

## Mill on Justice and Rights

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Mill develops his account of the juridical concepts of justice and rights in several different contexts and works. He discusses both the *logic* of these juridical concepts – what rights and justice are and how they are related to each other and to utility – and their *substance* – what rights we have and what justice demands. Though the logic and substance of these juridical concepts are distinct, they are related. An account of the logic of rights and justice should constrain how one justifies claims about their substance, and ways of defending what rights we have and what justice demands presuppose claims about the logic of these concepts. We would do well to examine Mill's central claims about the substance of justice and rights before turning to his views about their logic.

Mill links demands of justice and individual rights. He defends rights to basic liberties in *On Liberty* (1859), women's rights to sexual equality as a matter of justice in *The Subjection of Women* (1869), and rights to fair equality opportunity in *Principles of Political Economy* (1848) and *The Subjection of Women*. While these are Mill's central claims about the substance of rights and justice, he is attracted to three different conceptions of the logic of rights and justice. His most explicit discussion occurs in Chapter V of *Utilitarianism* (1861) in response to the worry that justice is a moral concept independent of considerations of utility. There, Mill develops claims about justice and rights that treat them as related parts of an indirect utilitarian conception of duty that explains fundamental moral notions in terms of expedient sanctioning responses. On this conception, duties are actions whose omission it is useful for us to sanction in some way. Matters of justice involve duties to respect rights, and rights are individual claims that it is useful for society to protect and enforce. But this conception of rights and justice inherits difficulties with sanction utilitarianism and fails to distinguish rights from other things society has reason to protect. Fortunately, Mill employs other claims about rights and justice that do not presuppose sanction utilitarianism.

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According to a second conception, rights involve secondary principles or rules that insulate especially important interests and liberties from routine cost-benefit analysis. Honoring rights and justice, on this conception, is justified by the utility of doing so. A third conception focuses on the greater value of the interests and liberties protected by rights and justice and justifies observing rights and the demands of justice as a way of promoting the overall good.

Many philosophers think that there is a tension between utility, on the one hand, and rights and justice, on the other hand. In Mill's day, intuitionists, such as William Whewell, thought that justice and rights were distinct from beneficence and non-derivatively justified. Nowadays, many moral and political philosophers think that rights and justice constrain utility, claiming that rights "trump" considerations of utility (Dworkin 1977: xi, 184–205) or act as "side constraints" on the pursuit of good consequences (Nozick 1974: 28–33). Mill is an interesting test for this conventional wisdom about the tension between utility and rights and justice, because he wants to give these deontic notions a utilitarian foundation. In Chapter V of *Utilitarianism*, he argues that justice and rights are derivatively justified by the way that they contribute to happiness. In *On Liberty*, Mill insists that his liberal arguments depend on rights that have utilitarian foundations.

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. (*Liberty*, XVIII: 224)

In reconstructing Mill's claims about rights and justice, we need to ask if he succeeds in providing them with a plausible utilitarian foundation.

## 1. Liberal Rights

*On Liberty* begins by distinguishing old and new threats to liberty. The old threat to liberty is found in traditional societies in which there is rule by one (a monarchy) or a few (an oligarchy). Though one could be worried about restrictions on liberty by benevolent monarchs or oligarchs, the traditional worry is that when rulers are politically unaccountable to the governed they will rule in their own interests, rather than the interests of the governed. In particular, they will restrict the liberties and opportunities of their subjects in ways that benefit the rulers, rather than the ruled. It was these traditional threats to liberty that the democratic reforms of the Philosophical Radicals were meant to address. Mill shares these concerns. But he thinks that these traditional threats to liberty are not the only ones to worry about. He makes clear that democracies contain their own threats to liberty – this is the tyranny, not of the one or the few, but of the majority (*Liberty*, XVIII: 217–20). Mill sets out to articulate the principles that should regulate when and how governments and societies, whether democratic or not, are allowed to restrict individual liberties (XVIII: 220).

In an early and famous passage, Mill formulates his liberal commitments in terms of "one very simple principle," which is worth quoting at length.

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (XVIII: 223–4)

Here, Mill distinguishes paternalistic and moralistic restrictions of liberty from restrictions of liberty based upon the harm principle and claims that the harm prevention is the sole legitimate basis for restricting individual liberties.

There is an ambiguity in Mill's formulation of the harm principle between harm prevention and preventing one person from harming others (cf. Brown 1972 and Lyons 1994: Ch. 4). These two claims are not equivalent. Every time A prevents B from harming another person C, A engages in harm prevention. But in some cases A might prevent harm to C by restricting B's liberty even though B is not the source of potential harm to C. So we can distinguish two different versions of the harm principle: (1) an *anti-harming* principle: A can restrict B's liberty only in order to prevent *B from harming others* and (2) a *harm prevention* principle: A can restrict B's liberty only in order to prevent *harm to others*. For instance, Good Samaritan laws involve the state restricting B's liberty by requiring him to aid C to prevent harm to C (e.g., rescuing a child drowning in a shallow pond) even if B is not the source of the threat to C. Such laws can be rationalized under the harm prevention principle but not under the anti-harming principle. Because Mill thinks that Good Samaritan laws are consistent with the harm principle (XVIII: 225), this is evidence that he understands the harm principle as a harm prevention principle.

Later, Mill distinguishes between genuine harm and *mere offense*. In order to satisfy the harm principle, an action must violate or risk violation of those important interests of others in which they have a right (XVIII: 225, 260, 276–7, 281, 283–4).

These distinctions allow Mill to defend a *categorical approach* to liberal rights. To decide whether an individual's liberty ought to be protected, we must ascertain to which category the potential restriction of liberty belongs: offense, moralism, paternalism, and harm prevention. Mill seems to permit or forbid restrictions on liberty by category, claiming that the only restrictions that are permissible involve harm prevention. Of course, a given regulation might fall under more than one category. Many provisions of the criminal law, such as prohibitions on murder and assault, might be designed both

to enforce fundamental moral provisions and to prevent harm to others. Mill does not object to moralistic or paternalistic legislation that can also be defended by appeal to the harm principle. Rather, the objection is to restrictions that can only be justified in these ways and cannot be justified by appeal to harm prevention.

Harm prevention is a necessary but not sufficient ground for restricting individual liberties. Harm prevention is sufficient to establish a *pro tanto* case for regulation (XVIII: 224), but whether regulation is all things considered appropriate depends on a utilitarian calculation of whether the benefits of regulation exceed its costs (XVIII: 292–3).

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. (XVIII: 276)

This means that the harm principle is not in fact Mill's only principle, because we cannot decide whether regulations that would prevent harm should be adopted without appealing to the principle of utility. But even if harm prevention is not sufficient to justify restricting liberty, Mill does appear to claim that it is necessary.

It is doubtful that Mill consistently adheres to the claim that the only permissible restrictions on liberty must be designed to prevent harm. How many exceptions he makes to this principle depends on complicated questions about how best to interpret the harm principle (Brink 2013: §§51–4). But even on interpretations that minimize the number of exceptions to the harm principle, Mill qualifies his blanket prohibition on paternalism to allow for some forms of paternalism, including the prohibition on selling oneself into slavery (XVIII: 299). There is an interesting question about the scope of this sort of exception to the usual prohibition on paternalism. But the exception itself shows that Mill does not think that the only acceptable restrictions on liberty are those that prevent harm to others. For this is a case in which it is permissible to restrict liberty, not to prevent harm to others, but to prevent a special kind of harm to self. This is further reason to think that Mill's one very simple principle is over-simple.

On a traditional understanding of Mill's liberal principles, acceptance of the categorical approach and, in particular, the harm principle leads Mill to recognize a large sphere of individual conduct that it is impermissible for the state to regulate. We could think of these as *liberal rights*. Mill's liberalism focuses on three basic kinds of liberties (XVIII: 225–6).

- (1) Liberties of conscience and expression
- (2) Liberties of tastes, pursuits and life-plans
- (3) Liberties of association.

Though these basic liberties evidently include quite a bit, Mill does not claim that there is a right to liberty *per se*.

Mill apparently believes that rights to these basic liberties can be derived by consistent application of the categorical approach, in particular, the harm principle. But rights

figure not only in the conclusion of Mill's liberal arguments but also in the premises. Because what distinguishes harm from mere offense are those important interests of others in which they have rights (XVIII: 276, 281), the application of the harm principle depends on a prior conception of rights.

## 2. Liberal Rights and Progressive Happiness

We have seen that Mill wants his liberal principles to have utilitarian foundations, “grounded on the permanent interests of man as a progressive being” (*Liberty*, XVIII: 224). Mill's reference to the interests of man as a progressive being invoke his idea that we have higher-order interests in self-examination and self-determination. It is our capacities for practical deliberation that enable us to be self-governing and responsible agents (*Logic*, VIII: 839–42). They are what distinguish us from other animals that are not genuine agents and that endow our existence with greater comparative worth (*Liberty*, XVIII: 262–3). And, of course, they explain the superiority of higher pleasures and allow us to distinguish genuine happiness and mere contentment – the life of Socrates and the life of the contented pig (*Utilitarianism*, X: 210–2). Mill's defense of basic liberties in *On Liberty* appeals at crucial points to these higher-order progressive capacities.

For instance, Mill's defense of freedom of expression reflects his view that freedoms of thought and discussion are necessary for developing and exercising our deliberative capacities and, hence, for fulfilling our natures as progressive beings. Mill appeals to the distinction between knowledge and mere true belief.

[A]ssuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument – this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. (*Liberty*, XVIII: 244)

If we understand knowledge as something like *justified* true belief, we can better understand his rationale for freedom of expression (cf. Scanlon 1972; Ten 1980: 126–8). Progressive beings seek knowledge and not simply true belief. Whereas the mere possession of true beliefs need not exercise one's deliberative capacities, because they might be the product of indoctrination, their justification would. One exercises deliberative capacities in the justification of one's beliefs and actions that is required for theoretical and practical knowledge. This is because justification involves comparison of, and deliberation among, alternatives (*Liberty*, XVIII: 231–2, 243–5, 258). Freedoms of thought and discussion are essential to the justification of one's beliefs and actions, because individuals are not cognitively self-sufficient (XVIII: 256–7, 260–1). Sharing thought and discussion with others, especially about important matters, improves one's deliberations. It enlarges the menu of options, by identifying new options worth consideration, and helps one better assess the merits of these options, by forcing on one's attention new considerations and arguments about the comparative merits of the options. In these ways, open and vigorous discussion with diverse interlocutors improves the quality of one's deliberations. If so, censorship, even of false belief, can rob both those whose speech is suppressed and their audience of resources that

they need to justify their beliefs and actions and so fulfill their natures as progressive beings (XVIII: 229).

Though important in its own right, Mill's defense of freedom of expression also provides the resources for a more general argument for other basic liberties. Mill elaborates this rationale in the balance of *On Liberty*, but especially in Chapter III. A good human life is one that exercises one's higher capacities, and a person's higher capacities include her deliberative capacities, in particular, capacities to form, revise, assess, select, and implement her own plan of life.

He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? (XVIII: 262–3)

Here, Mill makes clear the importance of the development and exercise of deliberative capacities in a life that is fit for progressive beings. Self-government requires various liberties of thought and action. If the choice and pursuit of projects and plans are to be deliberate, then they must be informed as to the alternatives and their grounds, and this requires intellectual freedoms of speech, association, and press that expand the menu of deliberative options and allow for the vivid representation of the comparative merits of options on that menu. If there is to be choice and implementation of choices, there must be liberties of action such as freedom of association, freedom of worship, and freedom to choose one's occupation (XVIII: 225–6).

In particular, the appeal to our higher-order interest in self-determination explains Mill's general anti-paternalism. For if a person's happiness depends on her exercise of the capacities that make her a responsible agent, then her own good must include opportunities for responsible choice and reflective decision making. But then it becomes clear how self-determination is an important part of a person's good and how paternalism undercuts her good in important and predictable ways. Indeed, once we understand how Mill grounds his anti-paternalism in our capacities for self-determination, we can understand why he makes an exception for regulations that limit one's ability to self oneself into slavery.

The ground for thus limiting his power of voluntarily disposing of his own lot is apparent, and is very clearly seen in this extreme case. ... [B]y selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He, therefore, defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself. (XVIII: 299)

Because it is the importance of self-governance that explains the usual reason for opposing paternalism, the same considerations argue against extending liberties to do things that would permanently undermine one's future capacities for self-governance.

In this case, an exception to the usual prohibition on paternalism is motivated by appeal to the very same values that explain the usual prohibition.

### 3. Justice, Rights, and Equality

*On Liberty* focuses more on rights to basic liberties than on justice. But in *Utilitarianism* Mill finds connections between rights and justice and links them with equal treatment.

[T]he Greatest Happiness Principle ... is a mere form of words without rational significance, unless one person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another's. ... The equal claim of everybody to happiness in the estimation of the moralist and legislator, involves an equal claim to all the means of happiness, except in so far as the inevitable conditions of human life, and the general interest, in which that of every individual is included, set limits to the maxim; and those limits ought to be strictly construed. ... All persons are deemed to have a *right* to equality of treatment, except when some recognised social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they ever could have been tolerated; forgetful that they themselves perhaps tolerate other inequalities under an equally mistaken notion of expediency, the correction of which would make that which they approve seem quite as monstrous as what they have at last learnt to condemn. The entire history of social improvement has been a series of transitions, by which one custom or institution after another, from being supposed a primary necessity of social existence, has passed into the rank of an universally stigmatized injustice and tyranny. So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; and so it will be, and in part already is, with the aristocracies of colour, race, and sex. (*Utilitarianism*, X: 257–8)

As Mill makes clear here and elsewhere, equal treatment does not always guarantee equality of outcome. The kind of equality Mill treats as a matter of right and justice is *equality of opportunity*. For instance, in *Principles of Political Economy* Mill claims that because the opportunities for each depend in part upon the position and resources of others the provision of fair opportunity constrains permissible socio-economic inequalities (II: 217–9).

A just and wise legislation would abstain from holding out motives for dissipating rather than saving the earnings of honest exertion. Its impartiality between competitors would consist in endeavoring that they should all start fair .... Many, indeed, fail with greater efforts than those with which others succeed, not from difference of merits, but difference of opportunities; but if all were done which it would be in the power of a good government to do, by instruction and by legislation, to diminish this inequality of opportunities, the differences of fortune arising from people's own earnings could not justly give umbrage. (*Principles*, III: 811)

As Mill makes clear in this passage, his concern is not with inequality as such. Though he envisions a society in which inequalities are reduced and in which a decent minimum standard of living is available to all (III: 753–7), he does defend the profits of capitalists

as a just recompense for their savings, risk, and economic supervision (*Principles*, II: 400–2; *Chapters*, V: 734–5). Rather, Mill's concern is with inequalities derived from inequality of opportunity and those inequalities that perpetuate inequality of opportunity.

#### 4. Sexual Equality, Rights, and Justice

These links between rights, justice, and equality of opportunity are on display in *The Subjection of Women* where Mill denounces existing forms of sexual inequality.

[T]he principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong in itself, and now one of the chief hindrances to human improvement; and ... it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other. (XXI: 261)

While Mill clearly expected many aspects of his liberal principles to be controversial (*Liberty*, XVIII: 220–3), the revolutionary import of Mill's liberal principles only became clear when he later applied them to issues of sexual equality in *The Subjection of Women* (Nicholson 1998: 471).

Mill rejects sexual inequality in both domestic and social contexts. He discusses domestic equality primarily in Chapter II of *The Subjection of Women*. There, he focuses on the rights of wives and mothers, recognizing women's equal rights over their bodies or persons (*Subjection*, XXI: 283–6), to own and control property (XXI: 284–5, 297) to control various aspects of domestic decision making and household management (XXI: 290–2), to custody and care of children (XXI: 285), and to separation and divorce (XXI: 285–6). But Mill is not only concerned with wives and mothers in domestic contexts. He also defends equal rights to education (XXI: 315–6), to professional opportunities (XXI: 299; *Principles*, III: 765), to vote in political elections (*Subjection*, XXI: 301), and to run for political office (XXI: 301). In addition to these rights, Mill presumably also endorses equal rights to freedom of expression, worship, and association. One assumes that he sees the main threats to these rights as occurring in the domestic realm and coming from husbands, fathers, and brothers.

At times, Mill defends sexual equality on explicitly consequentialist grounds as a way of making fuller use of people's talents and promoting a culture of equal opportunity, accountability, and genuine meritocracy (XXI: 326–8). But Mill also defends sexual equality as a matter of individual rights and justice.

Thus far, the benefits which it has appeared that the world would gain by ceasing to make sex a disqualification for privileges and a badge of subjection, are social rather than individual; consisting in an increase of the general fund of thinking and acting power, and an improvement in the general conditions of the association of men and women. But it would be a grievous understatement of the case to omit the most direct benefit of all, the unspeakable gain in private happiness to the liberated half of the species; the difference to them between a life of subjection to the will of others, and a life of rational freedom. After the primary necessities of food and raiment, freedom is the first and strongest want to human nature. (XXI: 336)

In elaborating this claim about women's higher-order interests in liberty, he says that personal independence is an "element of happiness" (XXI: 336–7). This echoes the arguments in *On Liberty* for claiming that basic liberties are necessary for persons to exercise the deliberative capacities that make them progressive beings.

In *The Subjection of Women*, Mill also defends sexual equality by appeal to the distinctively modern norm of equality of opportunity.

For, what is the peculiar character of the modern world – the difference which chiefly distinguishes modern institutions, modern social ideas, modern life itself, from those of times long past? It is that human beings are no longer born into their place in life, and chained down by an inexorable bond to the place they are born to, but are free to employ their faculties, and such favorable chances as offer, to achieve the lot which may appear to them most desirable. (XXI: 272–3)

Mill is especially interested in women's opportunities for self-realization, which would include opportunities for developing capacities for practical deliberation – normative competence – and for exercising this competence in self-governed lives that realize their natures as progressive beings. These opportunities are not good in themselves, but they are necessary conditions for achieving these higher-order goods. This explains why Mill refers to the demand for equal opportunity for welfare as a demand of justice (XXI: 325) and why it grounds a claim of right.

## 5. Justice, Rights, and Duty

These are some aspects of Mill's claims about the substance of rights and justice. Mill appears to link justice with respecting individual rights, and chief among the individual rights Mill recognizes are rights to basic liberties, rather than liberty per se, and rights to equality of opportunity. No doubt, Mill recognizes other rights as well if only because more specific rights may be derived from these. For instance, Mill can and does derive a right to education as a condition of self-determination and equality of opportunity (*Liberty*, XVIII: 301–3; *Principles*, III: 947–53). But rights to basic liberties and equality of opportunity seem especially fundamental for Mill. That is not to say that they are non-derivative. As we have seen, Mill thinks that they can be given a utilitarian foundation, and he explains their importance to the individuals whose rights they are in terms of their role in self-governance and the exercise of our higher deliberative faculties.

We can now turn to Mill's account of the logic of rights and justice, in particular, the way in which they are related to each other and to duty. This account is complicated by the fact that Mill appears committed to more than once conception of duty. Though Mill clearly thinks of duty and obligation in terms of actions that in some way promote happiness, he embraces incompatible ideas about exactly how duty is grounded in utility. In particular, he is ambivalent between direct and indirect utilitarian conceptions of duty.

A *direct utilitarian* makes the assessment of things depend on the value of their consequences for happiness. So a direct utilitarian assessment of actions would be the *act utilitarian* claim that an act is right or obligatory insofar as its consequences for

happiness are at least as good as any alternative action available to the agent. Mill suggests this sort of direct utilitarian assessment of actions in his famous Proportionality Doctrine.

The creed which accepts as the foundations of morals “utility” or the “greatest happiness principle” holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure. (*Utilitarianism*, X: 210)

Similarly, in other passages Mill makes the direct utilitarian claim that acts are right in virtue of their utility. In the opening paragraph of Chapter II, he tells us that utilitarians are “those who stand up for utility as the test of right and wrong” (X: 209). Later in that chapter, he says that utilitarianism requires that “utility or happiness [be] considered as the directive rule of human conduct” (X: 213). Still later in Chapter II, he describes utilitarianism as a “standard of what is right in conduct” (X: 218). Even Chapter V, which will eventually introduce some indirect elements, begins with Mill asserting that utilitarianism is “the doctrine that utility or happiness is the criterion of right and wrong” (X: 240).

By contrast, an *indirect utilitarian* assesses something not by the value of its consequences but by its relation to something else that is then assessed by its consequences for happiness. So, for instance, the most familiar form of indirect utilitarianism is *rule utilitarianism*, which claims that an act is obligatory or right insofar as it conforms to a rule whose acceptance value for happiness is at least as good as any alternative rule available to the agent.

Mill is sometimes read as a rule utilitarian (Urmson 1953; Miller 2010: Ch. 6; Eggleston 2011; Martin 2011). The main rationale for this reading is the importance he attaches to secondary principles in moral reasoning. He defends the utilitarian’s appeal to various moral precepts as secondary principles, such as veracity, fidelity, and fair play (*Utilitarianism*, X: 224–6). He thinks that optimal secondary principles satisfy two conditions.

- (1) Employing the principle generally but imperfectly leads to optimal results.
- (2) One cannot in general reliably discriminate whether or, if so, when adherence to the principle would produce suboptimal results.

When these two conditions are met, Mill believes, agents should follow these principles automatically and uncritically most of the time. In these cases, agents consult only secondary principles; they do not use them as heuristics in a utility calculation. They have genuine deliberative autonomy. But to say this is not to say that agents should never consult the utilitarian first principle or assess the acceptance value of secondary principles. They should periodically step back and review, as best they can, whether the principle continues to satisfy conditions (1) and (2). Also, they should set aside these secondary principles and make direct appeal to the principle of utility in unusual cases in which it is especially clear that the effects of adhering to the principle would be significantly, and not just marginally, suboptimal, and in cases in which secondary principles, each of which has a utilitarian justification, conflict (X: 219–20, 224–6).

Whether Mill's claims about the importance of secondary principles imply rule utilitarianism depends, in part, on whether he wants to define right action in terms of the best set of secondary principles or whether they are just a generally reliable way of doing what is in fact best and right. If he defines right action in terms of conformity with principles with optimal acceptance value, then he is a rule utilitarian. But if the right action is the best action, and secondary principles are just a reliable (though imperfect) way of identifying what is best, then Mill is an act utilitarian. An adequate discussion of this issue is not possible here, but a good case can be made that Mill's main claims about the importance of secondary principles can be squared with his act utilitarian commitments (Brink 2013: Ch. 4).

The same cannot be said about Mill's indirect utilitarian claims about duty in Chapter V of *Utilitarianism*. In one of Mill's clearest discussions of the inter-relations among duty, justice, and rights, he develops a conception of justice and rights that is part of an indirect utilitarian conception of duty. In particular, Mill links duty and sanctions.

For the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it – if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. (X: 246)

Here Mill defines wrongness and, by implication, duty, not directly in terms of the nature of the action or its consequences but indirectly in terms of appropriate responses to it. He appears to believe that one is under an obligation or duty to do something just in case failure to do it is wrong and that an action is wrong just in case some kind of external or internal sanction – legal punishment, social censure, or self-reproach – ought to be applied to its performance.

Sanctions determine when conduct is wrong, which allows Mill to say that an act is one's duty just in case its omission would be appropriate to sanction. In this way, the sanction test distinguishes duty from expediency (X: 246–8). Not all suboptimal or inexpedient acts are wrong, only those in which one ought to apply some sort of sanction (at least, self-reproach) to them.

Justice is a proper part of duty. Justice involves duties that are perfect duties – that is, duties that are correlated with rights (X: 246–8).

Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as a matter of right. (X: 247)

An act is unjust just in case it is wrong and violates someone's rights (X: 249–50). Someone has a right just in case she has a claim that society ought to protect by force of law or public opinion.

When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have

something guaranteed to him by society, we say that he has a right to it. If we desire to prove that anything does not belong to him by right, we think this is done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave it to chance, or to his own exertions. (X: 250)

Notice that these relationships among duty, justice, and rights do not yet introduce any utilitarian elements. But Mill does think that whether sanctions ought to be applied to an action – and hence whether it is wrong – and whether society ought to enforce an individual's claim – and hence whether she has a right – both depend upon the utility or expediency of doing so (X: 250). He does not say precisely what standard of expediency he has in mind. To fix ideas, let us assume that the relevant standard is optimality: something is one's duty just in case it is optimal to sanction its omission, and something is one's right just in case it is optimal for society to enforce one's claim to that thing.

Because this account of duty defines the rightness and wrongness of an act, not in terms of its utility, as act utilitarianism does, but in terms of the utility of applying sanctions to the conduct, it is an indirect form of utilitarianism. Because justice is a species of duty, it inherits this indirect character (cf. Lyons 1994). Because it makes various deontic categories depend upon the utility of sanctioning responses, we might call this conception of duty, justice, and rights *sanction utilitarianism*. Because sanction utilitarianism is a species of indirect utilitarianism, it is inconsistent with act utilitarianism.

## 6. The Sanction Theory of Rights

Mill links justice and rights – claims of justice are claims of individual right. According to the sanction theory, rights and, hence, justice are individual claims that it is useful to protect and enforce. Central among these rights are rights to basic liberties and to the conditions necessary for or conducive to equality of opportunity. Does the sanction theory provide a good reconciliation of rights and justice with utility?

For one thing, the sanction theory of rights inherits a problem from the sanction theory of duty. Sanction utilitarianism is a *hybrid* of indirect and direct elements. For while it provides an indirect utilitarian theory of duty, which applies to any kind of conduct, the account it provides of when sanctions should be applied to conduct is direct – it depends upon the consequences of applying sanctions. Because imposing sanctions is itself a form of conduct, the direct and indirect elements of sanction utilitarianism conflict. The general indirect criterion is incompatible with the direct criterion for applying sanctions.

- (1) Any act is right iff it is optimal to apply sanctions to its omission (the indirect claim).
- (2) Applying sanctions is right iff doing so is optimal (the direct claim).

This inconsistency in the sanction theory of duty infects the sanction theory of rights.

- (1) X has a right to Y iff society ought to protect X's claim to Y from interference (the first part of the sanction theory of rights).

- (2) Society ought to protect X's claim to Y from interference iff doing so is optimal (the direct part of the sanction theory of rights).
- (3) Society ought to protect X's claim to Y from interference iff it would be optimal to blame society for failing to do so (the indirect sanction theory of duty).

(2) and (3) are inconsistent. One could respond by decoupling the sanction theory of rights from the sanction theory of duty. (2) is only problematic when conjoined with the sanction theory of duty. One could maintain the sanction theory of rights by rejecting the sanction theory of duty and accepting a direct utilitarian conception of duty.

But the sanction theory of rights has problems of its own. The sanction theory of rights treats the desirability of social enforcement as constitutive of the idea of a right. But this seems to get things backward. It is because we have rights that society ought to enforce them; it is not that we have rights to whatever society ought to enforce. The desirability of social enforcement seems *consequential* on the existence of the right.

This is even clearer, because there are some claims that society ought to enforce that are not rights. Among the things that society ought to recognize and protect are both rights and *privileges*. The exact line between rights and privileges is not always clear. But we recognize the distinction in claiming that some interests and opportunities that the state ought to protect are not ones that can be claimed as a matter of right. Perhaps a driver's license, access to public transportation, or certain income tax credits are best understood as privileges, rather than rights. The intuitive idea with privileges is that though there are good reasons for the state to recognize and protect them, they are not things that can be claimed as a matter of individual right or entitlement. This shows that the usefulness of social enforcement cannot be constitutive of a right, because otherwise privileges would be rights. But it also underscores the idea that even with rights, the desirability of social enforcement is consequential on, and so not constitutive of, the existence of the right.

## 7. Rights as Secondary Principles

Though the sanction theory of rights is the conception Mill introduces when he is explicitly defining rights in Chapter V of *Utilitarianism*, he has the resources for other conceptions of rights that do not presuppose indirect utilitarianism. As we have seen, in *On Liberty* Mill recognizes rights but only such rights as can be given a utilitarian grounding (XVIII: 224). That means that rights must be subordinate to the utilitarian first principle, and that suggests that Mill regards rights as especially important *secondary principles* (cf. Berger 1984: Chs. 3–4). On this conception, rights are rules that insulate or protect an individual's interest or liberty from certain kinds of interference and that make no direct reference to the good consequences of insulation. We should observe such rules more or less uncritically and set them aside only when adherence to them is clearly suboptimal or in cases of conflicts among such rules (rights). In such exceptional cases, we should make direct appeal to the principle of utility.

Why should we regulate our conduct by such rules? Because doing so is generally but imperfectly optimal, and because we are unable to discriminate for cases in which deviation from the rules is suboptimal without deviating from them in other cases in

which it is not. Why should we believe that there are interests or liberties that are generally but imperfectly optimal to protect? Mill's answer is that some interests and liberties play a more fundamental role in human happiness than others.

While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice – that of a right residing in an individual – implies and testifies to this more binding obligation. (*Utilitarianism*, X: 255; cf. X: 255–6, 259)

Like other goods that are, as a class, especially valuable, Mill thinks that we should make them the object of secondary principles that regulate our deliberations and reasoning.

The special importance of the interests protected by rights suggests that Mill might claim not simply that rights are secondary principles but further that rights are *especially stringent* secondary principles. For we can assess the stringency of any moral claim by the number of other claims it defeats when they conflict. The reasons generated by secondary principles tend to defeat ordinary pro tanto reasons for action, which explains the stringency of secondary rules in relation to ordinary pro tanto reasons. But we might also recognize that some secondary principles tend to defeat others in cases of conflict, which makes the first sort of secondary principles more stringent than the second. Mill presumably thinks that these more stringent secondary rules concern security and other necessary conditions for exercising our higher capacities. One version of the secondary principle conception of rights would identify rights with especially stringent secondary principles. However, there will be conflicts among rights of comparable stringency, and these must be resolved by direct appeal to utility.

## 8. Rights as Pre-Eminent Goods

In explaining the secondary principle conception of rights, we saw that Mill explains why it is generally but imperfectly optimal to protect some interests and liberties by claiming that some interests and liberties play an especially fundamental role in human happiness (*Utilitarianism*, X: 255–9). But this claim suggests a distinct conception of rights, as protections of pre-eminent goods. This conception of rights rests on Mill's assumptions about happiness and the role of individual rights to basic interests and liberties in securing happiness.

On this reading, it is crucial that Mill's conception of happiness is a pluralistic one in which some elements of happiness trump or dominate others. We know that Mill accepts a conception of happiness that insists on the superiority of activities that exercise our capacities for practical deliberation and self-governance. Indeed, in the higher pleasures doctrine Mill insists that such pursuits are discontinuously better than mere contentment. But then we can see how superior goods trump lesser goods. Claims to liberties and opportunities that are necessary for or highly conducive to such

higher-order goods would also trump the promotion of lesser goods. On this view, honoring rights is normally the way to promote utility because the goods rights protect are higher-order goods. But the presumption in favor of honoring rights must be abandoned when rights conflict. Some suits trump others, but within the trump suit, the higher value card wins. So too, when rights conflict, the conflict should be resolved by determining which resolution better promotes utility.

## 9. Conclusion

Mill has a reasonably stable conception of what rights we have and what justice demands. Justice involves honoring individual rights, where possible. So Mill's conception of justice is given by his conception of rights. For Mill, our most important rights are to basic liberties, rather than liberty per se, and to conditions essential for preserving equality of opportunity. He defends these liberal rights by appeal to their role in furthering our higher-order interests in realizing our capacities for self-governance, which are constitutive of our nature as progressive beings.

He also tries to show that these liberal rights can be given a utilitarian foundation, so that they don't have to stand as non-derivative deontic notions, as the intuitionist claims. In fact, Mill is attracted to three different conceptions of how to reconcile rights and utility. In Chapter V of *Utilitarianism*, he articulates a sanction theory of rights according to which rights just are individual claims that it would be expedient for society to protect. But that view seems to inherit the incoherence of the sanction theory of duty, which mixes direct and indirect utilitarian claims in incompatible ways. Moreover, it fails to distinguish rights and privileges. Fortunately, Mill has the resources for two other utilitarian conceptions of rights. He can regard rights as especially important secondary principles. On this conception, rights are rules that insulate or protect an individual's interest or liberty from certain kinds of interference. Entrenched rules of this sort do not themselves make reference to the good consequences of insulation, but their adoption is justified by their good consequences for the happiness of progressive beings. Mill can also appeal to the hierarchy of values in his progressive conception of happiness to explain why liberal rights protect superior elements of happiness. For this reason, liberal rights trump other, lesser goods, and so honoring them is a normal part of promoting happiness. On this conception, rights are pre-eminent goods.

Fortunately, these two conceptions of rights are complementary, rather than competing. One could perhaps accept the conception of rights as especially important secondary principles without accepting the hierarchy of values ingredient in the conception of rights as pre-eminent goods. But the first claim will be even more plausible if we accept the second. Both conceptions imply that rights should normally be honored but allow that rights cannot be honored in cases of conflicts of rights. In such cases, conflicts should be resolved by determining which resolution better promotes overall utility. Moreover, both conceptions are compatible with direct utilitarianism, which provides Mill with a way to reconcile rights and utility that does not require him to give up his predominant commitment to direct utilitarianism.

Both of these conceptions of rights permit Mill to claim that rights are considerations that in normal circumstances trump or constrain the pursuit of other goods. But rights,

so conceived, are not absolute trumps or constraints, if only because rights can conflict. So neither conception captures every claim that has been made on behalf of rights. But it is not clear that the claims that rights cannot conflict and are absolute represent adequacy conditions on a conception of rights. But then the secondary principle and pre-eminent goods conceptions of rights show promise of vindicating Mill's claim to be able to give rights a utilitarian foundation.

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