ON JUSTICE, CONSEQUENCES, AND CICERO

Introduction

A standard principle in ethics is that there are some actions, such as murder, that one should never do in any circumstances, even and especially in those circumstances where murder would seem to have better consequences overall. This principle is rejected by consequentialist theories, which deny that there are any such constraints or restrictions on action and say instead that any action should be done, even murder, if it has the best consequences. But the principle has an intuitive plausibility to it and is widely accepted. Still, there is a question as to whether, despite its intuitive plausibility, it can be given an adequate defense and justification. A strong challenge has been made, notably by Samuel Scheffler and Shelly Kagan, that it cannot.[1]

The example that Scheffler and Kagan use for this purpose is that of killing one innocent person to save two or five innocent persons from being killed by someone else. A typical scenario is that some tyrant or ruffian has got several victims at his mercy and is threatening to kill them all unless you kill one of them, in which case he will let the others go free.[2] About this example Scheffler and Kagan argue roughly as follows. Supporters of the principle in question generally say that one should not kill because killing is morally objectionable or bad. But if one killing is bad then five killings must be worse, and it would seem preferable, since killings are so objectionable, to have fewer killings rather than more. It would therefore seem preferable to kill in order to reduce

1. Samuel Scheffler, *The Rejection of Consequentialism*, and "Agent-Centered Restrictions, Rationality and the Virtues" in *Mind* 94 (1985): 400-419; and Shelly Kagan, *The Limits of Morality*.

2. For the sake of the argument one has to assume that there are no other options save those of killing or not killing the one. The option of killing the tyrant or ruffian instead, while it might be real in the actual case, has to be disregarded in the example. The point of the example is to focus attention on the question which of these two options, killing the one and saving five or not killing the one and losing five, is better or the right thing to do.

the number of killings.[3]

Philippa Foot has understood this argument in a broadly consequentialist way. She takes it as amounting to the claim that it is better to kill to reduce killings because a better state of affairs overall is produced.[4] Scheffler contends that the argument need not only be understood like this. It can also be understood in a narrower sense where all that is claimed is that killing to save five produces fewer violations of the rule against killing. This, he contends, is more difficult for supporters of the principle to answer, because there is no need, on this formulation of the case, for any appeal to some notion, which such supporters might reject, of a better state of affairs overall. There is only need of appeal to the notion, which these supporters can hardly deny, that violations of the given rule are bad or morally undesirable. Kagan speaks in similar fashion.

That there is a distinction here seems clear. It therefore also seems clear that both formulations of the argument against the principle need to be considered. For there are generally two basic strategies that supporters of the principle can follow. Either they can accept the appeal to outcomes but contend that, despite appearances, the outcomes always favor not killing over killing. Or they can reject this appeal and say that outcomes do not matter. The latter strategy is the one that is often followed, and with some success, in rejecting the first formulation.[5] It does not seem to be as good a strategy to follow in rejecting the second formulation. As Scheffler in particular argues, any claim that violating the rule against killing is bad or wrong seems necessarily to entail that an appeal to outcomes must be legitimate and that outcomes must matter. For if one violation is bad or wrong then how can two or five violations not be worse? And if more violations are worse then

---

3. Scheffler, *The Rejection of Consequentialism*, pp. 80-114, Kagan, *The Limits of Morality*, pp. 25-32. When I use the work "kill" in this article I mean to refer, as do Scheffler and Kagan, only to cases of deliberately killing the innocent. I am not referring to cases of killing in war or accidental or judicial killing. These other cases would introduce irrelevancies and lead the discussion too far afield.
4. "Utilitarianism and the Virtues" in *Mind* 94 (1985): 196-209.

how can it not be better to commit a violation to prevent more violations?

In view of this I shall begin by adopting the opposite strategy and allow from the first that an appeal to outcomes is legitimate and that outcomes do matter. But I shall argue that these outcomes always favor not killing over killing even when killing would reduce the number of killings. This argument, while presented with respect in particular to the case of killing, will, like the opposing argument of Scheffler and Kagan, not be confined to that case. It will be generalizable to show the same for other restrictions and constraints on action (as constraints against theft, adultery, and so on). It will also be an argument that, once presented, can be adapted for the first strategy and for defending and justifying restrictions on action in a way that ignores outcomes altogether.

Two Understandings of Justice

The first of the two formulations of the argument against the principle is based on overall outcomes. The basic form of my answer is going to be this. Killing one to save five does not result in a better state of affairs overall because more lives are saved only by an act of injustice. But justice is better than saving lives because life is for the sake of justice and not justice for the sake of life. Therefore to sacrifice justice for the sake of life is to reverse the order of goods and to produce a worse state of affairs than would have been produced if one had refrained from the injustice, even though, by so refraining, one failed to save as many lives.

While this answer will, I maintain, serve as it stands, it is not immediately obvious why it should. Three objections in particular come to mind. First of all the sense of justice appealed to here seems bizarre. How can life be for the sake of justice and not justice for the sake of life? Is not the

---

5. It is the one followed by Foot as well as by Finnis, *Natural Law and Natural Rights*, ch. 5.

injustice of killing precisely the fact that it destroys life? So how could the good of justice be understood in separation from, even in opposition to, the good of preserving lives?

Secondly, most consequentialists[6] would reject the charge that killing one to save five is a case of preferring lives to justice. What is really going on, they will say, is that this act of killing is really an act of justice. The rule about not killing only counts as a rule of justice when not killing in fact results in a better overall outcome. This will be the case most of the time. But a situation can arise where following the rule does not produce better results. In such situations better results will be produced if one breaks the rule. The case in question is manifestly of this kind, for it is better to save five by killing one than to lose five by not killing one. So by killing the one to save the five one is really performing an act of justice and not, contrary to the charge just made, preferring lives to justice. By choosing lives one is thereby choosing justice.

Thirdly, if this is so and killing the one in this case is just and right, has one not, by failing to kill the one, committed an act of injustice? Indeed has one not committed a more serious act of injustice than one professes to be avoiding, since in this way more killings occur?

I will answer these objections separately but beginning with the second. What I propose to say about it will prepare the way for what I propose to say about the other two. My answer to the second objection is that describing the killing of one to save five as an act of justice instead of as an act of injustice presupposes a particular understanding of justice. There will, therefore, be no reason to accept the description if one rejects the understanding it presupposes. The understanding in question is an instrumentalist understanding.

What I mean is this. The justice of just acts, and the injustice of unjust acts, is here being understood in terms of the good or bad results these acts produce. These results are judged by

reference to something other than justice itself. In the case in question this something else is the good of lives saved or the bad of lives lost. Now this something else will be described variously according to different kinds of consequentialism. In classical utilitarianism it is the good of pleasure and the bad of pain. In more recent forms of consequentialism it is the good and bad of the satisfaction or frustration of preferences, or of the general welfare, or something else of the kind. Speaking generally we might call them the goods and bads of satisfying or frustrating people's interests.

Usually there is included among the results of an action the good or bad intrinsic to the action itself, that is to say the value that the act has in itself independently of any additional results that might follow from it. Whatever this intrinsic value might happen to be, it cannot be the justice or injustice of the action. This justice or injustice, since it is determined by reference to the overall results, can only be understood *after* all the results have been calculated. If its own intrinsic value is one of the results to be calculated, this value has to be understandable and calculable *before* the justice or injustice of the act is pronounced. Such calculating would be impossible were the act's intrinsic value the same as its justice or injustice. Further, if we consider one and the same action, with one and the same intrinsic value, and keep that constant while varying the other results that come from it, the action will sometimes be just and sometimes unjust (as the killing of an innocent victim which involves the saving of five other innocent victims and the killing of an innocent victim which involves the saving of none). But if we can make an act's justice or injustice vary while its intrinsic value remains unaltered, its justice or injustice cannot be the same as its intrinsic value. Should we be required to say what this intrinsic value is, we will have to say that it is the interest or preference or pleasure, or whatever other term one might choose, that the act, by itself,

---

6. Though not all. An alternative response is noted later.

directly satisfies or frustrates.

This is what I mean when I say that this understanding of justice is an instrumentalist understanding. It determines the requirements of justice by reference to certain other goods, goods different from justice itself, that acts of justice and injustice serve to bring about or prevent. Wherever the balance of these other goods and bads is better, then doing what will bring about that balance will be an act of justice. Wherever the balance of the other goods and bads is worse, then doing what will bring about this other balance will be an act of injustice. In short, what it is just and unjust to do is always to be determined by following the balance of the other goods. To put it another way, the only goods and bads that proponents of this understanding of justice say should go into the balance when one is comparing states of affairs are non-moral goods and bads, like lives and deaths, pleasures and interests, and so on. The moral goods and bads--justice, injustice and the virtues and vices generally--will automatically follow the greater or lesser balance of the non-moral goods.

Such, at any rate, is what many consequentialists will want to say. Others might respond differently by conceding that killing the one to save five is an act of injustice. They will add that this injustice is outweighed in the circumstances because better results follow if one commits it than if one does not. These consequentialists would allow that the injustice of an act can include or be identified with the value intrinsic to the act. They would add that the results of an intrinsically unjust act could outweigh that injustice and make the act, despite its injustice, the better act overall and so the one it is right to do. On this view, the intrinsic injustice of an act is an independently recognizable value. But it is a value that has to be calculated along with other goods and bads, and sometimes the balance of these other goods and bads might outweigh that injustice. While this view or response is different from the first, it shares with the first the idea that what it is ultimately right

to do in any given case is determined by the calculation of consequences. The difference concerns whether the justice and injustice of the act are understood as a result of this calculation, so that justice and injustice are wholly instrumental, or as one of the goods and bads to be calculated, so that justice and injustice are subordinated to what is instrumental.

Opposed to this instrumentalist understanding of justice (however one understands the instrumentality) is another understanding according to which it is always better not to kill one to save five. Here I will appeal to a somewhat neglected ancient philosopher, Marcus Tullius Cicero. In his various writings on philosophy Cicero presents us with this other understanding.[7] This understanding also has the additional advantage that it allows one at the same time to give an answer to the first and third objections raised above, namely how life can be understood to be for the sake of justice and not vice versa, and how, even though one allows five to die, one has nevertheless not committed an act of injustice against them.

Cicero traces the roots of the good and virtuous life to nature. All animate things, including men, have a natural desire to preserve themselves in being. Human nature differs from that of the other animals in that it shares in reason. Human preservation is above all the preservation of life with reason. Such life is marked by the following: intimate union in speech and life with those who likewise share reason, namely one's fellow men, beginning with the family; search and pursuit of truth; a desire, joined to love of truth, not to be subject to anyone unworthy; an awareness of beauty, order, and loveliness. This is the fourfold root of the honorable and fine (*honestum*) and generates the four virtues of justice, wisdom, courage, and moderation respectively. For the honorable is found in the constitution of human society, that is in rendering each their due and preserving trust;

7. Other philosophers, both ancient and medieval, have defended a similar understanding of justice. I have chosen Cicero partly because he expresses this understanding with particular elegance, and partly because I think he deserves to be more widely read and studied.

in sharp and skilled penetration of truth; in the grandeur of a high and unconquered spirit; in the orderliness and measure of all that is said and done.[8]

Human life is the life of the virtues as so understood. To preserve oneself as a man is to preserve oneself in this sort of life, that is, in doing the acts of all the virtues. Not to do this is to that extent not to preserve one's life but to lose it in a decline into the bestial, the non-human and the non-rational. Cicero is very concerned to stress that, on this understanding of human life, nothing can count as good or expedient that is contrary to the honorable. The other goods one so often thinks of, as pleasure, wealth, fame, power, are either not, properly speaking, good at all, or whatever good they have is as nothing in comparison with the honorable.[9] Certainly they are worthless if possessed or pursued in opposition to the honorable. Cicero devotes an entire book to showing that there can never be a conflict between what is honorable or right (*honestum*) and what is expedient (*utile*).[10] What is right is by that very fact expedient, and what is wrong is by that very fact inexpedient. This indeed must be the case on Cicero's analysis of human life. For only that could be expedient for men which preserves their life; but their life is defined by the right or the honorable; therefore only the honorable could preserve their life. To think otherwise, to separate the expedient or useful from the honorable, is, says Cicero, simply calamitous.[11] It is to maintain that that preserves human life which in very truth destroys it.

Cicero's doctrine of justice is that justice is good in and of itself and not for any consequential advantages. Justice is good in and of itself because it is, along with the other virtues, constitutive of a genuinely human life. It is not good for its consequential advantages because there

---

8. I summarize here the content of chapters 4 and 5 of book one of *De Officiis*. The same ideas find expression also in *De Finibus*, II, ch. 14, sects. 45-47.
9. Here Cicero remains undecided as between the Stoic and Peripatetic opinion on the matter. *De Officiis*, III, ch. 7, sect. 33.
10. *De Officiis*, III.

are no consequences which, taken in abstraction from it and the other virtues, could possibly be considered advantageous. It is never the case, contrary to what consequentialists think, either that justice could be instrumental to such presumed advantages or that it could be subordinated to them.

Justice and Consequences

Given this conception of justice, one may, indeed one must, say, in reply to the first objection raised above, that life is for the sake of justice and not justice for the sake of life. Life is for the sake of justice because life is for the sake of living well and living well is living justly. Justice is not for the sake of life because, first, if life is understood as good life, justice is not for the sake of it but rather (along with the other virtues) constitutive of it; and, second, if life is understood as mere life, justice is not for the sake of it but it for the sake of justice.[12]

The injustice of deliberately killing the innocent is to be understood in this light. What makes such killing unjust is not the mere fact that death is a harm and that someone's interest or his desire to live is frustrated. Any death is a harm and a frustration in this sense, even a death that happens accidentally or because of some natural disaster or disease. Such deaths might be called sad and tragic, but they cannot be called unjust or acts of injustice. Death and other harms are only unjust when they are inflicted deliberately by another rational being and contrary to what is due, that is, when an undue death or harm is expressly chosen by someone as the direct object of his act. Death is ordinarily not due to anyone, and certainly not as the expressly chosen object of another's

---

11. This word comes from *De Officiis*, III, ch. 12, sect. 49.
12. It is worth noting here that when Cicero criticizes the Epicureans the burden of his complaint focuses on this issue. The Epicureans have a false understanding of what is meant by a good life. They do not hold that a good life is constituted by virtue but that it is constituted by what the virtues bring, namely pleasure and freedom from pain. Despite the differences that divide ancient Epicureans from modern consequentialists in other respects, they would both agree in this, that the value of justice and the virtues generally is instrumental value. *De Finibus*, II, ch. 22, sects. 70-73.

act.[13] What is due to those who share together in one and the same community, or who enjoy the same common life, is mutual benefit not mutual harm. That is what it means to live together well, and living together well is part and parcel of the good life and so part and parcel of what life itself is for. Deliberately to kill the innocent is unjust, not because death is a harm, but because deliberately to inflict such harm is contrary to what is due to others in one's common life together.

Armed thus with this Ciceronian, or what might be called constitutive, understanding of justice, we can return to the first formulation of the case against restrictions on action mentioned at the beginning (namely that killing one to save five produces a better state of affairs overall), and see how the answer I there gave actually works.

Justice is not for the sake of any further outcome. It is already by itself the best outcome. To commit an injustice for the sake of saving lives (and killing the one is certainly an injustice, since it is the deliberate choice to inflict on that one an undue harm) is to suppose that justice is not in itself the best outcome but that more lives saved is. Doubtless it is a good thing, considered in the abstract, that lives are saved and that more lives are saved than lost. It is even a requirement of justice that one try to save lives (for to shield others from harm when and as one can is part of living together well). But it is not a good thing, nor is it in accord with justice, that the lives are saved by an act of injustice. If life is for the sake of living well, that is living justly, any choice of lives over justice is necessarily going to be a worse choice and the result a worse state of affairs. It cannot even matter, odd though this may seem, that more people die in this way. On this understanding of justice what is really regrettable is not death (which is anyway unavoidable for all of us and can happen in a thousand accidental ways), but unjust living. Even the five who die because of one's refusal to kill the one should, on this same understanding of justice, adopt no other view. They

13. Except perhaps in cases of war and judicial execution, but these, as I said, are not part of my present topic.

should be glad that no act of injustice will be committed to save them. To want an act of injustice, even an act of injustice performed by someone else, is in some way to become unjust oneself. It is to become, at least in desire, a partner to that injustice. But if justice is better than life, then it is better for the five to prefer to die than unjustly to want to go on living.

One might try to avoid this conclusion by repeating the third objection raised above. By not killing the one to save the five one has committed an injustice against those five who die, and indeed a worse injustice since thus more people are killed. But this claim is false. The injustice against the five is committed by the tyrant or ruffian who kills them, not by oneself. It cannot even be said that one does in some sense kill them because one lets them die when one could have done something to save them. For, on the contrary, there is nothing one could have done to save them. Killing someone else is not something one could have done because it is not something one could have done justly, and if there is nothing one can do justly then, for the just man, there is nothing one can do simply. To deny this and to say that what one can do unjustly to save more lives is something one can do, or to say that whatever one can do to save more lives must be better or more just, is to beg the question by surreptitiously re-importing into the debate a non-constitutive or instrumentalist sense of justice. Those who hold to a constitutive understanding of justice cannot, in terms of that understanding, be charged with preferring the worse to the better by refusing to kill one to save five. On the contrary, in terms of this understanding, it will always be their opponents, the consequentialists, who end up doing that.

Such is the answer that, following Cicero, I propose to the claim that killing one to save five produces a better state of affairs overall. But my answer is not complete until I have also applied it to the second formulation, namely that committing one violation of the rule against killing in order to prevent more violations is better because fewer violations overall actually occur. In the case of

killing one to save five from being killed, refusing to kill the one means that more killings take place. How can this be better or more just since the result is that more injustice actually occurs?

It does not appear that one can make the same response here as to the first formulation, namely that this involves subordinating a higher good, justice, to a lower good, life. For in this understanding of the case one is sacrificing justice not to life but to justice itself. The killing of the one (which is, as such, something unjust) is for the sake of not having five killings (which is, as such, something just, and more just than not having one killing). There is no subordination of a higher good to a lower but simply of the same good to itself. As Scheffler points out, what seems paradoxical here is that to refuse to commit a violation to reduce violations seems to involve setting up some goal or end of pursuit, the good of not committing violations, and then refusing to do the action that will realize that end better than any other possible action.[14]

I agree that to do this would be paradoxical but I deny that, when one understands justice in the Ciceronian or constitutive sense, refusing to commit a violation to prevent five violations is an example of such a paradox. To begin with, the term "violation" is ambiguous. A rule of justice is violated in one way when there is an unjust state of affairs. It is violated in another and indeed profounder way when, in addition to the unjust state of affairs, there is an unjust act and an unjust actor. For instance, if a man is prevented, through no fault of his own, from paying back a debt (say he suffers an unforeseeable bankruptcy), then there is an unjust state of affairs (the debt is not repaid and the creditor is deprived of what is his due), but the debtor commits no unjust act nor is he thereby an unjust man. If, however, the debtor deliberately refuses to pay the debt though perfectly able to, then there is, in addition to the unjust state of affairs, an unjust act and an unjust actor. Even if he is forced to pay the debt (say his assets are seized by court order or he is threatened

with punishment), justice is only not violated in the sense that there is a just state of affairs (the creditor gets back his due). But it remains violated in the act and intention of the debtor (since he acts, if he acts, against his will and would continue not to pay the debt if he could). We must recall what was said earlier. Harms, like loss of money, are only unjust when they are inflicted deliberately by another rational being and contrary to what is due, that is, when someone chooses an undue harm as the direct object of his act.

The same things hold of the case at issue, that of killing one to prevent five killings. If I kill the one and the ruffian refrains from killing the five, then while the resulting state of affairs is more just (one killing occurs instead of five), yet there are no just acts and no just agents. The ruffian certainly does not perform any just act nor does he become a just man. He is party to my killing the one (of which he is, by his bargain, the principal agent, while I am but the willing instrument), and his refraining from killing the five, even if it is just in its results, is not just as an act. For it is not done or chosen as just but only as part of an unjust bargain. Thus in no way does he become a just, or even a juster, man (for a man who bargains with five lives and is ready to kill them is not a juster man, though he produce a juster result, than one who does actually kill them). Neither do I perform any just act, for my killing of the one is unjust; nor am I a just man, for I kill deliberately and from choice (I choose to accept the ruffian's bargain).

Actually the injustice involved in my killing the one is worse than has so far been described. As concerns myself, not only do I commit injustice against that one, I also commit injustice against the ruffian and against the five who are not killed. I commit injustice against the ruffian because what is owed or due to someone set on murder, however few or many the murders, is not furtherance in murder but restraint from murder, which restraint, if I cannot do by force, I should at

---

14. Scheffler, "Agent Centered Restrictions," p. 414.

least do by rebuke. I also commit injustice against the five because while I may owe it to them to do what I can to save them, I do not owe it to them to kill another to save them. If I am to win for them an offer of life I ought to make that offer itself a fair and just one, and not defile it by shedding the innocent blood of another in the process. A just man would not want the offer of life on such terms (for, as noted before, to want life as a result of injustice is itself unjust since it is, at least in desire, to be party to that injustice). The case is similar to being offered a gift by a friend who has stolen money in order to buy that gift. No just man would want such a gift, however desirable the gift might be. He would rather be offended by it.

As concerns the ruffian, it goes without saying that he commits injustice in all the same ways. He commits it against the one killed because he is the principal agent of his death. He commits it against me because he wants to involve me in his own murderous acts. He commits it against the five, even though he does not kill them, because he is using their lives as bargaining chips and remains ready to kill them if he has to.

We must now ask, in view of all this, whether refusing to kill the one to save five really is a case of the paradox that Scheffler says it is. What is the goal of pursuit that the Ciceronian conception of justice has set up? Surely the goal is justice itself and the avoidance of violations against justice. But what results when I kill the one is neither justice nor the avoidance of violations against justice. It is certainly not, for the reasons just stated, the avoidance of violations in the sense of avoiding unjust acts and agents. It is not even the avoidance of violations in the sense of avoiding a more unjust state of affairs. For while a state of affairs consisting of one murder is, taken in the abstract, more just than a state of affairs consisting of five murders, it is not, even as a state of affairs, more just when taken in the concrete situation of my killing one to save five. In that situation the avoiding of five murders is not anywhere taken under the aspect of its justice. For it is

not taken under that aspect in what I and the ruffian do, and it is not taken under that aspect in what the one or the five suffer. The only way in which avoiding the five murders could be taken as just would be if I, or someone else, were able to disarm or disable the ruffian before he could do any harm. Then not only would the ruffian receive what is just, but his disarmer or disabler would do something just, and the five (and the one too) would be offered and be able to receive their lives as something just.

This option is not one that the example is allowing us to consider. We are required instead to judge what to do simply in the light of the alternatives of killing or not killing the one. It should now be evident that, of these alternatives, the alternative that violates justice least is that where I do not kill the one. As explained, where I do kill the one there is neither just act, nor just agent, nor even just state of affairs taken under its aspect as just. Where, on the other hand, I do not kill the one, then at least there is a just act, namely my own, and I am, to that extent, a just agent, and the resulting state of affairs is, in that same act of mine, taken under its aspect as just. For five being killed by another, instead of one being killed by me to save them, is what alone has the aspect of justice for my action. Moreover only then can the state of affairs be taken as just by the five who die, since, as was already said, they could not justly want to be saved by another's act of injustice. And what is thus true for this case of killing one to save five will be true for any other case where the option is presented of doing something unjust to prevent more instances of the same injustice being done by someone else. The same analysis as given here will, *mutatis mutandis*, hold everywhere.

What this analysis especially brings to attention, and what needs always to be kept in mind when discussing justice, is that justice, or at any rate justice in the Ciceronian conception, consists in certain acts and not in certain states of affairs. Or it only consists in states of affairs when these

are taken as objects of, and so as intrinsic to, certain acts. To pursue justice and to avoid or reduce injustice always consists in the doing of just acts and the avoiding of unjust ones. It does not consist in the avoiding or reducing of unjust states of affairs, or of harms, taken in the abstract. Justice in the Ciceronian sense is living well together in community, and living well is an activity, not a state. It is the activity of each and all giving to each and all what is due to each and all, and this mutual giving is, simply as such giving, something good and desirable. That is why justice belongs to what is honorable (*honestum*), or to what is good in and of itself, and not to what is useful (*utile*), or to what is good only for the sake of something else.

That is also why, when one is considering what it is just to do, one's focus and aim is always going to be the intrinsic goodness of one's own action. Only in such intrinsic goodness, and not in any abstract states of affairs, is the justice of one's action to be found. Of course one can, for other purposes, consider abstract states of affairs. Specifically one can do this for purposes of comparison, as when judging that the abstract state of affairs when five people are murdered is worse and more unjust than the abstract state of affairs when one person is murdered. But such comparison, when left in the abstract, will give no guidance with respect to what course of action one should pursue. As just pointed out, states of affairs *taken in the abstract* are not the object of pursuit.

There is thus a fallacy in the argument Scheffler and Kagan are relying on when they claim it is paradoxical to deny that it is better to kill one to save five. The argument proceeds from the premise that five killings are worse to the conclusion that one should kill one person to prevent five killings. This conclusion does not follow from the premise. The premise is talking about abstract states of affairs; the conclusion is talking about what one should do. One cannot, without further argument, go from the first to the second. One needs some other premise in addition. The only

premise that will get one to the conclusion is the premise that one should do what is necessary to avoid a worse abstract states of affairs. This premise is false. That is not what one should do, or it is not what one should do if one's aim is justice. What one should do is what is just, and what is just for action is just acts, not abstract states of affairs. At any rate this is what one should do on the Ciceronian or constitutive understanding of justice. On the consequentialist understanding, by contrast, it may in fact be true that one should do what is necessary to avoid a worse abstract state of affairs. But all that this shows is that Scheffler's and Kagan's argument only works on the assumption of a consequentialist conception of justice. Reject that assumption and adopt the Ciceronian conception instead and the argument simply fails.

In fact it fails in this way twice over. It fails first even in its own terms of being an attempt to reduce the number of violations. As just explained, on the Ciceronian conception the violations of justice are not reduced but increased if I kill the one to save five. It fails second even if one allows, *per impossibile* and for the sake of argument, that killing the one to save five does reduce the number of violations. What the pursuit of justice requires is, on the Ciceronian conception, the doing of justice and the avoiding of injustice. This requirement can only be met if one does actually do in one's own act what is just and avoid what is unjust. The further consequences of one's act, whether these be understood in terms of overall outcomes or in terms of the reduction of violations of justice, will not make any difference. An unjust act, precisely as unjust, ought not to be done, and it ought not to be done because of its intrinsic evil or its intrinsic irrationality. This evil or irrationality, because it is intrinsic to the act and determinative of it, can never be removed from the act by any consequences, however good these consequences are imagined to be. The consequences of an unjust act can never make any difference to what one should do. What one should do is, as already noted several times, the doing of justice and the avoiding of injustice, and the consequences

can never make an intrinsically unjust act to be intrinsically just.[15]

Two Understandings of Consequences

The case, then, against restrictions on action fails in both its formulations. Or it thus fails if one adopts the Ciceronian instead of the consequentialist understanding of justice. The Ciceronian conception is the traditional conception, the conception that has lain for centuries behind the standard restrictions on action. It is only because of general ignorance about, or dismissal of, that conception, and the dominance in our thinking of consequentialist ideas instead, that the reason for those restrictions has become obscure and problematic and that people like Scheffler and Kagan have come to suppose that nothing at all can satisfactorily justify them.

Nevertheless one needs to be cautious about what is meant by consequentialism. There is a sense in which the Ciceronian understanding of justice is also consequentialist. Certainly it aims at maximizing results, I mean the results that are just actions. These results are, to be sure, concrete acts instead of abstract states of affairs. But that is what, in the end, makes all the difference.

Cicero's understanding is an understanding of virtue in general and not of the virtue of justice alone. The virtues, while they are good and desirable as certain habits of character, exist for the sake of the acts that they produce or in which they are exercised. This is the end of life and happiness, namely to live a virtuous life, a life constituted by virtuous activity. Virtue ethics (and

15. Kagan argues (1989: 30) against this appeal to the idea that an intrinsic evil, because it is an intrinsic evil, should not be done. The thought, he says, that the nature of evil is such that we should avoid it, and hence the thought that if we cannot do an act which is itself evil then a fortiori we cannot do it for a good end either, conceals a non sequitur. It trades, he says, on an ambiguity between 'evil' in the sense of 'forbidden' and 'evil' in the sense of 'harm.' Killing one to save five may be an evil in the sense of being a harm to that one, but it does not follow from this alone that it is an evil in the sense of being forbidden. Some further premise is needed to justify the conclusion that inflicting such harm is forbidden. This argument of Kagan's itself conceals an ignoratio elenchi. Killing the one is not a harm merely but a harm that is an injustice (it is the deliberate infliction on another of an undue harm). Since injustice is precisely what is forbidden on the Ciceronian conception of justice, it does indeed follow that if killing is an evil in the sense of an injustice then it is an evil in the sense of something forbidden.

Cicero's ethics is clearly a virtue ethics) cares about virtue because it cares about the acts of virtue, the acts that the virtues cause and bring about as their proper result. Consequentialism, by contrast, is concerned with the results, not of virtues, but of acts, namely the states of affairs that acts produce. It is only concerned with virtues insofar as these produce the acts that produce the desired states of affairs. One could, accordingly, change virtue ethics into consequentialism and consequentialism into virtue ethics simply by changing what it is that is to be maximized: either from acts to the results of acts, or from the results of acts to acts.

To locate the difference between consequentialist theories and virtue theories, one must ignore the strategy of maximizing (for that is common to both) and focus instead on the different things they maximize. For consequentialism these things are goods other than the acts themselves taken precisely as acts of virtue. Such goods will be what was mentioned earlier, namely the satisfaction of interests, but will obviously include such specific things as life, health, wealth, fame, and so on. What they will not include, of course, will be the good of virtuous acts precisely as virtuous. Virtuous acts, according to consequentialism, have no good precisely as virtuous. Their goodness is wholly instrumental or derivative from the goodness of the results they produce. According to Ciceronian virtue theory, by contrast, virtuous acts do have goodness precisely as virtuous, the goodness namely of their inner harmony with, and proportion to, reason. A virtuous act is virtuous insofar as it is, according to its very character, what agrees with reason. So honoring father and mother agrees with reason because this is what is due as from children to parents. Conversely murder and stealing are contrary to reason because the deliberate taking of another's life or property is not due as from one rational being to another (save perhaps in war or judicial proceedings).

Such inner harmony or proportion to reason is what Cicero calls *honestum* and his Greek

predecessors *kalon*, and what we, in imitation of them, may call the beautiful or the noble. All other goods, as in particular life, health, wealth, fame, and so on, are for the sake of the beautiful and noble and are only good, strictly speaking, insofar as they serve the beautiful and noble. To have them or pursue them at the expense of the beautiful and noble is not only harmful (since this makes one worse as a man); it is also base and vulgar. It is to subordinate the higher good to the lower, or to choose for the sake of something else what should really be chosen for its own sake. And that is precisely what consequentialism does. It prefers other goods to the good of virtuous acts precisely as virtuous. Indeed it denies all good to virtuous acts save insofar as these acts bring about certain results (it does not care what beauty or harmony to reason these acts may have independently of their results). It will even prefer vicious acts if these bring about better results. Consequentialism is, therefore, base and vulgar. That, in the end, is the chief complaint one should raise against it. It certainly is the chief complaint that was always raised against it in the past and the complaint raised by Cicero himself.[16]

What we might say by way of conclusion about the arguments of Scheffler, Kagan, and others, and about their attacks on the rationality of restrictions on action, is that these attacks and arguments are wrong above all because they are vulgar. They are vulgar because they presuppose and are based on a vulgar understanding of what is good or of which goods are to be preferred to which. For to prefer the results of virtuous acts to those acts themselves is to prefer what is lower to what is higher. And that is most certainly vulgar.

16. See note 12 above.