do. Thus we say that the captured soldier has a “right” to try to escape when we mean, not that we do wrong to stop him, but that he has no duty not to make the attempt. We use “right” this way when we speak of someone having the “right” to act on his own principles, or the “right” to follow his own conscience. We mean that he does no wrong to proceed on his honest convictions, even though we disagree with these convictions, and even though, for policy or other reasons, we must force him to act contrary to them.

Suppose a man believes that welfare payments to the poor are profoundly wrong, because they sap enterprise, and so declares his full income-tax each year but declines to pay half of it. We might say that he has a right to refuse to pay, if he wishes, but that the Government has a right to proceed against him for the full tax, and to fine or jail him for late payment if that is necessary to keep the collection system working efficiently. We do not take this line in most cases; we do not say that the ordinary thief has a right to steal, if he wishes, so long as he pays the penalty. We say a man has the right to break the law, even though the State has a right to punish him, only when we think that, because of his convictions, he does no wrong in doing so.

These distinctions enable us to see an ambiguity in the orthodox question: Does a man ever have a right to break the law? Does that question mean to ask whether he ever has a right to break the law in the strong sense, so that the Government would do wrong to stop him, by arresting and prosecuting him? Or does it mean to ask whether he ever does the right thing to break the law, so that we should all respect him even though the Government should jail him? . . .

I said that in the United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution. If this idea is significant, and worth bragging about, then these rights must be rights in the strong sense I just described. The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so.

This is a crucial point, and I want to labour it. 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. So, though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification if the proper officials believe, on sound evidence, that the gain to the many will outweigh the inconvenience to the few. 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.

Not all legal rights, or even Constitutional rights, represent moral rights against the Government. I now have the legal right to drive either way on Fifty-seventh Street, but the Government would do no wrong to make that street one-way if it thought it in the general interest to do so. I have a Constitutional right to vote for a congressman every two years, but the national and state governments would do no wrong if, following the amendment procedure, they made a congressman’s term four years instead of two, again on the basis of a judgment that this would be for the general good.

But those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense; that is the point of the boast that our legal system respects the fundamental rights of the citizen. If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed.

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 major public benefit (though if he acknowledged this last as a possible justification he would be treating the right in question as not among the most important or fundamental). 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. That admission would make his claim of a right pointless, and would show him to
be using some sense of “right” other than the strong sense necessary to give
his claim the political importance it is normally taken to have. . . .

The argument so far has been hypothetical: if a man has a particular
moral right against the Government, that right survives contrary legislation
or adjudication. But this does not tell us what rights he has, and it is notori-
ous that reasonable men disagree about that. There is wide agreement on cer-
tain clear-cut cases; almost everyone who believes in rights at all would
admit, for example, that a man has a moral right to speak his mind in a non-
provocative way on matters of political concern, and that this is an important
right that the State must go to great pains to protect. But there is great con-
troversy as to the limits of such paradigm rights. . . . How should the differ-
ent departments of government go about defining moral rights?

They should begin with a sense that whatever they decide might be
wrong. History and their descendants may judge that they acted unjustly
when they thought they were right. If they take their duty seriously, they
must try to limit their mistakes, and they must therefore try to discover
where the dangers of mistake lie. . . .

The institution of rights against the Government is not a gift of God, or
an ancient ritual, or a national sport. It is a complex and troublesome practice
that makes the Government’s job of securing the general benefit more diffi-
cult and more expensive, and it would be a frivolous and wrongful practice
unless it served some point. Anyone who professes to take rights seriously,
and who praises our Government for respecting them, must have some sense
of what that point is. He must accept, at the minimum, one or both of two
important ideas. The first is the vague but powerful idea of human dignity.
This idea, associated with Kant, but defended by philosophers of different
schools, supposes that there are ways of treating a man that are inconsistent
with recognizing him as a full member of the human community, and holds
that such treatment is profoundly unjust.

The second is the more familiar idea of political equality. This supposes
that the weaker members of a political community are entitled to the same
concern and respect of their government as the more powerful members
have secured for themselves, so that if some men have freedom of decision
whatever the effect on the general good, then all men must have the same
freedom. I do not want to defend or elaborate these ideas here, but only to
insist that anyone who claims that citizens have rights must accept ideas very
close to these.
It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.

So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. But then it must be wrong to say that inflating rights is as serious as invading them. . . .

Do we have a right to liberty? Thomas Jefferson thought so, and since his day the right to liberty has received more play than the competing rights he mentioned to life and the pursuit of happiness. Liberty gave its name to the most influential political movement of the last century, and many of those who now despise liberals do so on the ground that they are not sufficiently libertarian. Of course, almost everyone concedes that the right to liberty is not the only political right, and that therefore claims to freedom must be limited, for example, by restraints that protect the security or property of others. Nevertheless the consensus in favor of some right to liberty is a vast one, though it is, I shall argue, misguided.

The right to liberty is popular all over this political spectrum. The rhetoric of liberty fuels every radical movement from international wars of liberation to campaigns for sexual freedom and women’s liberation. But liberty has been even more prominent in conservative service. Even the mild social reorganizations of the anti-trust and unionization movements, and of the early New Deal, were opposed on the grounds that they infringed the right to liberty, and just now efforts to achieve some racial justice in America through techniques like the busing of black and white schoolchildren, and social justice in Britain through constraints in private education are bitterly opposed on that ground.

It has become common, indeed, to describe the great social issues of domestic politics, and in particular the racial issue, as presenting a conflict between the demands of liberty and equality. It may be, it is said, that the poor and the black and the uneducated and the unskilled have an abstract right to equality, but the prosperous and the whites and the educated and the able have a right to liberty as well and any efforts at social reorganization in
aid of the first set of rights must reckon with and respect the second. Everyone except extremists recognizes, therefore, the need to compromise between equality and liberty. Every piece of important social legislation, from tax policy to integration plans, is shaped by the supposed tension between these two goals.

I have this supposed conflict between equality and liberty in mind when I ask whether we have a right to liberty, as Jefferson and everyone else has supposed. That is a crucial question. If freedom to choose one’s schools, or employees, or neighborhood is simply something that we all want, like air conditioning or lobsters, then we are not entitled to hang on to these freedoms in the face of what we concede to be the rights of others to an equal share of respect and resources. But if we can say, not simply that we want these freedoms, but that we are ourselves entitled to them, then we have established at least a basis for demanding a compromise.

There is now a movement, for example, in favor of a proposed amendment to the constitution of the United States that would guarantee every school child the legal right to attend a “neighborhood school” and thus outlaw busing. The suggestion, that neighborhood schools somehow rank with jury trials as constitutional values, would seem silly but for the sense many Americans have that forcing school children into buses is somehow as much an interference with the fundamental right to liberty as segregated schooling was an insult to equality. But that seems to me absurd; indeed it seems to me absurd to suppose that men and women have any general right to liberty at all, at least as liberty has traditionally been conceived by its champions.

I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to. Isaiah Berlin, in the most famous modern essay on liberty, put the matter this way: “The sense of freedom, in which I use this term, entails not simply the absence of frustration but the absence of obstacles to possible choices and activities—absence of obstructions on roads alone which a man can decide to walk.” This conception of liberty as license is neutral amongst the various activities a man might pursue, the various roads he might wish to walk. It diminishes a man’s liberty when we prevent him from talking or making love as he wishes, but it also diminishes his liberty when we prevent him from murdering or defaming others. These latter constraints may be justifiable, but only because they are compromises necessary to protect the liberty or security of others, and not because they do not, in themselves, infringe the independent value of liberty. Bentham said that any law whatsoever is an
“infraction” of liberty, and though some such infractions might be necessary, it is obscurantist to pretend that they are not infractions after all. In this neutral, all embracing sense of liberty as license, liberty and equality are plainly in competition. Laws are needed to protect equality, and laws are inevitably compromises of liberty.

Liberals like Berlin are content with this neutral sense of liberty, because it seems to encourage clear thinking. It allows us to identify just what is lost, though perhaps unavoidably, when men accept constraints on their actions for some other goal or value. It would be an intolerable muddle, on this view, to use the concept of liberty or freedom in such a way that we counted a loss of freedom only when men were prevented from doing something that we thought they ought to do. It would allow totalitarian governments to masquerade as liberal, simply by arguing that they prevent men from doing only what is wrong. Worse, it would obscure the most distinctive point of the liberal tradition, which is that interfering with a man’s free choice to do what he might want to do is in and of itself an insult to humanity, a wrong that may be justified but can never be wiped away by competing considerations. For a true liberal, any constraint, upon freedom is something that a decent government must regret, and keep to the minimum necessary to accommodate the other rights of its constituents.

In spite of this tradition, however, the neutral sense of liberty seems to me to have caused more confusion than it has cured, particularly when it is joined to the popular and inspiring idea that men and women have a right to liberty. For we can maintain that idea only by so watering down the idea of a right that the right to liberty is something hardly worth having at all.

The term “right” is used in politics and philosophy in many different senses, some of which I have tried to disentangle elsewhere. In order sensibly to ask whether we have a right to liberty in the neutral sense, we must fix on some one meaning of “right.” It would not be difficult to find a sense of that term in which we could say with some confidence that men have a right to liberty. We might say, for example, that someone has a right to liberty if it is in his interest to have liberty, that is, if he either wants it or if it would be good for him to have it. In this sense, I would be prepared to concede that citizens have a right to liberty. But in this sense I would also have to concede that they have a right, at least generally, to vanilla ice cream. My concession about liberty, moreover, would have very little value in political debate. I should want to claim, for example, that people have a right to equality in a much stronger sense, that they do not simply want equality but that they are
entitled to it, and I would therefore not recognize the claim that some men and women want liberty as requiring any compromise in the efforts that I believe are necessary to give other men and women the equality to which they are entitled.

If the right to liberty is to play the role cut out for it in political debate, therefore, it must be a right in a much stronger sense. . . . I defined a strong sense of right that seems to me to capture the claims men mean to make when they appeal to political and moral rights. . . . A successful claim of right, in the strong sense I described, has this consequence. If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so. This sense of a right (which might be called the antiutilitarian concept of a right) seems to me very close to the sense of right principally used in political and legal writing and argument in recent years. It marks the distinctive concept of an individual right against the State which is the heart, for example, of constitutional theory in the United States.

I do not think that the right to liberty would come to very much, or have much power in political argument, if it relied on any sense of the right any weaker than that. If we settle on this concept of a right, however, then it seems plain that there exists no general right to liberty as such. I have no political right to drive up Lexington Avenue. If the government chooses to make Lexington Avenue one-way down town, it is a sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong. The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds, as being in the general interest or for the general welfare; if, as Bentham supposes, each of these laws diminishes my liberty, they nevertheless do not take away from me any thing, that I have a right to have. It will not do, in the one-way street case, to say that although I have a right to drive up Lexington Avenue, nevertheless the government for special reasons is justified in overriding that right. That seems silly because the government needs no special justification—but only a justification—for this sort of legislation. So I can have a political right to liberty, such that every act of constraint diminishes or infringes that right, only in such a weak sense of right that the so called right to liberty is not competitive with strong rights, like the right to equality, at all. In any strong sense of right, which would be competitive with the right to equality, there exists no general right to liberty at all.
It may now be said that I have misunderstood the claim that there is a right to liberty. It does not mean to argue, it will be said, that there is a right to all liberty, but simply to important or basic liberties. Every law is, as Bentham said; an infraction of liberty, but we have a right to be protected against only fundamental or serious infractions. If the constraint on liberty is serious or severe enough, then it is indeed true that the government is not entitled to impose that constraint simply because that would be in the general interest; the government is not entitled to constrain liberty of speech, for example, whenever it thinks that would improve the general welfare. So there is, after all, a general right to liberty as such, provided that that right is restricted to important liberties or serious deprivations. This qualification does not affect the political arguments I described earlier, it will be said, because the rights to liberty that stand in the way of full equality are rights to basic liberties like, for example, the right to attend a school of one’s choice.

But this qualification raises an issue of great importance for liberal theory, which those who argue for a right to liberty do not face. What does it mean to say that the right to liberty is limited to basic liberties, or that it offers protection only against serious infractions of liberty? That claim might be spelled out in two different ways, with very different theoretical and practical consequences. Let us suppose two cases in which government constrains a citizen from doing what he might want to do: the government prevents him from speaking his mind on political issues; from driving his car uptown on Lexington Avenue. What is the connection between these two cases, and the difference between them, such that though they are both cases in which a citizen is constrained and deprived of liberty, his right to liberty is infringed only in the first, and not in the second?

On the first of the two theories we might consider, the citizen is deprived of the same commodity, namely liberty, in both cases, but the difference is that in the first case the amount of that commodity taken away from him is, for some reason, either greater in amount or greater in its impact than in the second. But that seems bizarre. It is very difficult to think of liberty as a commodity. If we do try to give liberty some operational sense, such that we can measure the relative diminution of liberty occasioned by different sorts of laws or constraints, then the result is unlikely to match our intuitive sense of what are basic liberties and what are not. Suppose, for example, we measure a diminution in liberty by calculating the extent of frustration that it induces. We shall then have to face the fact that laws against theft, and even traffic laws, impose constraints that are felt more
keenly by most men than constraints on political speech would be. We might take a different tack, and measure the degree of loss of liberty by the impact that a particular constraint has on future choices. But we should then have to admit that the ordinary criminal code reduces choice for most men more than laws which forbid fringe political activity. So the first theory—that the difference between cases covered and those not covered by our supposed right to liberty is a matter of degree—must fail.

The second theory argues that the difference between the two cases has to do, not with the degree of liberty involved, but with the special character of the liberty involved in the case covered by the right. On this theory, the offense involved in a law that limits free speech is of a different character, and not just different in degree, from a law that prevents a man from driving up Lexington Avenue. That sounds plausible, though as we shall see it is not easy to state what this difference in character comes to, or why it argues for a right in some cases though not in others. My present point, however, is that if the distinction between basic liberties and other liberties is defended in this way, then the notion of a general right to liberty as such has been entirely abandoned. If we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats.

This is not simply a question of terminology. The idea of a right to liberty is a misconceived concept that does a dis-service to political thought in at least two ways. First, the idea creates a false sense of a necessary conflict between liberty and other values when social regulation, like the busing program, is proposed. Second, the idea provides too easy an answer to the question of why we regard certain kinds of restraints, like the restraint on free speech or the exercise of religion, as especially unjust. The idea of a right to liberty allows us to say that these constraints are unjust because they have a special impact on liberty as such. Once we recognize that this answer is spurious, then we shall have to face the difficult question of what is indeed at stake in these cases.

I should like to turn at once to that question. If there is no general right to liberty, then why do citizens in a democracy have rights to any specific kind of liberty, like freedom of speech or religion or political activity? It is no answer to say that if individuals have these rights, then the community
will be better off in the long run as a whole. This idea—that individual rights may lead to overall utility—may or may not be true, but it is irrelevant to the defence of rights as such, because when we say that someone has a right to speak his mind freely, in the relevant political sense, we mean that he is entitled to do so even if this would not be in the general interest. If we want to defend individual rights in the sense in which we claim them, then we must try to discover something beyond utility that argues for these rights.

I mentioned one possibility earlier. We might be able to make out a case that individuals suffer some special damage when the traditional rights are invaded. On this argument, there is something about the liberty to speak out on political issues such that if that liberty is denied the individual suffers a special kind of damage which makes it wrong to inflict that damage upon him—even though the community as a whole would benefit. This line of argument will appeal to those who themselves would feel special deprivation at the loss of their political and civil liberties, but it is nevertheless a difficult argument to pursue for two reasons.

First, there are a great many men and women and they undoubtedly form the majority even in democracies like Britain and the United States, who do not exercise political liberties that they have, and who would not count the loss of these liberties as especially grievous. Second, we lack a psychological theory which would justify and explain the idea that the loss of civil liberties, or any particular liberties, involves inevitable or even likely psychological damage. On the contrary, there is now a lively tradition in psychology, led by psychologists like Ronald Laing, who argue that a good deal of mental instability in modern societies may be traced to the demand for too much liberty rather than too little. In their account, the need to choose, which follows from liberty, is an unnecessary source of destructive tension. These theories are not necessarily persuasive, but until we can be confident that they are wrong, we cannot assume that psychology demonstrates the opposite, however appealing that might be on political grounds.

If we want to argue for a right to certain liberties, therefore, we must find another ground. We must argue on grounds of political morality that it is wrong to deprive individuals of these liberties, for some reason, apart from direct psychological damage, in spite of the fact that the common interest would be served by doing so. I put the matter this vaguely because there is no reason to assume, in advance, that only one kind of reason would support that moral position. It might be that a just society would recognize a variety of individual rights, some grounded on very different sorts of moral consid-
erations from others. . . . I shall try to describe only one possible ground for rights. It does not follow that men and women in civil society have only the rights that the argument I shall make would support; but it does follow that they have at least these rights, and that is important enough.

The central concept of my argument will be the concept not of liberty but of equality. I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.

The sovereign question of political theory, within a state supposed to be governed by the liberal conception of equality, is the question of what inequalities in goods, opportunities and liberties are permitted in such a state, and why. The beginning of an answer lies in the following distinction. Citizens governed by the liberal conception of equality each have a right to equal concern and respect. But there are two different rights that might be comprehended by that abstract right. The first is the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone else has or is given. The Supreme Court, in the Reapportionment Cases, held that citizens have a right to equal treatment in the distribution of voting power; it held that one man must be given one vote in spite of the fact that a different distribution of votes might in fact work for the general benefit. The second is the right to treatment as an equal. This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed. Suppose the question is raised whether an economic policy that injures long-term bondholders is in the general interest. Those who will be injured have a right that their prospective loss be taken into account in deciding whether the general interest is served by the policy. They may not simply be ignored in that calculation. But when their interest is taken into
account it may nevertheless be outweighed by the interests of others who will gain from the policy, and in that case their right to equal concern and respect, so defined, would provide no objection. In the case of economic policy, therefore, we might wish to say that those who will be injured if inflation is permitted have a right to treatment as equals in the decision whether that policy would serve the general interest, but no right to equal treatment that would outlaw the policy even if it passed that test.

I propose that the right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and that the more restrictive right to equal treatment holds only in those special circumstances in which, for some special reason, it follows from the more fundamental right, as perhaps it does in the special circumstance of the Reapportionment Cases. I also propose that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights. If this is correct, then the right to distinct liberties does not conflict with any supposed competing right to equality, but on the contrary follows from a conception of equality conceded to be more fundamental.

I must now show, however, how the familiar rights to distinct liberties—those established, for example, in the United States constitution—might be thought to be required by that fundamental conception of equality. I shall try to do this, . . . only by providing a skeleton of the more elaborate argument that would have to be made to defend any particular liberty on this basis, and then show why it would be plausible to expect that the more familiar political and civil liberties would be supported by such an argument if it were in fact made.

A government that respects the liberal conception of equality may properly constrain liberty only on certain very limited types of justification. I shall adopt, for purposes of making this point, the following crude typology of political justifications. There are, first, arguments of principle, which support a particular constraint on liberty on the argument that the constraint is required to protect the distinct right of some individual who will be injured by the exercise of the liberty. There are, second, arguments of policy, which support constraints on the different ground that such constraints are required to reach some overall political goal, that is, to realize some state of affairs in which the community as a whole, and not just certain individuals, are better off by virtue of the constraint. Arguments of policy might be further subdivided in this way. Utilitarian arguments of policy argue that the community as a whole will be better off because (to put the point roughly) more of its
citizens will have more of what they want overall, even though some of them will have less. Ideal arguments of policy, on the other hand, argue that the community will be better off, not because more of its members will have more of what they want, but because the community will be in some way closer to an ideal community, whether its members desire the improvement in question or not.

The liberal conception of equality sharply limits the extent to which ideal arguments of policy may be used to justify any constraint on liberty. Such arguments cannot be used if the idea in question is itself controversial within the community. Constraints cannot be defended, for example, directly on the ground that they contribute to a culturally sophisticated community, whether the community wants the sophistication or not, because that argument would violate the canon of the liberal conception of equality that prohibits a government from relying on the claim that certain forms of life are inherently more valuable than others.

Utilitarian arguments of policy, however, would seem secure from that objection. They do not suppose that any form of life is inherently more valuable than any other, but instead base their claim, that constraints on liberty are necessary to advance some collective goal of the community, just on the fact that that goal happens to be desired more widely or more deeply than any other. Utilitarian arguments of policy, therefore, seem not to oppose but on the contrary to embody the fundamental right of equal concern and respect, because they treat the wishes of each member of the community on a par with the wishes of any other, with no bonus or discount reflecting the view that that member is more or less worthy of concern, or his views more or less worthy of respect, than any other.

This appearance of egalitarianism has, I think, been the principal source of the great appeal that utilitarianism has had, as a general political philosophy, over the last century. . . . The egalitarian character of a utilitarian argument is often an illusion. . . .

Utilitarian arguments fix on the fact that a particular constraint on liberty will make more people happier, or satisfy more of their preferences, depending upon whether psychological or preference utilitarianism is in play. But people’s overall preference for one policy rather than another may be seen to include, on further analysis, both preferences that are personal, because they state a preference for the assignment of one set of goods or opportunities to him and preferences that are external, because they state a preference for one assignment of goods or opportunities to others. But a util-
itarian argument that assigns critical weight to the external preferences of members of the community will not be egalitarian in the sense under consideration. It will not respect the right of everyone to be treated with equal concern and respect.

Suppose, for example, that a number of individuals in the community holds racist rather than utilitarian political theories. They believe, not that each man is to count for one and no one for more than one in the distribution of goods, but rather that a black man is to count for less and a white man therefore to count for more than one. That is an external preference, but it is nevertheless a genuine preference for one policy rather than another, the satisfaction of which will bring pleasure. Nevertheless if this preference or pleasure is given the normal weight in a utilitarian calculation, and blacks suffer accordingly, then their own assignment of goods and opportunities will depend, not simply on the competition among personal preferences that abstract statements of utilitarianism suggest, but precisely on the fact that they are thought less worthy of concern and respect than others are.

Suppose, to take a different case, that many members of the community disapprove on moral grounds of homosexuality, or contraception, or pornography, or expressions of adherence to the Communist party. They prefer not only that they themselves do not indulge in these activities, but that no one else does so either, and they believe that a community that permits rather than prohibits these acts is inherently a worse community. These are external preferences, but, once again, they are no less genuine, nor less a source of pleasure when satisfied and displeasure when ignored, than purely personal preferences. Once again, however, if these external preferences are counted, so as to justify a constraint on liberty, then those constrained suffer, not simply because their personal preferences have lost in a competition for scarce resources with the personal preferences of others, but precisely because their conception of a proper or desirable form of life is despised by others.

These arguments justify the following important conclusion. If utilitarian arguments of policy are to be used to justify constraints on liberty, then care must be taken to insure that the utilitarian calculations on which the argument is based fix only on personal and ignore external preferences. That is an important conclusion for political theory because it shows, for example, why the arguments of John Stuart Mill in On Liberty are not counterutilitarian but, on the contrary, arguments in service of the only defensible form of utilitarianism.

Important as that conclusion is at the level of political philosophy, however, it is in itself of limited practical significance, because it will be impos-
sible to devise political procedures that will accurately discriminate between personal and external preferences. Representative democracy is widely thought to be the institutional structure most suited, in a complex and diverse society, to the identification and achievement of utilitarian policies. It works imperfectly at this, for the familiar reason that majoritarianism cannot sufficiently take account of the intensity, as distinct from the number, of particular preferences, and because techniques of political persuasion, backed by money, may corrupt the accuracy with which votes represent the genuine preferences of those who have voted. Nevertheless democracy seems to enforce utilitarianism more satisfactorily, in spite of these imperfections, than any alternative general political scheme would.

But democracy cannot discriminate, within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method for enforcing the former while ignoring the latter. An actual vote in an election or referendum must be taken to represent an overall preference rather than some component of the preference that a skillful cross-examination of the individual voter, if time and expense permitted, would reveal. Personal and external preferences are sometimes so inextricably combined, moreover, that the discrimination is psychologically as well as institutionally impossible. That will be true, for example, in the case of the associational preferences that many people have for members of one race, or people of one talent or quality, rather than another, for this is a personal preference so parasitic upon external preferences that it is impossible to say, even as a matter of introspection, what personal preferences would remain if the underlying external preference were removed. It is also true of certain self-denying preferences that many individuals have; that is preferences for less of a certain good on the assumption, or rather proviso, that other people will have more. That is also a preference, however noble, that is parasitic upon external preferences, in the shape of political and moral theories, and they may no more be counted in a defensible utilitarian argument than less attractive preferences rooted in prejudice rather than altruism.

I wish now to propose the following general theory of rights. The concept of an individual political right, in the strong anti-utilitarian sense I distinguished earlier, is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions
that seem, antecedently, likely to have been reached by virtue of the external
components of the preferences democracy reveals.

It should be plain how this theory of rights might be used to support the
idea . . . that we have distinct rights to certain liberties like the liberty of free
expression and of free choice in personal and sexual relations. It might be
shown that any utilitarian constraint on these liberties must be based on
overall preferences in the community that we know, from our general knowl-
edge of society, are likely to contain large components of external prefer-
ences, in the shape of political or moral theories, which the political process
cannot discriminate and eliminate. . . .