

MILL'S AMBIVALENCE ABOUT RIGHTS¹

John Stuart Mill thinks that utility or the general happiness is the ultimate standard for moral assessment, but he also recognizes individual rights to important interests and liberties. This commitment to utility and rights is interesting, because nowadays it is common to suppose that utilitarians cannot recognize rights. Much contemporary work in moral and political philosophy assumes that rights acts as trumps or side constraints on the pursuit of utility and is skeptical about the compatibility of utility and rights. Understanding Mill's theory of rights is a good test of this conventional wisdom.

Understanding how Mill might reconcile utility and rights requires understanding his theory of rights. Though Mill is clear about the existence and importance of rights, he is ambivalent about how best to understand the nature of rights. In particular, he is attracted to three distinct conceptions of the nature of rights or, at least, he has the resources to articulate three distinct conceptions of rights. On one conception, rights function as an important kind of *secondary principle* to be used in moral reasoning in lieu of direct appeals to the utilitarian first principle. On another conception, rights protect certain interests and liberties that qualify as *pre-eminent goods*, higher in importance than other goods. Both of these conceptions of rights can be squared, I believe, with the *direct* utilitarian assumption that any object of moral assessment (e.g. action, motive, policy, or institution) should be assessed by and in proportion to the value of its consequences for the general happiness. Mill's third conception of rights understands them, at least in part, as *claims that it is especially useful for society to enforce*. This conception of rights, I believe, requires adopting a form of *indirect* utilitarianism, which assumes that an object of moral assessment should be assessed, not by the value of its consequences for human happiness, but by its conformity to something else (e.g. norms or responses) that has or have good or optimal acceptance value.

In what follows, I will sketch these three conceptions of rights and the ways they draw on and interact with other aspects of Mill's utilitarianism. I will compare and contrast the commitments of the three conceptions and explore the different ways they reconcile utility and rights. To do so, I will need to make some assumptions about other aspects of Mill's moral philosophy. Most of these assumptions will be familiar, but some will be controversial. Where I cannot provide systematic defense of these assumptions, I hope my discussion and assumptions will nonetheless be reasonably clear and self-contained.

To appreciate how Mill might reconcile rights and utility, we need some grasp of how he understands utilitarianism, especially its theory of duty. This issue raises its own interpretive

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difficulties, which I cannot discuss here in proper detail. But I will suggest some reason for thinking that Mill is also ambivalent about the nature of duty, especially as between direct and indirect utilitarian conceptions. This ambivalence will be directly relevant to understanding Mills' ambivalence about rights.²

1. DIRECT AND INDIRECT UTILITARIANISM

In order to understand what is at stake among some different interpretations of Mill's theories of duty and of rights, we need to make some now generally familiar distinctions. In particular, we need to distinguish between direct and indirect utilitarianism.

- **Direct Utilitarianism:** Any object of moral assessment (e.g. action, motive, policy, or institution) should be assessed by and in proportion to the value of its consequences for the general happiness.
- **Indirect Utilitarianism:** Any object of moral assessment should be assessed, not by the value of its consequences for the general happiness, but by its conformity to something else (e.g. norms or motives) that has (have) good or optimal acceptance value.

So formulated, direct and indirect utilitarianism are general theories that apply, at least in principle, to any object of moral assessment. But our focus here is on right action or duty. Act utilitarianism is the most familiar form of direct utilitarianism applied to action, whereas the most common indirect utilitarian theory of duty is rule utilitarianism.

- **Act Utilitarianism:** An act is right insofar as its consequences for the general happiness are at least as good as any alternative available to the agent.
- **Rule Utilitarianism:** An act is right insofar as it conforms to a rule whose acceptance value for the general happiness is at least as great as any alternative rule available to the agent.

This conception of act utilitarianism is both *maximizing*, because it identifies the right action with the best available action, and *scalar*, because it recognizes that rightness can come in degrees, depending the action's proximity to the best.³ The right act is the optimal act, but some suboptimal acts can be more right and less wrong than others. Similarly, this conception of rule utilitarianism assesses rules in both maximizing and scalar fashion.

Act utilitarianism appears to say that we should adhere to familiar moral precepts about honesty, fidelity, and nonmaleficence only when doing so has the best consequences. It is a counter-intuitive doctrine to the extent that we regard some of these precepts as categorical moral rules or principles. Rule utilitarianism may seem less counter-intuitive, because it can explain why one ought to adhere to certain rules or precepts, even when doing so does not have the best

²I discuss Mill's conceptions of duty in greater detail in "Mill's Ambivalence about Duty" (unpublished but available on SSRN). Here, I draw on the essentials of that essay as background to discussing Mill's ambivalence about rights.

³This conception of act utilitarianism might be contrasted with *satisficing* act utilitarianism, which says that an act is right just in case its consequences for the general happiness are *good enough*. Though satisficing act utilitarianism is also a form of direct utilitarianism, Mill shows no signs of being attracted to it, and I will not discuss it further here.

consequences, provided doing so is generally optimal. Act utilitarianism must condemn following rules when doing so is suboptimal; rule utilitarianism need not. But not everyone agrees that this makes rule utilitarianism superior to act utilitarianism. Some think that we are wrong to embrace categorical moral rules and principles. Though these rules and principles might be good rules of thumb, they are not exceptionless generalizations. Moreover, rule utilitarianism may seem ad hoc. If utility is the appropriate test for rules, then why shouldn't we assess actions by the same criterion? Isn't rule utilitarianism a form of irrational rule worship? I raise these issues here, not to take a stand on them, but to indicate what might be at stake in the debate between direct and indirect utilitarianism.

2. UTILITARIANISM AS A STANDARD OF CONDUCT

Chapter II of Utilitarianism purports to explain what utilitarianism is.⁴ In an early and famous passage, Mill describes that doctrine this way.

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 [II 2].

For obvious reasons, this famous passage is sometimes called the Proportionality Doctrine.

As we will see, the Proportionality Doctrine has been interpreted in both act-utilitarian and rule-utilitarian ways. But before we get to these issues, we should attend to a different question about the sort of principle that utilitarianism is. We might expect a utilitarian (act or rule) to apply the utilitarian principle in her deliberations. Consider act utilitarianism for a moment. We might expect such a utilitarian to be motivated by pure disinterested benevolence and to deliberate by calculating expected utility. But it is a practical question how to reason or be motivated, and act utilitarianism implies that this practical question, like all practical questions, is correctly answered by what would maximize utility. Utilitarian calculation is time-consuming and often unreliable or subject to bias and distortion. For such reasons, we may better approximate the utilitarian standard if we don't always try to approximate it. Mill says that to suppose that one must always consciously employ the utilitarian principle in making decisions

... is to mistake the very meaning of a standard of morals and confound the rule of action with the motive of it. It is the business of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do

⁴The definitive edition of Mill's writings is Collected Works of John Stuart Mill [CW], 33 vols., ed. J. Robson (Toronto: University of Toronto Press, 1965-91). In order to facilitate common reference among readers using different editions, I will, in general, refer to Mill's writings using natural divisions in his texts, such as chapter, section, and/or paragraph. So, for instance, 'U I 2' would refer to paragraph 2 of chapter I of Utilitarianism. Unless otherwise indicated, all references to Mill's writings will be to Utilitarianism. Any references to CW will be by volume and page number. So, for instance, 'CW X 33' would refer to page 33 of volume X of Mill's collected works.

shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done if the rule of duty does not condemn them [II 18].

Later utilitarians, such as Henry Sidgwick, have emphasized this point, insisting that utilitarianism provides a *standard* of right action, not necessarily a *decision procedure*.

Finally, the doctrine that Universal Happiness is the ultimate *standard* must not be understood to imply that Universal Benevolence is the only right or always the best *motive* of action. For, as we have observed, it is not necessary that the end which gives the criterion of rightness should always be the end at which we consciously aim: and if experience shows that the general happiness will be more satisfactorily obtained if men frequently act from other motives than pure universal philanthropy, it is obvious that these other motives are reasonably to be preferred on Utilitarian principles.⁵

If utilitarianism is itself the standard of right conduct, not a decision procedure, then what sort of decision procedure should the utilitarian endorse, and what role should the principle of utility play in moral reasoning? As we will see (§4), Mill thinks that much moral reasoning should be governed by secondary precepts or principles about such things as fidelity, fair play, and honesty that make no direct reference to utility but whose general observance does promote utility. These secondary principles should be set aside in favor of direct appeals to the utilitarian first principle in cases in which adherence to the secondary precept would have obviously inferior consequences or in which such secondary principles conflict (II 19, 24-25).

The question that concerns us here is what kind of utilitarian standard Mill endorses. Is he an act utilitarian, a rule utilitarian, or some other kind of indirect utilitarian?

3. ACT UTILITARIANISM

Several of Mill's characterizations of utilitarianism imply or at least suggest a form of direct utilitarianism, specifically act utilitarianism. Chapter II, we saw, is where Mill purports to say what the doctrine of utilitarianism does and does not say. In the opening paragraph, he tells us that utilitarians are "those who stand up for utility as the test of right and wrong" (II 1). According to the Proportionality Doctrine, introduced in the next paragraph, utilitarianism holds "that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness" (II 2). Later in that chapter, he says that it requires that "utility or happiness [be] considered as the directive rule of human conduct" (II 8). Still later in Chapter II, he describes utilitarianism as a "standard of what is right in conduct" (II 17). 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" (V 1). These passages all seem to endorse a form of direct utilitarianism, specifically act utilitarianism.

4. RULE UTILITARIANISM?

But not everyone agrees. J.O. Urmson has famously defended a rule utilitarian reading of Mill. One of Urmson's reasons for this rule utilitarian reading appeals to Mill's reliance on various rules and secondary principles in moral reasoning. We will examine that rationale

⁵Henry Sidgwick, The Methods of Ethics, 7th ed. (New York: Macmillan, 1907), p. 413.

shortly. But, perhaps surprisingly, Urmson also appeals to the Proportionality Doctrine as requiring a rule utilitarian interpretation of Mill.

A. Felicific Tendencies. Recall that the Proportionality Doctrine says, in part, that utilitarianism holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness (II 2)." Urmson claims that we can make sense of an action's tendency to produce good or bad consequences only as a claim about what is true of a *class* or *type* of actions. Token actions produce specifiable consequences; only types of actions have tendencies. On Urmson's interpretation, Mill is really saying that an action is right if it is a token of a type of act that tends to have good or optimal consequences. But then the Proportionality Doctrine would espouse a form of rule utilitarianism. But several considerations count against Urmson's interpretation of the Proportionality Doctrine.

First, it was common among the Philosophical Radicals to formulate utilitarianism, as the Proportionality Doctrine does, in terms of the felicific tendencies of actions. For instance, Jeremy Bentham does this early in his Introduction to the Principles of Morals and Legislation (1789).⁶

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness. I say of every action whatsoever; and therefore not only every action of a private individual, but of every measure of government [I 2; cf. I 3, 6].

Here Bentham clearly ascribes the felicific tendency to action tokens, and he equates an action's felicific tendency with the extent to which it promotes utility. Later, Bentham repeats this extensional understanding of tendencies.

The general tendency of an act is more or less pernicious, according to the sum total of its consequences: that is, according to the differences between the sum of such as are good, and the sum of such as are evil [VII 2; cf. IV 5].

So Bentham claims that action tokens have felicific tendencies and that an action's felicific tendency consists in the value of its actual consequences. If we interpret Mill's talk of felicific tendencies in the Proportionality Doctrine as Bentham understands his own talk of such tendencies, then we have strong evidence against Urmson's reading and in favor of an act utilitarian reading of the Proportionality Doctrine.⁷

Bentham also suggests a slightly different understanding of an action's felicific tendencies. Particular actions have many consequences that are distributed both across persons and across times. The felicific or hedonic valence of these various consequences can be mixed. A given act may have consequences that are good for A and B but bad for C or bad for A and B

⁶Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, ed. J. Burns and H.L.A. Hart (London: Athlone Press, 1970).

⁷My claims here are indebted to Fred Berger, Happiness, Justice, and Freedom: The Moral and Political Philosophy of John Stuart Mill (Los Angeles: University of California Press, 1984), pp. 73-78.

in the short-run but better for them in the long-run. We could speak of an action's tendency to promote happiness either as a way of picking out its beneficial consequences or perhaps as a way of signaling that its beneficial consequences outweigh or predominate over its harmful consequences.

Sum up all the values of all the *pleasures* on the one side, and those of all the *pains* on the other. The balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole, with respect to the interests of that *individual* person; if on the side of pain, the *bad* tendency of it upon the whole [Principles IV 5].

But then the Proportionality Doctrine would be asserting that an action is right insofar as it has beneficial consequences or insofar as its beneficial consequences predominate. But these are also act utilitarian claims.

B. Secondary Principles. But Urmson does not appeal only to the Proportionality Doctrine to support his rule utilitarian interpretation. He also defends this interpretation as a reading of Mill's claims about the importance of secondary principles and rules in our moral reasoning. He recognizes that an act utilitarian might appeal to rules or principles as rules of thumb in doing utilitarian calculations, but he insists that Mill's secondary principles are not mere rules of thumb.

We can see the need for rules and principles that do not refer to utility by remembering Mill's distinction between a moral standard and a decision procedure (II 19). In his Autobiography Mill notes the case for pursuing our own happiness indirectly.

I never, indeed, wavered in the conviction that happiness is the test of all rules of conduct, and the end of life. But I now thought that this end was only to be attained by not making it the direct end. Those only are happy (I thought) who have their minds fixed on some object other than their own happiness; on the happiness of others, on the improvement of mankind, even on some art or pursuit, followed not as a means, but as itself an ideal end. Aiming thus, at something else, they find happiness by the way [Ch. V para. 6/ CW I 145].

The need for indirection in the pursuit of one's own happiness is sometimes called the paradox of egoism or prudence. It requires that one pursue things other than one's own happiness for their own sakes in order to be happy. Mill treats these plural ends as secondary principles. He holds similar views about the need for secondary principles in the promotion of universal happiness. For instance, in Utilitarianism he defends the utilitarian's appeal to various moral precepts as secondary principles (II 24-25). But it's not entirely clear how these secondary principles are related to the utilitarian first principle. Mill's discussion of the indirect pursuit of one's own happiness suggests a possible relationship.

- Secondary principles are false targets for the successful pursuit of one's primary objective, as when one shouldn't think too hard about how to make a free throw if one wants to increase one's chances of making the shot or when one aims to the left of the green so as to compensate for a slice in one's golf swing.

However, the immediate context of discussion in Chapter II of Utilitarianism suggests a different relationship.

- Secondary principles are generally but imperfectly reliable guides to doing what will maximize happiness.

Secondary principles, so understood, might sound like mere rules of thumb. But Mill does not regard them as mere heuristics in a utility calculation. They don't themselves make reference to utility, and he thinks they should be adhered to uncritically in ordinary circumstances. He goes so far as to describe the rule against lying as "sacred" (II 23). He seems to believe that secondary principles, such as the principle against lying, often satisfy two conditions.

1. Following 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. 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 disastrous and in cases in which secondary principles, each of which has a utilitarian justification, conflict (II 19, 24-25). But, otherwise, they should regulate their conduct according to these secondary principles without recourse to the utilitarian first principle. Regulating one's behavior in this way by secondary principles is what will best promote happiness. Mill summarizes this picture in A System of Logic.

I do not mean to assert that the promotion of happiness should be itself the end of all actions, or even all rules of action. It is the justification, and ought to be the controller, of all ends, but it is not itself the sole end. There are many virtuous actions, and even virtuous modes of action (though the cases are, I think, less frequent than is often supposed) by which happiness in the particular instance is sacrificed, more pain being produced than pleasure. But conduct of which this can be truly asserted, admits of justification only because it can be shown that on the whole more happiness will exist in the world, if feelings are cultivated which will make people, in certain cases, regardless of happiness [VI.xii.7/CW VIII 952].

Mill makes similar claims in his essay "On Bentham"

We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement in persons who differ in their ultimate standard; and about which there does exist a much greater unanimity among thinking persons, than might be supposed from their diametrical divergence on the great questions of moral metaphysics. ... Those who adopt utility as a standard can seldom apply it truly except through the secondary principles; those who reject it, generally do no more than erect those secondary

principles into first principles. It is when two or more of the secondary principles conflict, that a direct appeal to some first principle becomes necessary; and then commences the practical importance of the utilitarian controversy ... [para. 61/CW X 110-11].

Mill's claims about the nature and importance of secondary principles and precepts which are and ought to be regulated by utilitarian first principles form an important part of his views about moral reasoning. His utilitarian justification of discrete secondary principles is intended as a contrast with the intuitionism of William Whewell and others. As he makes clear in his essay "Whewell on Moral Philosophy" (1852), Mill thinks that the intuitionist wrongly treats familiar moral precepts as ultimate moral factors whose justification is supposed to be self-evident to reason (CW X). By contrast, Mill's account of secondary principles recognizes their importance in moral reasoning but insists that they are neither innate nor infallible; they are precepts that have been adopted and internalized because of their acceptance value, and their continued use should be suitably regulated by their ongoing comparative acceptance value. Far from undermining utilitarian first principles, Mill thinks, appeal to the importance of such moral principles actually provides support for utilitarianism.

It seems clear that Mill is assigning to secondary principles or rules a role that goes beyond rules of thumb in a utilitarian calculation. In the passage from A System of Logic above he claims that utility justifies which principles or rules we follow. Does this commit Mill to rule utilitarianism? Urmson thinks it does.

But Mill's claims about secondary principles are not inconsistent with act utilitarianism. For one thing, though Mill does not treat secondary principles as mere rules of thumb in utilitarian calculation, he does not think that they should be followed uncritically or independently of their consequences. He thinks that they should be set aside in favor of direct appeal to the principle of utility when following them would be clearly suboptimal or when there is a conflict among secondary principles.

Moreover, act utilitarianism permits one to act on discrete moral precepts or principles that make no direct reference to utility if this results in one performing the optimal action. Indeed, the act utilitarian can allow the agent to follow principles or rules even when this sometimes results in suboptimal acts being performed. Recall that act utilitarianism is a species of direct utilitarianism, which assesses things by their (actual) consequences. But the direct utilitarian assesses things other than actions, including motives, principles, and rules. Now it might be true that for a particular agent the rules with the optimal acceptance value direct him to perform actions some of which are suboptimal. If he cannot reliably identify in advance those cases where adherence to the rule would be suboptimal or if he is not sufficiently fine-grained psychologically to deviate from the rule here where doing so is optimal without deviating from the rule in other cases where it is not, then he will do more good by following the rules uncritically even though he knows that by doing so he will perform some suboptimal actions. In such a situation, a direct utilitarian should want the agent to follow the optimal rules, rather than perform the optimal action. This would be rule utilitarianism (not direct utilitarianism) only if we made the further claim that the right action is to follow the optimal rules. But the direct utilitarian will refuse this further move. She will say that the right action is the optimal action, but that for some agents it can in principle be best to act from optimal motives, rather than

perform the right action. The suboptimal actions the agent thus performs will be wrong, but they can be cases of *blameless wrongdoing*, perhaps even *praiseworthy wrongdoing*.⁸

Important as it is to understanding some aspects of Mill's utilitarianism, this account of secondary principles does not force a choice between direct, act utilitarianism and indirect, rule utilitarianism. A fortiori, it does not provide reason to reject the act utilitarian strand in Mill's formulation of the utilitarian doctrine.⁹

5. SANCTION UTILITARIANISM

So far, the picture we get is that Mill endorses act utilitarianism as a standard of right conduct or duty, even if he does not require it to be a decision procedure or to supply a set of motives. Though he believes in the importance of secondary rules that can and should regulate much moral reasoning, this does not require any departure from direct utilitarianism. However, Chapter V of Utilitarianism introduces claims about duty, justice, and rights that are hard to square with direct or act utilitarianism.

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 [V 14].

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 -- punishment, social censure, or self-reproach -- ought to be applied to its performance. This test distinguishes duty from expediency (V 14, 15). 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 (V 15).

⁸It might be thought that the optimal action and the action based on optimal motives could not come apart in this way, because the negative effects of departing from optimal rules must count against the optimality of departing from optimal rules. This is a complicated issue. Our actions do affect our motives and dispositions. But one act does not a motive or disposition make, from which it follows, I believe, that we cannot assume that the best action is always the same as the action required by the best motives.

⁹Some writers understand indirect utilitarianism as including any utilitarian theory that permits psychological indirection, in the form of false targets or secondary principles, as a way of satisfying the utilitarian standard. But, as I have argued, these forms of indirection do not require that the standard itself be formulated in indirect terms. Our focus has been on whether Mill's standard itself is direct or indirect.

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 [V 15].

An act is just if and only if it is not unjust, and it is unjust just in case it is wrong and violates someone's rights (V 23). 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 [V 24].

Mill makes or implies several claims here. Let's try to distinguish some of them and see how he relates them.

1. An act is wrong iff some sort of sanction ought to be applied to its performance.
2. An act is obligatory or one's duty iff failure to do it is wrong.
3. Hence, an act is obligatory or one's duty iff some sort of sanction ought to be applied to the failure to do it.
4. An act is permissible iff it is not wrong to perform it.
5. Hence, an act is permissible iff it is not the case that some sort of sanction ought to be applied to its performance.
6. Not all inexpedient or suboptimal acts are wrong.
7. Hence, it is not always one's obligation or duty to perform the optimal act.
8. Hence, some suboptimal acts are permissible
9. Hence, there can be supererogatory acts.
10. Justice is a species of duty in which the failure to act justly is not only wrong but also violates rights.
11. Someone has a right to x iff society ought to protect her claim to x by force of law or public opinion.
12. Hence, unjust acts are wrongs that society ought to prohibit by force of law or opinion.
13. Hence, just acts are duties that society ought to require by force of law or opinion.

Notice that these relationships among duty, justice, and rights and other deontic notions 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 (V 25). However, he does not say precisely what standard of expediency he has in mind. In particular, he does not say whether something counts as wrong just in case it is optimal to sanction that conduct or just in case it would be beneficial to sanction it, etc. The class of wrong acts is narrower if we require that sanctions be optimal than if we require that they be merely beneficial. Unless otherwise noted, I will ignore this interesting question about the proper utilitarian standard for applying sanctions.

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 the indirect character of sanction utilitarianism. In "Mill's Theory of Morality" and other essays, David Lyons has drawn attention to this indirect aspect of Mill's utilitarianism.¹⁰ Lyons does not have a name for this form of indirect utilitarianism. Because it makes the rightness and wrongness of conduct depend upon the utility of sanctioning that conduct in some way, we might call it *sanction utilitarianism*. Because sanction utilitarianism is a species of indirect utilitarianism, it is inconsistent with act utilitarianism.

While I am indebted to Lyons' analysis of Mill's theory of duty in Chapter V of Utilitarianism, I disagree with the significance he attaches to sanction utilitarianism. Lyons concludes from the fact that Mill's indirect account of duty is not act-utilitarian that Mill is not an act utilitarian. But whereas I agree with the premise, the conclusion does not follow. The fact that Mill sometimes makes claims that do not fit with act utilitarianism does not mean that he does not elsewhere make commitments to act utilitarianism. The problem is simply that Mill is attracted to different utilitarian conceptions of right action. While the account of duty in chapter V represents an indirect form of utilitarianism, Mill elsewhere – and on several occasions -- assigns utility a direct role in the determination of right and wrong action. The introduction of indirect utilitarian ideas in Chapter V of Utilitarianism into an account of utilitarianism that is otherwise act utilitarian reveals a fundamental tension in Mill's thought about duty.

6. SANCTION vs. ACT UTILITARIANISM

Given Mill's ambivalence between direct and indirect utilitarianism, it is natural to inquire whether one view is more plausible than the other. Some of Mill's claims in Chapter V suggest a possible advantage that sanction utilitarianism might have. In articulating sanction utilitarianism, Mill claims that it allows him to distinguish duty and expediency and claim that not all inexpedient acts are wrong; inexpedient acts are only wrong when it is good or optimal to sanction them. This suggests that sanction utilitarianism may be preferable to act utilitarianism, because it has a more plausible account of the relation among different deontic categories.

Consider some of the implications of act utilitarianism. Act utilitarianism implies that I do wrong every time I fail to do the very best action, even when the suboptimal act that I perform is very good indeed. That may seem harsh and overly demanding. To see why, consider a familiar fourfold deontic distinction.

- a) wrong or forbidden,
- b) permissible,
- c) obligatory, and
- d) supererogatory

According to commonsense thinking, the obligatory is just a proper part of the permissible, and there are many permissible acts that are neither obligatory nor wrong. Common sense also recognizes a class of supererogatory acts that are above and beyond the call of duty.

By contrast, act utilitarian seems unable to account for this fourfold distinction. Because it makes the optimal obligatory and the suboptimal wrong, it appears to expand the domain of the

¹⁰Lyons, Rights, Welfare, and Mill's Moral Theory, chs. 2 and 3.

forbidden. Act utilitarianism also collapses the distinction between the permissible and the obligatory, treating all non-obligatory acts as impermissible. Moreover, act utilitarianism recognizes no supererogatory acts. If the optimal is already one's duty, there appears to be no room for the supererogatory.

By contrast, sanction utilitarianism does not appear to have these problems. It offers a distinct account of each category.¹¹

- a) Wrong or forbidden acts are those whose performance it is optimal to blame.
- b) Permissible acts are those whose performance it is not optimal to blame.
- c) Obligatory acts are those whose omission it is optimal to blame.
- d) Supererogatory acts are permissible acts that are especially expedient.

In this way, sanction utilitarianism appears to respect this common fourfold distinction and, in particular, to make room for the supererogatory.¹²

Is this a genuine advantage of sanction utilitarianism? The direct utilitarian can and should distinguish between the moral assessment of an act and the moral assessment of the act of praising or blaming that act. Each should be assessed, the direct utilitarian claims, by the utility of doing so. But then it is possible for there to be wrongdoing (a suboptimal act) that is blameless or even praiseworthy. But then the direct utilitarian can appeal to the same distinctions among praiseworthiness and blameworthiness that the sanction utilitarian appeals to, while allowing that these distinctions line up differently with her own deontic distinctions.

- a) Acts whose performance it is optimal to blame. This class will include only those suboptimal (wrong) acts that rise to the level of meriting blame.
- b) Acts whose performance it is not optimal to blame. This class will include optimal (obligatory) acts and some, but not all, suboptimal (wrong) acts that do not merit any kind of blame.
- c) Acts whose omission it is optimal to blame. This class would include only those acts whose nonperformance was so suboptimal (wrong) as to merit blame.
- d) Acts whose performance it is not optimal to blame and whose performance is optimal to praise. This class will include especially expedient acts, including the optimal (obligatory) act and several slightly suboptimal (wrong) acts.

Because this fourfold distinction is made, not directly in terms of deontic status, but in terms of patterns of praise and blame, it represents a kind of *pragmatic* reconstruction of the commonsense classification.

While there is no a priori guarantee that the direct utilitarian fourfold classification in terms of praise and blame will track perfectly the commonsense classification of deontic status,

¹¹Recall that Mill's sanction utilitarianism is agnostic about whether the utilitarian standard for applying sanctions should be optimality or something less, such as net benefit. For ease of comparison with act utilitarianism, I focus on the optimality criterion. But similar claims would apply, *mutatis mutandis*, for the comparison with the net benefit criterion.

¹²In "Auguste Comte and Positivism" (1865) Mill discusses the need to recognize categories of the permissible but not obligatory and the supererogatory (CW X 337-38), but he does not say or imply that this is a problem for act utilitarianism or an argument for sanction utilitarianism.

there is some reason to think that it will sort options in roughly the same ways and to wonder whether the direct utilitarian's classification might not provide reflectively acceptable guidance and correction where the commonsense classification provides uncertain or questionable guidance. In any case, it is hard to see how sanction utilitarianism could be preferable to act utilitarianism here, because they offer the same classification in terms of praise and blame. The only difference is that whereas sanction utilitarianism ties rightness and wrongness to praise and blame, act utilitarianism does not. But this looks more like a difference in moral book-keeping systems than a substantive moral difference.

However, sanction utilitarianism appears to have disadvantages that act utilitarianism does not. One such cost is that sanction utilitarianism appears to provide the *wrong sort of reason* for thinking an action wrong. It makes the wrongness of an act depend upon the appropriateness of punishing or, more generally, sanctioning it. But this inverts what many would regard as the usual dependency between duty and punishment. Many think that punishment is appropriate for wrong acts because they are wrong. This requires grounding their wrongness in some independent account; it is not the suitability for punishment that makes an act wrong. Retributivism is the view that punishment should be consequential on, and proportional to, the wrongness of the conduct in question. But then the retributivist owes us some independent account of what makes actions wrong. Usually, this debt is paid in deontological currency. By contrast, direct consequentialism must deny that an act's wrongness is either a necessary or a sufficient condition for punishment, because whether an act should be punished depends on the consequences, not of the original action, but of the act of punishing it. Though they disagree about whether punishment is always and only consequential on wrongness, the direct consequentialist and the retributivist agree on the need for an account of an action's wrongness that is prior to an independent of its suitability for punishment. It is only sanction consequentialism that must deny the explanatory priority of wrongness to punishment.

Another disadvantage of sanction utilitarianism is its *hybrid* structure. Sanction utilitarianism is impurely indirect. For while it provides an indirect utilitarian theory of duty, the account it provides of when sanctions should be applied to conduct is direct – it depends upon the consequences of applying sanctions. This isn't just the worry that sanction utilitarianism is a *mixed* theory – combining direct and indirect elements in an unmotivated or ad hoc way – though that would be cause for concern too. There is a deeper worry afoot. Sanction utilitarianism provides an indirect utilitarian account of the conditions under which an action – any action – is right or wrong. This general indirect criterion is that any action is wrong to which one ought to attach sanctions. But sanction utilitarianism goes on to explain when one ought to attach sanctions in direct utilitarian terms of whether doing so would be optimal (or, perhaps, beneficial). But imposing sanctions is a kind of action, and we can ask whether the imposition of a particular sanction would be right or wrong. The general criterion implies that we should answer this question about the rightness of applying sanctions in sanction-utilitarians terms, namely, by asking whether it would be right to sanction the failure to apply sanctions. This introduces a second-order sanction, whose rightness we can now ask about. We seem to be off on an infinite regress of sanctions. This is already cause for concern, inasmuch as this infinite regress looks vicious, because there appears to be no determinate fact to ground an answer to the original question about whether it is right to apply the first-order sanction. But matters are worse for sanction utilitarianism inasmuch as it implies a direct utilitarian answer to the question of whether it is right to apply sanctions that is inconsistent with the general criterion. As far as I can see, this renders sanction utilitarianism internally inconsistent.

In the face of these worries about sanction utilitarianism, it may be tempting to try to square sanction utilitarianism with act utilitarianism by noticing that in the crucial passage introducing sanction utilitarianism Mill says that “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” (V 14, emphasis added). One might argue that Mill is giving an account of when we *call* something wrong, not when it *is* wrong. Whereas being wrong is, as the act utilitarian claims, a matter of being suboptimal, we only bother to call something wrong if it rises to the level that it would be good or optimal to sanction. We might call this is a kind of *pragmatic* reading of sanction utilitarianism. It would be like the pragmatic strategy considered earlier in this section for the fourfold distinction among the wrong, the permissible, the obligatory, and the supererogatory. Considered in itself, this act utilitarian reading of the significance of sanction utilitarianism is reasonably plausible. The problem is that the surrounding text makes it difficult to sustain this reading without strain. For in the previous sentence Mill says that “the idea of penal sanction ... enters ... into any kind of wrong,” and in the sentence immediately following the statement of sanction utilitarianism he says “that this seems to be the real turning point of the distinction between morality and simple expediency”. Here, he seems to be speaking in his own voice and insisting on distinguishing one's duty from what is or would be optimal.

7. UTILITY AND RIGHTS

Mill recognizes individual rights, but they are based in some way on considerations of utility, as he insists in the introduction to On Liberty.

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 [I 11].

What are the prospects for Mill's utilitarian theory of rights? Rights theorists disagree about just what rights we have. But most rights theorists treat certain fundamental interests and liberties as protected by rights. Nowadays it is common to think that the utilitarian cannot recognize individual rights, because rights are conceived as “trumps” (Dworkin) or “side constraints” (Nozick) on the pursuit of collective goals.¹³ In particular, many writers think that individuals have rights to bodily integrity and basic liberties of thought and action such that it would be wrong to violate these rights even if doing so maximized utility. There may seem to be a special problem reconciling direct, act utilitarianism and rights, inasmuch as it's hard to see how such a utilitarian would recognize a moral currency that is independent of utility that could override considerations of utility.

It might help to assess the tension between utility and rights if we could identify possible features of rights that seem to resist capture within the utilitarian intellectual net.

¹³See Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977) and Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974).

1. Where rights are at stake, they should typically silence or trump direct appeals to utility in moral deliberation and reasoning.
2. Where rights are at stake, they typically trump or defeat moral claims about the value of pursuing collective goods.
3. It can be wrong to violate a right, even though doing so would maximize utility.
4. There can be a right to do something wrong.
5. Rights are side constraints on pursuit on the good.
6. Rights are absolute; it is always wrong to violate a right, even if doing so would maximize utility.

These assumptions about rights and utility are not all equally uncontroversial. Though all have some plausibility and adherents, some are more plausible than others. I have tried to arrange them from the most plausible to the least. In understanding and assessing Mill's conceptions of rights, it may help to see which, if any, of these claims about rights Mill can accept.

8. RIGHTS AS SECONDARY PRINCIPLES

One Millian conception of rights treats them as secondary principles whose observance is justified on utilitarian grounds. On this interpretation, rights are protected by rules that insulate 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 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.¹⁴

Why should we believe that there are interests or liberties that it is 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. Recall that in Chapter V of Utilitarianism Mill links the idea of justice and rights insofar as all injustices are not only wrong but violate rights.

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 [V 32; cf. V 33, 37-38].

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 conception of rights as secondary principles accounts for many common assumptions about rights and their relation to considerations of utility. First, rights, on this conception, do

¹⁴This is very much like what Berger calls the “strategy” conception of rights; see Berger, Happiness, Justice, and Freedom, chs. 3-4.

typically silence or trump direct appeals to utility in moral deliberation and reasoning. This is just how secondary principle function. They do not silence or trump appeals to utility in all circumstances; direct appeal to utility can and should be made when doing so is obviously or saliently suboptimal or when rights conflict with one another or other entrenched secondary principles.

This conception also implies that it is typically best and, hence, right to honor rights to individual interests or liberties over moral claims about the value of pursuing collective goods by interfering with those interests or liberties.

However, if we treat rights as secondary principles, then we are committed to the claim that there are or at least could be cases in which honoring rights is suboptimal. As long as we cannot identify and discriminate these cases reliably and efficiently, then we will be justified in respecting rights, even when doing so is suboptimal. These would be cases of blameless wrongdoing.

But that means that one might be unjustified in violating a right, even though doing so would maximize utility. This means that there can be a right to do something wrong or suboptimal.

Though rights can and will constrain direct pursuit of the good, they are not, on this conception, side constraints on the good, if that means that rights are absolute and cannot conflict. But these claims about rights are more extreme and controversial. It is not clear that they represent adequacy conditions on an account of rights.

9. RIGHTS AS PRE-EMINENT GOODS

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 (V 32, 33, 37-38). But this claim suggests a distinct conception of rights, as pre-eminent or incomparable goods. This conception of rights rests on Mill's perfectionist assumptions about happiness and the role of individual rights to basic interests and liberties in securing happiness.

One way to motivate this conception of rights is by examining Mill's defense of a right to freedom of expression in On Liberty. In Chapter II Mill famously defends freedom of expression, against censorship, on the ground that free expression is most likely to promote true belief or, better, the ratio of true to false belief. But, however influential, this truth-tracking defense is rather weak. It does not explain why we shouldn't censor where there is good evidence of falsity, and it does not explain what would be wrong with reliable censors who censored all and only false beliefs. But Mill also suggests that freedom of expression is needed to keep true beliefs from becoming dogmatic. In this suggestion lie the resources for a more robust defense of freedom of expression, in part because it is intended to rebut the case for censorship even on the assumption that all and only false beliefs would be censored (II 2, 21). Mill's argument is that freedoms of thought and discussion are necessary conditions for fulfilling our natures as progressive beings (II 20).

Recall Mill's claim that he appeals to rights based on a conception of utility "in the largest sense, grounded on the permanent interests of man as a progressive being" (I 11). He thinks that it is our deliberative capacities, especially our capacities for practical deliberation, that mark us as progressive creatures and that, as a result, the principal ingredients of our happiness or well-being must activities that exercise these deliberative capacities. At its most general, practical

deliberation involves reflective decision-making. In On Liberty Mill thinks of practical deliberation in terms of capacities to form, assess, choose, and implement projects and goals.

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 [III 4]?

Mill makes similar claims about the importance of self-examination and reflective decision-making in his discussion in Utilitarianism of the higher pleasures doctrine, where he recognizes a categorical preference on the part of competent judges for activities that exercise their higher capacities -- claiming that "it is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied" (II 6).

Even if we agree that these deliberative capacities are unique to humans or that humans possess them to a higher degree than other creatures, we might wonder in what way their possession marks us as progressive beings or their exercise is important to human happiness. Mill thinks an account of human happiness ought to reflect the kinds of beings we are or what is valuable about human nature. Though he is not as clear about this as one might like, his discussion of responsibility in A System of Logic ("Of Liberty and Necessity") suggests that he thinks that humans are responsible agents and that this is what marks us as progressive beings. There he claims that capacities for practical deliberation are necessary for responsibility. In particular, he claims that moral responsibility involves a kind of self-mastery or self-governance in which one can distinguish between the strength of one's desires and their suitability or authority and in which one's actions reflect one's deliberations about what is suitable or right to do (VI.ii.3). Non-responsible agents, such as brutes or small children, appear to act on their strongest desires or, if they deliberate, to deliberate only about the instrumental means to the satisfaction of their strongest desires. By contrast, responsible agents must be able to deliberate about the appropriateness of their desires and regulate their actions according to these deliberations. If this is right, then Mill can claim that possession and use of our deliberative capacities mark us as progressive beings, because they are what mark us as moral agents who are responsible. If our happiness should reflect the sort of being we are, then Mill is in a position to argue that higher activities that exercise these deliberative capacities form the principal or most important ingredient in human happiness.

Mill's claim that the value of freedom of expression lies in keeping true beliefs from becoming dogmatic reflects his view that freedoms of thought and discussion are necessary for fulfilling our natures as progressive beings. For instance, we can see Mill appealing to a familiar distinction between *true belief*, on the one hand, and *knowledge*, understood as something like *justified true belief*, on the other.¹⁵ Progressive beings seek knowledge or justified true belief, and not simply true belief. Whereas the mere possession of true beliefs need not exercise one's

¹⁵See, T.M. Scanlon, "A Theory of Freedom of Expression" Philosophy & Public Affairs 1 (1972), pp. 204-26 and C.L. Ten, Mill On Liberty (Oxford: Clarendon Press, 1980), pp. 126-28.

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 (II 6, 7, 8, 22-23, 43). Freedoms of thought and discussion are essential to the justification of one's beliefs and actions, because individuals are not cognitively self-sufficient (II 38, 39; III 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 (II 1).

This defense of a right to free expression is just a special case of Mill's more general defense of rights to a number of basic interests and liberties, including education, freedom of worship, freedom of occupational choice, and freedoms of association.

It can be tempting to suppose that Mill actually treats these as intrinsic goods, perhaps especially important intrinsic goods. But limitations in the scope of Mill's argument show that this cannot be right.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. ... Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion [I 10].

These restrictions make no sense if basic liberties are intrinsic goods, for then it should always be valuable to accord people liberties -- a claim that Mill here denies. These restrictions make perfect sense if the liberties in question, though not intrinsically valuable, are necessary conditions to realizing dominant goods, for then there will be, or need be, no value to liberty where, as in these circumstances, other necessary conditions for the realization of these higher values -- in particular, sufficient rational development -- are absent.

So, on this conception, rights to basic interests and liberties are necessary conditions to the exercise of deliberative capacities, which is the pre-eminent or incomparable ingredient in human happiness. Rights are especially important, and the only thing as important is other rights -- other rights of that individual or the rights of other individuals. But then it should always be optimal to honor rights, except in cases of conflicts of rights. We should apparently resolve conflicts of rights by determining which resolution would maximize utility. This account of rights could be fit within a direct conception of utilitarianism and would be compatible with act utilitarianism.

The pre-eminent goods conception of rights would explain why one person's right trumps ordinary appeals to collective advantage. Securing other goods might ordinarily be a sufficient reason to pursue a particular policy or course of conduct. But if rights protect interests and liberties that are higher in the scale of value than other considerations, then there may be few, if any, cases in which interfering with a right to promote other collective goods would be optimal. Indeed, if Mill treats such interests and liberties as he treats higher pleasures -- as being incomparably better than other goods -- then it could never be better overall to sacrifice a right in the smallest way to achieve any amount of lesser goods.

Of course, even if the goods that rights protect are incomparably better than other goods, they won't be incomparably better than each other. So we can imagine that honoring a right might be purchased at the price of honoring other, comparable rights. There should be no presumption in such conflicts that it is always optimal to honor an individual's rights. But that would be to recognize a conflict of rights, and Mill's conception of secondary principles implies that such conflicts should be resolved by direct appeal to the principle of utility. Presumably, Mill would be committed to the desirability of maximizing the observance of rights or minimizing their violation. This is the view Robert Nozick calls a "utilitarianism of rights" in Anarchy, State, and Utopia.

But a theory may include in a primary way the nonviolation of rights, yet include it in the wrong place and in the wrong manner. For suppose some condition about minimizing the total (weighted) amount of violations of rights is built into the desirable end state to be achieved. We would then have something like a "utilitarianism if rights" This still would require us to violate someone's rights when doing so minimizes the total (weighted) amount of the violation of rights in society [28].

This utilitarianism or consequentialism of rights must allow that it can be not only permissible but also obligatory to violate a right in order to maximize utility – but only in cases of conflicts of rights. In cases of conflicts of rights, the pre-eminent goods conception of rights could recognize a right to do something wrong, but one which can and should be overridden.

Can the conception of rights as pre-eminent goods recognize rights as side constraints or absolute constraints? Nozick contrasts this conception of rights as goals with his own conception of rights as side constraints.

In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints C. ... This view differs from the one that tries to build the side constraints C into the goal G. The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society [29].

So the direct utilitarian reading of Mill's conception of rights does not deliver Nozick's conception of rights as side constraints. But it is far from clear that it is a decisive objection to it. Nozick himself notes that conceiving of rights as side constraints is potentially paradoxical.

Isn't it irrational to accept a side constraint C, rather than a view that directs minimizing the violations of C? If nonviolation of C is so important, shouldn't that be the goal? How can a concern for the nonviolation of C lead to the refusal to violate C even when this would prevent other more extensive violations of C? What is the rationale for placing the nonviolation of rights as a side constraint upon action instead of including it solely as the goal of one's actions? [30]

If conceiving of rights as side constraints is paradoxical in a way that makes utilitarianism of rights less paradoxical, it may be a virtue, rather than a defect, if Mill embraces the latter, rather than the former. Obviously, this depends upon just how paradoxical side constraints are.

10. MILL'S INDIRECT THEORY OF RIGHTS

Because secondary principle and pre-eminent goods conceptions of rights are both compatible with direct utilitarianism, they share some features in common. They both justify honoring rights in the face of appeals to mere collective advantage. Rights are to be honored, except in cases of conflicts of rights, in which case the conflict is to be resolved by appeal to overall good. There can be rights to do something that is wrong (suboptimal), and it can even be obligatory to enforce rights to do wrong.

Notice that these direct utilitarian interpretations of Mill's conception of rights explain why he might believe that rights are considerations that are sufficiently important that they ought to be not simply honored but socially protected by force of law or opinion (V 24). Consider the pre-eminent goods conception. It treats the social enforceability of rights as *consequence* of their importance. It does not treat social enforceability as the defining feature of rights.

However, at least one passage in Chapter V does treat social enforceability not just as a predictable consequence of independent value, but as a defining feature of rights. Let's develop this suggestion. Mill says that the idea of a rights violation has two elements – the idea of injury to the right holder and the idea of warranted punishment.

These [two] elements are, a hurt to some assignable person or persons on the one hand, and a demand for punishment on the other. ...[T]hese two things include all that we mean when we speak of violation of a right. 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 [V 24].

This is a sanction theory of rights, akin to Mill's sanction theory of duty. These two elements do not yet introduce any utilitarian considerations. Mill adds utilitarianism to the mix in his account of the conditions under which society ought to enforce an individual's claim to be free from interference.

To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility [V 25].

These claims introduce a form of indirect utilitarianism into Mill's conception of rights. For it implies that whether one possesses the moral trump of a right to particular interests or liberties in a particular case is not determined by the value of honoring or interfering with that interest or liberty but by the value of protecting and/or punishing interference. This is a sanction-utilitarian theory of rights.

How, if at all, does this indirect utilitarian aspect of Mill's theory of rights afford a response to the apparent tension between utility and rights? For example, what does it imply about some possible marks of rights, which we have discussed?

If an individual's interest or liberty is sufficiently important to justify society's protection, even when protecting that right requires inconvenience or foregoing some collective benefits, then it seems clear that rights, on this conception, will typically trump claims about the value of pursuing collective goods and should typically silence such appeals in moral reasoning and public debate.

It also seems clear that rights, so conceived, can conflict with considerations of direct utility. For whether a right is violated by interference with an individual's interest or liberty is determined not by the comparative utility of the interference but by the comparative utility of enforcing the individual's claim to that interest or liberty. It seems quite possible that it would be good or optimal to defend an individual's liberty in some matters, even if the individual exercises that liberty to choose suboptimal outcomes. So, for instance, it seems likely that it would be good or optimal for society to defend an individual's autonomy even in cases in which the individual chooses imprudently (and there are not other relevant consequences for others).

The indirect account of a right does not itself tell us whether rights should trump considerations of collective good or utility when they conflict. So one relevant question would be whether Mill can say that it is always wrong to violate rights. Mill thinks that a right is something that society ought to protect me in the possession and exercise of, and he thinks that to protect me in this way is to punish (by force of law or opinion) those who do or would interfere with my possession or exercise of that to which I have a right. But then rights violators ought to be punished by society. But then – according to the sanction theory of duty -- it follows that they act wrongly.

1. One has a right to x iff society ought to protect one's possession or exercise of x.
2. In order for society to protect a claim to x, it must punish (by law or opinion) those who interfere with the possession or exercise of x.
3. Hence, if one has a right, society ought to punish those who violate that right.
4. An act is wrong iff some sort of sanction ought to be applied to its performance.
5. Hence, it is always wrong to violate rights.

Can we also claim there are cases in which it would be wrong to perform the optimal act, because it would involve a violation of rights? If there are optimal acts that violate rights, the argument we have just examined allows Mill to say that it would be wrong to violate the right. But could there be cases in which it was optimal to violate a right? Put another way, could there be cases where society ought to enforce an individual's claim even though it would be optimal to violate it? There seems to be no problem in principle with this view. Whether A should interfere with B's enjoyment of x is one issue, and whether C should enforce B's claim to x is another. It is not clear why both couldn't be optimal relative to their alternatives. But would it make sense for C's enforcement of B's claim to x to be optimal if A's interferences with B's enjoyment of x is optimal?

I think that we can imagine circumstances in which this might be true. Consider a familiar example of rights that seem to defy utilitarian analysis -- Organ Harvesting. Suppose that a surgeon (A) can save five lives (C-G) by harvesting and transplanting the organs of one healthy patient (B). If all else is equal, transplantation would seem to be optimal, yet it would

seem to violate the rights of the unwilling donor. Perhaps this would be a case in which Mill could say that harvesting the organs could be optimal but that it would nonetheless be wrong, because it would be good or optimal to sanction, and that it would nonetheless involve a violation of rights because it would be good or optimal for society to protect B's bodily integrity by legal force or public opinion.

Can there be a right to do something wrong? It seems clear that Mill can maintain this thesis if he combines this indirect utilitarian theory of rights with a direct (act) utilitarian theory of duty. Because the direct utilitarian claims that any suboptimal act is wrong, there will be a right to do wrong, as long as there are cases in which there is an individual liberty to perform suboptimal acts that it is optimal or especially useful for society to protect. As we have already seen, it seems plausible that there are some forms of imprudence and socially obtuse behavior that ought to be protected from interference.

The more difficult question is whether Mill can maintain the right to do wrong if he combines his indirect sanction theory of rights with his indirect sanction theory of duty. Here the question is whether there is a liberty to perform acts that it is optimal (or useful) to protect, even though it is optimal (or useful) to sanction the act. The answer to this question appears to be Yes. Especially if we have in mind informal sanctions in the form of self-reproach or social censure, it is not hard to imagine that there might be forms of imprudence or socially obtuse behavior that would be wrong – because it would be optimal or especially useful to sanction – which the individual would nonetheless have a right to perform – because it would be optimal or especially useful for society to protect the individual's claim to do so.

When the sanction theory of rights is viewed within the context of the sanction theory of duty, it seems to follow that rights are a side constraint on the direct pursuit of the good. We do wrong by doing the optimal act if that requires violating a right.

But it doesn't follow that rights are absolute. For I see no reason to think that Mill should think that rights cannot conflict. I don't see why the same individual or different individuals couldn't have interests or liberties that cannot both be honored but each of which it would be especially useful, if not optimal, to protect. This might be claimed about familiar dilemmas often described as conflicts of rights, such as conflicts between the rights of the accused to due process or a fair trial and the rights of privacy or freedom of the press of third parties. If such conflicts of rights are to be resolved, it would seem that Mill could only do so, as he resolves conflicts among secondary principles, by direct appeal to utility.

11. Concluding Remarks

We have seen that Mill has the resources for three distinct conceptions of rights. These different conceptions both overlap and diverge in interesting ways.

	Deliberative Trumps	Trumps	Always Wrong to Violate Rights	Right to do Wrong	Side Constraints	Absolute
Secondary Principles	Yes	Yes	No	Yes	No	No
Pre-eminent Goods	Yes	Yes	No	Yes*	No	No
Sanction	Yes	Yes	Yes	Yes	Yes	No

Perhaps the greatest overlap is between the secondary principle and pre-eminent goods conceptions. This is perhaps not so surprising, inasmuch as both are compatible with direct utilitarianism, specifically act utilitarianism. They agree that rights are considerations that trump ordinary appeals to collective advantage, both as a matter of moral fact and within our moral reasoning and deliberation. Though both imply that rights should in general be respected, neither implies that it is always wrong to violate rights. This is in part because both imply that there can be conflicts of rights, which ought to be resolved by minimizing the (weighted) violation of rights. Neither recognizes rights as genuine side constraints on pursuit of the good. Because each recognizes rights that can conflict and can be overridden, each recognizes the possibility of a right to do wrong. The one real difference between them, I think, lies in their accounts of the existence of rights to do wrong. Though the pre-eminent goods conception allows that there is a right to do wrong, it also implies that one is never justified in honoring such rights, because it is, by hypothesis, wrong (suboptimal) to do so. (This is why there is an asterisk next to its claim that there can be a right to do wrong.) By contrast, the secondary principles conception has somewhat different implications. For it allows that one might be justified in applying norms even when doing so is suboptimal provided that doing so is generally but imperfectly optimal and one isn't able to discriminate reliably and efficiently for those cases in which adherence to the norm is suboptimal. Adhering to norms with optimal acceptance value in cases in which doing so is suboptimal is treated as blameless, or we might say justified, wrongdoing. But then there will be at least some cases in which one might be justified in honoring an individual's right to do wrong.

By contrast, Mill's indirect utilitarian conception of rights disagrees with these two direct utilitarian conceptions on two issues. As long as this sanction theory of rights is conjoined with a sanction theory of duty, it can and will imply that it is always wrong to violate rights, because rights, like duties, are claims the violation of which ought to be sanctioned. Because of its indirect character, the sanction theory of rights implies that rights do constrain direct appeals to utility. But like these direct conceptions of rights, the sanction theory implies that rights are not absolute.

The choice between direct and indirect utilitarian theories of rights will likely depend on two things – how paradoxical we think side constraints are and whether we find direct or indirect utilitarianism less paradoxical. Though I have identified some intellectual costs and benefits associated with each issue, I have not tried to resolve those issues here. What's perhaps as interesting as these differences among these conceptions is the common ground they share. They all agree on the idea that individuals have basic interests and liberties the protection of which should not be subject to a case-by-case consequentialist calculation involving disparate kinds of goods. They all recognize rights to basic liberties that trump the pursuit of collective interests in comfort and convenience. They recognize the possibility of conflicts of rights and imply, as a result, that there can be rights to do wrong. Even if we cannot be sure which strand in Mill's account of rights is most promising, this common ground provides some vindication of his claim to give rights a utilitarian foundation.