Critics of utilitarianism frequently call attention to the abhorrent policies that unrestricted aggregative reasoning might justify under certain possible or even actual circumstances. They invite the conclusion that one can do justice to the firm intuition that such horrors are clearly unjustifiable only by adopting a deontological moral framework which places limits on what appeals to maximum aggregate well-being can justify. As one who has often argued in this way, however, I am compelled to recognize that this position has its own weaknesses. In attacking utilitarianism one is inclined to appeal to individual rights, which mere considerations of social utility cannot justify us in over-riding. But rights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects? This seems to be the uncontroversial insight of the classical utilitarians. Further, unless rights are to be taken as defined by rather implausible rigid formulae, it seems that we must invoke what looks very much like the consideration of consequences in order to determine what they rule out and what they allow. Thus, for example, in order to determine whether a given policy violates the right of freedom of expression it is not enough to know merely that it restricts speech. We may need to consider also what the effect would be of granting to governments the kind of supervisory powers in question.

I am thus drawn toward a two-tier view: one that gives an important role to consequences in the justification and interpretation of rights but which takes rights seriously as placing limits on consequentialist reasoning at the level of casuistry. Such a view looks like what has been called rule utilitarianism, a theory subject to a number of apparently fatal objections. First, rule utilitarians are hard pressed to explain why, if at base they are convinced utilitarians, they are not thoroughgoing ones. How can they square their utilitarianism with the acceptance of individual actions that are not in accord with the utilitarian formula? Second, rule utilitarianism seems to be open to some of the same objections leveled
against utilitarianism in its pure form; in particular it seems no more able than act-utilitarianism is to give a satisfactory place to considerations of distributive justice. Third, in attempting to specify which rules it is that are to be applied in the appraisal of acts and policies, rule-utilitarians of the usual sort are faced with an acute dilemma. If it is some set of ideal rules that are to be applied — those rules general conformity to which would have the best consequences — then the utilitarian case for a concern with rules, rather than merely with the consequences of isolated acts, appears lost. For this case generally rests on benefits flowing from the coordination of individual actions, coordination that rules make possible. These benefits are gained only if the rules are in fact generally observed. But if, on the other hand, the rules that are to be applied must be ones that are actually observed in the society in question then the utilitarian force of the theory is lost, and it dissolves into a kind of uncritical conservatism.

The problem, then, is to explain how a theory can have, at least in part, a two-tier structure; how it can retain the basic appeal of utilitarianism, at least as it applies to the foundation of rights, and yet avoid the problems that have plagued traditional rule utilitarianism. As a start towards describing such a theory I will consider three questions. (1) What consequences are to be considered, and how is their value to be determined? (2) How do considerations of distributive justice enter the theory? (3) How does one justify taking rights (or various moral rules) as constraints on the production of valued consequences?

1. CONSEQUENCES AND THEIR VALUES

Here I have two remarks, one of foundation, the other of content. First, as I have argued elsewhere¹ but can here only assert, I depart from the classical utilitarians and many of their modern followers in rejecting subjective preferences as the basis for the valuation of outcomes. This role is to be played instead by an ethically significant, objective notion of the relative importance of various benefits and burdens.

Second, as to content, the benefits and burdens with which the theory is concerned must include not only the things that may happen to people but also factors affecting the ability of individuals to determine what will happen. Some of these factors are the concern of what are generally called rights, commonly² distinguished into (claim-) rights to command