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## MILL'S AMBIVALENCE ABOUT RIGHTS

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### INTRODUCTION

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 act as trumps or side constraints on the pursuit of utility

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and is skeptical about the compatibility of utilitarianism and rights. Understanding Mill's theory of rights is a good test of this conventional wisdom.

Whether Mill can reconcile rights and utility is a question that engaged David Lyons in a series of landmark articles on Mill's theories of duty, justice, and rights.<sup>1</sup> Though these essays did much to advance our understanding of central concepts in Mill's moral theory, Lyons is ultimately skeptical that Mill can recognize rights with a utilitarian foundation.<sup>2</sup> I hope that it is a fitting tribute to the ongoing importance of these issues – and what I have learned from Lyons's contributions to them – that I revisit the question of whether Mill can reconcile rights and utility and argue cautiously for a less skeptical conclusion.

Understanding how Mill might reconcile utility and rights requires understanding his theory of rights. Though he is clear about the existence and importance of rights, he is ambivalent about how best to understand their nature, in particular, the way in which they are grounded in utility. 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 *preeminent 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 rather by its conformity to something else (e.g., norms or responses) that has 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

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<sup>1</sup> Most of these essays – especially *Mill's Theory of Morality*, *Mill's Theory of Justice*, and *Utility and Rights* – are collected in DAVID LYONS, *RIGHTS, WELFARE, AND MILL'S MORAL THEORY* (1994).

<sup>2</sup> See DAVID LYONS, *Utility and Rights*, in *ETHICS, ECONOMICS, AND THE LAW* 107 (J. Roland Pennock & John W. Chapman eds., 1982), reprinted in LYONS, *RIGHTS, WELFARE, AND MILL'S MORAL THEORY*, *supra* note 1, at 147, 174-75.

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cannot provide systematic defenses 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 difficulties, which I cannot discuss here in full 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 Mill's ambivalence about rights.<sup>3</sup>

#### I. 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, motives, or responses) that has 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 will be 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 on the action's proximity to the

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<sup>3</sup> I discuss Mill's conceptions of duty in greater detail in David O. Brink, *Mill's Ambivalence About Duty*, in J.S. MILL ON JUSTICE (Leonard Kahn ed., forthcoming 2011) (manuscript at 12-14). Here, I draw on the essentials of that essay as background to discussing Mill's ambivalence about rights.

best.<sup>4</sup> 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. But in circumstances, whether actual or merely counterfactual, in which adherence to these precepts would be suboptimal, one should depart from these precepts. Act utilitarianism is a counterintuitive doctrine to the extent that we regard some of these precepts as categorical moral rules or principles. Rule utilitarianism may seem less counterintuitive, because it can explain why one ought to adhere to certain rules or precepts, even when doing so does not have the best consequences, provided doing so is generally optimal. Act utilitarianism must condemn following rules when doing so is suboptimal; rule utilitarianism need not. However, 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 generalizations, they are not exceptionless. 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.

## II. UTILITARIANISM AS A STANDARD OF CONDUCT

Chapter II of *Utilitarianism* purports to explain what utilitarianism is.<sup>5</sup> 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.<sup>6</sup>

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

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<sup>4</sup> This 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.

<sup>5</sup> JOHN STUART MILL, *Utilitarianism*, in X COLLECTED WORKS OF JOHN STUART MILL 203, ch. II, at 209-26 (John M. Robson ed., 1969).

<sup>6</sup> *Id.* para. 2, at 210.

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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 in each case 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 the utilitarian standard of 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 to 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 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.<sup>7</sup>

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.<sup>8</sup>

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, 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.<sup>9</sup> These secondary principles should be set aside in favor of direct appeals to the utilitarian first principle in cases in which adherence to the

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<sup>7</sup> *Id.* para. 19, at 219.

<sup>8</sup> HENRY SIDGWICK, *THE METHODS OF ETHICS* 413 (7th ed. 1907).

<sup>9</sup> *See infra* Part IV.

secondary precept would have obviously inferior consequences or in which such secondary principles conflict.<sup>10</sup>

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?

### III. 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."<sup>11</sup> According to the Proportionality Doctrine, introduced in Mill's 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."<sup>12</sup> Later in that chapter, he says that it requires that "Utility or Happiness [be] considered as the directive rule of human conduct."<sup>13</sup> Still later in Chapter II, he describes utilitarianism as a "standard of what is right in conduct."<sup>14</sup> 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."<sup>15</sup> These passages all seem to endorse a form of direct utilitarianism, specifically act utilitarianism.

### IV. RULE UTILITARIANISM?

But not everyone agrees. In his famous paper, *The Interpretation of the Moral Philosophy of J.S. Mill*, J.O. Urmson famously defended a rule utilitarian reading of Mill.<sup>16</sup> 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 shortly. But, perhaps surprisingly, Urmson also appeals to the Proportionality Doctrine as requiring a rule utilitarian interpretation.

#### 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,

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<sup>10</sup> MILL, *supra* note 5, ch. II, paras. 19, 24, 25, at 219, 224-25.

<sup>11</sup> *Id.* para. 1, at 209.

<sup>12</sup> *Id.* para. 2, at 210.

<sup>13</sup> *Id.* para. 8, at 213.

<sup>14</sup> *Id.* para. 17, at 218.

<sup>15</sup> *Id.* ch. V, para. 1, at 240.

<sup>16</sup> J.O. Urmson, *The Interpretation of the Moral Philosophy of J. S. Mill*, 3 PHIL. Q. 33, 35-36 (1953).

wrong as they tend to produce the reverse of happiness.”<sup>17</sup> 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.<sup>18</sup> 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, in which case 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 *An Introduction to the Principles of Morals and Legislation*:

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.<sup>19</sup>

Here Bentham clearly ascribes felicific tendencies 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 difference between the sum of such as are good, and the sum of such as are evil.<sup>20</sup>

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.<sup>21</sup>

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. As a result, the felicific or

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<sup>17</sup> MILL, *supra* note 5, ch. II, para. 2, at 210.

<sup>18</sup> Urmson, *supra* note 16, at 37.

<sup>19</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. I, para. 2, at 2 (J. Burns & H.L.A. Hart eds., 1970) (1789); *cf. id.* paras. 3, 6, at 2-3.

<sup>20</sup> *Id.* ch. VII, para. 2, at 70; *cf. id.* ch. IV, para. 5, at 30-31.

<sup>21</sup> My claims here are indebted to FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 73-78 (1984).

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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* 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.<sup>22</sup>

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. However, these are also direct utilitarian claims.

#### B. *Secondary Principles*

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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

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<sup>22</sup> BENTHAM, *supra* note 19, ch. IV, para. 5, at 30-31.

<sup>23</sup> Urmson, *supra* note 16, at 35.

<sup>24</sup> MILL, *supra* note 5, ch. II, para. 19, at 219.

<sup>25</sup> JOHN STUART MILL, *Autobiography*, in I COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, ch. V, para. 11, at 145.

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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.<sup>26</sup> But it is 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 one 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 rules of thumb, but Mill does not regard them as mere heuristics in a utility calculation. They do not 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."<sup>27</sup> 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 reliably discriminate whether and, 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 significantly suboptimal and in cases in which secondary principles, each of which has a utilitarian justification, conflict.<sup>28</sup> Otherwise, agents 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,

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<sup>26</sup> MILL, *supra* note 5, ch. II, paras. 24-25, at 224-25.

<sup>27</sup> *Id.* para. 23, at 223.

<sup>28</sup> *See id.* paras. 19, 24, 25, at 219, 224-25.

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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 . . . 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.<sup>29</sup>

Mill makes similar claims in his essay *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 . . .<sup>30</sup>

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*, Mill thinks that the intuitionist wrongly treats familiar moral precepts as ultimate moral factors whose justification is supposed to be self-evident to reason.<sup>31</sup> 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 that an appeal to the importance of such moral principles actually provides support for utilitarianism. Mill makes this argument in considerable detail in Chapter V of *Utilitarianism*, where he argues that justice is not, as intuitionists allege, a principle independent of utility, but rather a principle (and associated set of

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<sup>29</sup> JOHN STUART MILL, *A System of Logic: Ratiocinative and Inductive*, in XIII COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, bk. VI, ch. xii, § 7, at 952.

<sup>30</sup> JOHN STUART MILL, *Bentham*, in X COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, para. 61, at 110-11.

<sup>31</sup> JOHN STUART MILL, *Whewell on Moral Philosophy*, in X COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, at 191-92.

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emotions) protecting security and other essentials of happiness, and, hence, justified by its good consequences.<sup>32</sup>

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,<sup>33</sup> he claims that utility justifies which principles or rules we follow. Does this commit Mill to rule utilitarianism? Urmson thinks it does.<sup>34</sup>

However, 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 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 could be cases of *blameless wrongdoing*, perhaps even *praiseworthy wrongdoing*.<sup>35</sup>

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<sup>32</sup> See MILL, *supra* note 5, ch. V, paras. 1, 3, 32-38, at 240, 241, 255-59.

<sup>33</sup> See *supra* text accompanying note 29.

<sup>34</sup> See Urmson, *supra* note 16, at 35-36.

<sup>35</sup> It 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

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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.<sup>36</sup> A fortiori, it does not provide reason to reject the act utilitarian strand in Mill's formulation of the utilitarian doctrine.<sup>37</sup>

#### V. 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.<sup>38</sup>

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 if and only if 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.<sup>39</sup> Not all suboptimal or inexpedient acts are wrong, only those to which one ought to apply some sort of sanction (at the very least, self-reproach).

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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.

<sup>36</sup> Some readers of Chapter II might also appeal to the "abstinence" passage as evidence that Mill endorses rule utilitarianism. See MILL, *supra* note 5, ch. II, para. 19, at 220. I address this claim in *Mill's Ambivalence About Duty*. See Brink, *supra* note 3 (manuscript at 14).

<sup>37</sup> Some 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.

<sup>38</sup> MILL, *supra* note 5, ch. V, para. 14, at 246.

<sup>39</sup> *Id.* paras. 14, 15, at 246-47.

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Justice is a proper part of duty. Justice involves duties that are perfect duties – that is, duties that are correlated with rights.<sup>40</sup>

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.<sup>41</sup>

An act is unjust just in case it is wrong and violates someone's rights.<sup>42</sup> 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.<sup>43</sup>

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

1. An act is wrong if and only if some sort of sanction ought to be applied to its performance.
2. An act is obligatory or one's duty if and only if failure to do it is wrong.
3. Hence, an act is obligatory or one's duty if and only if some sort of sanction ought to be applied to the failure to do it.
4. An act is permissible if and only if it is not wrong to perform it.
5. Hence, an act is permissible if and only if 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* if and only if society ought to protect her claim to *x* by force of law or public opinion.

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<sup>40</sup> *Id.* para. 15, at 247.

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* para. 23, at 250.

<sup>43</sup> *Id.* para. 24, at 250.

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.<sup>44</sup>

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. For the most part, I will ignore this interesting question about the proper utilitarian standard for applying sanctions, though it will eventually be relevant to understanding Mill's indirect conception of rights.<sup>45</sup>

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, Lyons has drawn attention to this indirect aspect of Mill's utilitarianism.<sup>46</sup> Lyons notes that Mill offers a sanction theory of duty but does not give a name to the resulting 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's analysis of Mill's theory of duty in Chapter V of *Utilitarianism*, I disagree with his interpretation on one point and dispute the significance he attaches to sanction utilitarianism.

It is worth noticing that Lyons's interpretation of Mill's theory of duty is *doubly* indirect. It is indirect, as we have seen, because it makes an action's rightness or wrongness a function not of its utility but rather of the utility of others responding to it in certain ways. But on Lyons's reading, Mill's theory is indirect in another way as well.

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<sup>44</sup> *Id.* para. 25, at 249-50.

<sup>45</sup> See *infra* Part X.

<sup>46</sup> See DAVID LYONS, *Mill's Theory of Justice*, in VALUES AND MORALS 1, 5-6 (A.I. Goldman & J. Kim eds., 1978), reprinted in LYONS, RIGHTS, WELFARE, AND MILL'S MORAL THEORY, *supra* note 1, at 67, 75; DAVID LYONS, *Mill's Theory of Morality*, 10 NOÛS 101 (1976) [hereinafter LYONS, *Mill's Theory of Morality*], reprinted in LYONS, RIGHTS, WELFARE, AND MILL'S MORAL THEORY, *supra* note 1, at 47, 56.

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To call an act wrong is to imply that guilt feelings, and perhaps other sanctions, would be warranted against it. But sanctions assume coercive rules. *To show an act wrong, therefore, is to show that a coercive rule against it would be justified.*<sup>47</sup>

Lyons believes that for Mill an action's deontic status turns, not on its utility, but on the utility of sanctioning responses, not to the action, but to actions of that type or class. This second layer of indirection is the appeal to rules. However, I see no justification for this second layer of indirection. In particular, I see no evidence that Mill wants to introduce rules or principles into his formulation of the utilitarian standard. Of course, as we have seen, he is a firm believer in the need for secondary principles in ordinary moral deliberations. But this is a claim about how we are likely to best satisfy the utilitarian standard, not a claim about the formulation of the standard itself. When Mill defines wrong action in terms of sanctions, he says that an act is wrong if *it* ought to be sanctioned in some way, not if it is enjoined by a principle, violations of which ought to be sanctioned. If so, sanction utilitarianism is only singly indirect, which means that it is even further removed from the sort of indirection embodied in rule utilitarianism. Sanction utilitarianism is really a distinct form of indirect utilitarianism.

Moreover, Lyons concludes from the fact that Mill's indirect account of duty is not act utilitarian that Mill is not an act utilitarian. However, 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 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, we have seen that 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.<sup>48</sup>

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<sup>47</sup> LYONS, *Mill's Theory of Morality*, *supra* note 46, at 55.

<sup>48</sup> Some commentators claim that Mill's discussion of the Art of Life in *A System of Logic*, MILL, *supra* note 29, bk. VI, ch. xii, § 6, at 949-52, is inconsistent with act utilitarianism and fits with sanction utilitarianism. See, e.g., Daniel Jacobson, *Utilitarianism Without Consequentialism: The Case of John Stuart Mill*, 117 PHIL. REV. 159, 159-60 (2008). In his discussion of the Art of Life, Mill divides morality, prudence, and aesthetics into separate spheres or domains. In particular, the domain of the moral is limited to actions that affect others, whereas the domain of prudence concerns self-regarding actions. This claim about the restricted domain of the moral is incompatible with the act utilitarian claim that any action is morally assessable by the value of its consequences, precisely because the latter claim contains no restriction on the domain of morality. But this does not support the sanction utilitarianism of Chapter V or show that Mill is not committed to act utilitarianism. First, notice that the Art of Life seems to counsel maximization within the spheres of morality and prudence, whereas sanction utilitarianism does not. Second, sanction

## VI. 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 utilitarianism 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 forbidden. Act utilitarianism also collapses the distinction between the permissible and the obligatory, treating all non-obligatory acts as impermissible. Moreover, act utilitarianism

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utilitarianism is also inconsistent with the claims about morality's limited domain within the Art of Life. For sanction utilitarianism implies that an action is morally wrong just in case any kind of sanction, whether external or internal, is appropriate on utilitarian grounds. But there is every reason to believe that it will often be useful or even optimal for an agent to experience self-reproach in connection with gross imprudence. But then sanction utilitarians should deny that matters of prudence lie outside of morality. Third, the Art of Life's claim about the restricted domain of morality is contradicted by those passages in *Utilitarianism*, which we have already examined, that endorse act utilitarianism and its implications about the unrestricted domain of morality, notably the Proportionality Doctrine's claim "that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." MILL, *supra* note 5, ch. II, para. 2, at 210. So Mill's claims in the Art of Life are consistent with neither act nor sanction utilitarianism and introduce further inconsistency into Mill's theory of duty. In what follows, I will ignore these further complications introduced by this aspect of his remarks about the Art of Life.

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.<sup>49</sup>

- 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.<sup>50</sup>

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. This means that 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

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<sup>49</sup> Recall 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.

<sup>50</sup> In *Auguste Comte and Positivism*, Mill discusses the need to recognize categories of the permissible but not obligatory and the supererogatory, but he does not say or imply that this is a problem for act utilitarianism or an argument for sanction utilitarianism. JOHN STUART MILL, *Auguste Comte and Positivism*, in X COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, at 337-38.

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, 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. This looks more like a difference in moral bookkeeping 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 wrongness and punishment.<sup>51</sup> Many think that punishment is appropriate for wrong acts because they are wrong. This requires grounding 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 and 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

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<sup>51</sup> For a similar diagnosis, see David Lyons, *Human Rights and the General Welfare*, 6 PHIL. & PUB. AFF. 113 (1977), reprinted in RIGHTS 174, 181 (David Lyons ed., 1979).

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sanctions. This is not 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 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, about whose rightness we can now ask. We seem to be off on an infinite regress of sanctions. This is a 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 avoids the regress by giving a direct utilitarian answer to the question of whether it is right to apply sanctions that is inconsistent with the general criterion.

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

As far as I can see, the combination of (1) and (2) renders sanction utilitarianism internally inconsistent.<sup>52</sup>

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 “[w]e 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.”<sup>53</sup> 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 a kind of *pragmatic* reading of sanction utilitarianism. It would be like the pragmatic strategy considered earlier in this Part for the fourfold

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<sup>52</sup> As I indicated above, Lyons does not treat Mill’s account of when to apply sanctions as a direct utilitarian account; it is indirect inasmuch as it adverts to optimal rules. But Mill’s form of sanction utilitarianism faces a parallel structural dilemma even on Lyons’s view – Mill can avoid the vicious regress only by introducing a singly indirect account of the duty to apply sanctions that is inconsistent with the doubly indirect general account of duty that is provided by sanction utilitarianism.

<sup>53</sup> MILL, *supra* note 5, ch. V, para. 14, at 246 (emphasis added).

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 that of any kind of wrong,” and in the sentence immediately following the statement of sanction utilitarianism he says that “[t]his seems to be the real turning point of the distinction between morality and simple expediency.”<sup>54</sup> Here, he seems to be speaking in his own voice and insisting on distinguishing one’s duty from what is or would be optimal.

## VII. 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.<sup>55</sup>

What are the prospects for Mill’s utilitarian theory of rights? Rights theorists disagree about just what rights we *have*. But there appears to be more agreement about what rights *are*. 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”<sup>56</sup> or “side constraints”<sup>57</sup> on the pursuit of collective goals. 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 is 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.

1. Where rights are at stake, they should typically silence or trump direct appeals to utility in moral deliberation and reasoning.

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<sup>54</sup> *Id.*

<sup>55</sup> JOHN STUART MILL, *On Liberty*, in XVIII COLLECTED WORKS OF JOHN STUART MILL, *supra* note 5, at 213, ch. I, para. 11, 224.

<sup>56</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 87, 90 (1977).

<sup>57</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix (1974).

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

Claims (1) and (2) both invoke Dworkin's idea that rights function as trumps, that is, as a kind of moral suit or currency that defeats other kinds of moral suits or currencies. Claim (1) is an epistemic claim about moral psychology and deliberation; it says that rights should supersede direct appeals to considerations of utility in an agent's deliberations. By contrast, claim (2) is a metaphysical claim that rights are moral factors that override or take precedence over other moral factors involving collective advantage. Claim (3) asserts that there are rights to pursue a suboptimal course of conduct. Claim (4) assumes that there can be a right to do something wrong in some cases, that is, a right to make certain kinds of unwise or bad choices. Claim (5) is Nozick's idea that rights are not themselves especially important values, but are instead side constraints on the pursuit of goods. But Nozick does not insist that rights are absolute. On some views, they may be permissibly violated when the consequences of honoring them would be not just suboptimal but catastrophic. Claim (6) goes further, insisting that rights are absolute, which presumably means that it would always be wrong to violate them.

These assumptions about rights and utility are not all equally uncontroversial. Though all have adherents, some are more plausible than others. I have tried to arrange them from the least to the most controversial. 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.

It is important to be clear about the scope of my inquiry. A fully satisfactory utilitarian theory of rights would not only be able to recognize the logic of rights – the way that rights in some way constrain the pursuit of utility – but would also justify a plausible allocation of rights – telling a plausible story about what rights different individuals have. Mill does offer this kind of comprehensive utilitarian conception of rights. I will be focusing only on the first part of this comprehensive conception – Mill's understanding of the logic of rights. Mill's defense of liberalism in *On Liberty* and elsewhere represents his account of the content and distribution of rights, but I will not have a lot to say about this topic here.<sup>58</sup> Instead, I will consider Mill's views about the way in which rights might be grounded in utility. I will argue that he has the resources for three distinct utilitarian conceptions of rights – rights as

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<sup>58</sup> I do address these issues in David Brink, *Mill's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (2007), <http://plato.stanford.edu/entries/mill-moral-political>.

secondary principles, rights as protections of preeminent goods, and a sanction theory of rights. As these conceptions address how rights are grounded in utility, some of them can be agnostic about the nature of utility. So far as possible, my treatment of these conceptions will be correspondingly agnostic or ecumenical about Mill's conception of utility or happiness. However, we will see that the preeminent goods conception of rights makes some limited but definite assumptions about the nature of happiness, which will require some reconstruction of Mill's conception of happiness.

#### VIII. 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 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 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.<sup>59</sup>

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. 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.<sup>60</sup>

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

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<sup>59</sup> This interpretation is very much like what Berger calls the "strategy" conception of rights. See BERGER, *supra* note 21, chs. 3-4.

<sup>60</sup> MILL, *supra* note 5, ch. V, para. 32, at 255; *cf. id.* paras. 33, 37-38, at 255, 259.

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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 typically silence or trump direct appeals to utility in moral deliberation and reasoning. This is just how secondary principles function. They do not, however, silence or trump appeals to utility in all circumstances. Direct appeal to utility can and should be made when following secondary precepts 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. There will be cases where following the rule and, hence, respecting the right is suboptimal; but such cases will be, by design, exceptional.

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. This means that there can be a right to do something wrong or suboptimal. Moreover, 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 it might be best to respect rights to do things that are suboptimal.

Though rights can and will constrain direct pursuit of the good, they are not, on this conception, side constraints on the good. Rather they are forms of entrenching expectations that are justified by the way that such entrenchment promotes utility. Nor are rights absolute. When honoring rights is not just suboptimal but dramatically so, and the agent is able to discriminate reliably for this sort of exception, she should depart from the secondary principle and not honor the associated right. Even more clearly, secondary principles can and will conflict, even the especially important secondary principles associated with rights. In such cases, we have a conflict of rights, and Mill thinks that this conflict should be resolved by direct recourse to the utilitarian first principle. It follows that rights, conceived of as especially important secondary principles, cannot be absolute. But these claims about rights are more controversial. It is not clear that they represent adequacy conditions on an account of rights or that the failure of the secondary principle conception of rights to vindicate them is a decisive objection to that conception.

#### IX. RIGHTS AS PREEMINENT 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. This claim suggests a distinct conception of rights as protections of preeminent 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.

One way to motivate this conception of rights is by briefly examining Mill's defense of a right to freedom of expression in *On Liberty*.<sup>61</sup> 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.<sup>62</sup> However influential, this truth-tracking defense is rather weak. It does not explain why we should not 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 lies 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.<sup>63</sup> Mill's argument is that freedoms of thought and discussion are necessary conditions for fulfilling our natures as progressive beings.<sup>64</sup>

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."<sup>65</sup> For Mill, it is our deliberative capacities, especially our capacities for practical deliberation, that mark us as progressive creatures, and as a result, the principal ingredients of our happiness or well-being are 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?<sup>66</sup>

Mill makes similar claims about the importance of self-examination and reflective decision-making in his discussion of the higher pleasures doctrine in

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<sup>61</sup> I provide a fuller reconstruction and assessment of Mill's defense of expressive liberties in David O. Brink, *Mill's Liberal Principles and Freedom of Expression, in MILL'S ON LIBERTY* 40, 40-61 (C.L. Ten ed., 2008).

<sup>62</sup> MILL, *supra* note 55, ch. II, at 229, 243, 246.

<sup>63</sup> *Id.* at 229, 243.

<sup>64</sup> *Id.* para. 20, at 242.

<sup>65</sup> *Id.* para. 11, at 224.

<sup>66</sup> *Id.* ch. III, para. 4, at 262-63.

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*Utilitarianism*, where he recognizes a categorical preference on the part of competent judges for activities that exercise their higher capacities, claiming that “[i]t is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”<sup>67</sup>

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* suggests that he thinks that humans are responsible agents and that this is what marks us as progressive beings.<sup>68</sup> 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 one can regulate one's actions in accordance with one's deliberations about what is suitable or right to do.<sup>69</sup> 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 beings 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. This would explain why Mill thinks that the higher pleasures of Socrates are incomparably greater than the lower pleasures of swine.

We can now better understand how Mill's claim in *On Liberty* 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 hand.<sup>70</sup> 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 deliberative capacities, because they might be the product of indoctrination, their justification would. One exercises deliberative capacities in the justification of

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<sup>67</sup> MILL, *supra* note 5, ch. II, para. 6, at 212.

<sup>68</sup> MILL, *supra* note 29, bk. VI, ch. ii, at 836-43.

<sup>69</sup> See *id.* § 3, at 839-42.

<sup>70</sup> See C.L. TEN, MILL ON LIBERTY 126-28 (1980); T.M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217-19 (1972).

one's beliefs and actions that is required for theoretical and practical knowledge. This is because justification involves comparison of, and deliberation among, alternatives.<sup>71</sup> Freedoms of thought and discussion are essential to the justification of one's beliefs and actions, because individuals are not cognitively self-sufficient.<sup>72</sup> 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.<sup>73</sup>

Mill introduces his discussion of expressive liberties by saying that there is general agreement about their importance and that once the grounds for these liberties are understood this agreement can be exploited to support a more general defense of individual liberties.<sup>74</sup> After articulating this deliberative rationale for expressive liberties, which appeals to our capacities as progressive beings, Mill extends this rationale to a more general defense of rights to a number of basic interests and liberties, including education, freedom of worship, freedom of occupational choice, and freedom 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 assumption 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.<sup>75</sup>

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 other necessary conditions for the realization of these higher values – in particular, sufficient normative competence – are absent.

On this conception, rights to basic interests and liberties are necessary conditions to the exercise of deliberative capacities, which is the preeminent or

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<sup>71</sup> MILL, *supra* note 55, ch. II, paras. 6, 7, 8, 22, 23, 43, at 231-32, 243-45, 258.

<sup>72</sup> *See id.* paras. 38, 39, at 256-57; *id.* ch. III, para. 1, at 260-61.

<sup>73</sup> *See id.* ch. II, para. 1, at 229.

<sup>74</sup> *See id.* ch. I, para. 16, at 227.

<sup>75</sup> *Id.* para. 10, at 224.

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incomparable ingredient in human happiness. Rights are especially important, and the only things as important are other rights – other rights of that individual or the rights of other individuals.

On this reading, it is crucial that Mill's conception of utility is a pluralistic one in which some elements of happiness dominate others. This makes possible an act-utilitarian conception of rights that treats them as protections for dominant goods and for necessary conditions of dominant goods. For then it should always be optimal to honor rights, except in cases of conflicting rights. We should apparently resolve conflicts of rights by determining which resolution would maximize utility.

The preeminent goods conception of rights would explain why rights act as trumps. Consider the metaphysical dimension of trumps first. In card games, one suit or kind of card trumps other suits, so that the trumping suit defeats even a higher value card in the trumped suit. Indeed, the lowest value card in a trump suit defeats the highest value card in any other suit. Dworkin thinks of rights as a certain kind of moral factor or currency that trumps or defeats the moral factor or currency of collective advantage.<sup>76</sup> In contexts where rights are not in play, considerations of majority preference, efficiency, and so forth are normally good reasons for action, whether individual or collective. But where these benefits come at the expense of rights, rights normally trump. The preeminent goods conception explains why this is so. Rights protect interests and liberties that are higher in the scale of value than other considerations. Protecting rights will then be the way to maximize value. 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. If preeminent goods are metaphysical trumps, trumping other moral suits or currencies, then they should also be treated as deliberative trumps, dominating appeals to collective advantage, measured in terms of lesser goods, within our moral reasoning.

On this conception of rights, there can also be a right to something even though honoring that right would be suboptimal, and there can be a right to do wrong. Both possibilities depend on the idea that rights can conflict. Even if the goods that rights protect are incomparably better than other kinds of goods, they will not be incomparably better than each other. Thus, we can imagine that honoring one 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. Nozick calls this view a "utilitarianism of rights":

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<sup>76</sup> See DWORKIN, *supra* note 56, at xi.

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But a theory may include in a primary way the nonviolation of rights, yet include it in the wrong place and 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 then would have something like a “utilitarianism of 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 the society.<sup>77</sup>

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 preeminent 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 preeminent goods recognize rights as side 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.<sup>78</sup>

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 the direct utilitarian reading that it does not treat rights as side constraints. 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 a goal of one’s actions?<sup>79</sup>

If the nonviolation of a constraint is so important, shouldn’t we take as our goal the minimization of violations of that constraint?

Nozick’s own answer is to appeal to the separateness of persons and the Kantian demand that we treat all agents as ends and never merely as means. But the Kantian requirement does not obviously require side constraints.

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<sup>77</sup> NOZICK, *supra* note 57, at 28.

<sup>78</sup> *Id.* at 29.

<sup>79</sup> *Id.* at 30.

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Suppose that only by causing harm to *B* can *A* prevent individually comparable harms to *C*, *D*, and *E*. If *A* harms *B* only in order to protect *C*, *D*, and *E*, perhaps *A* treats *B* as a means, but he need not treat her as a mere means. To do that would require viewing her as a mere instrument or tool, not as someone whose own agency is valuable. But *A* can take her agency into account and nonetheless proceed with a reluctance that derives from a concern with her agency. If *A* could have protected *C*, *D*, and *E* without harming *B*, he certainly would have, and, if the situation changes so that he can protect them without harming *B*, he will gladly do so. If *A* acts impermissibly so as to minimize harm, it is not because in so acting he must be treating those whom he harms as mere means.

Nozick also defends side constraints by appeal to a sort of *inviolability* that individuals possess if and only if their fundamental interests are protected by side constraints. But to make *B* inviolable in this way will require turning a deaf ear to the comparable interests of *C*, *D*, and *E*. This seems to deny them moral *considerability*. Though we want to take seriously the fundamental interests of each, it is not obvious that we should endorse inviolability, because ensuring the inviolability of each denies the moral considerability of others.

These are large issues that cannot be properly adjudicated here. They show, however, that conceiving of rights as side constraints is not unproblematic. 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.

Nozick remains agnostic about whether side constraints are absolute or whether there is some threshold level of good consequences to be secured or bad consequences to be avoided above which it would be permissible to violate rights.<sup>80</sup> But both threshold and absolute conceptions of side constraints are puzzling. Side constraints with thresholds are puzzling in the ways that thresholds are always puzzling. If rights can be violated only when the cost of honoring the rights is *n*, the obvious question is why does the cost of respecting rights matter not at all below *n* and then become decisive at *n*? We might adopt bright line thresholds for pragmatic reasons, but their introduction into the theory of rights seems arbitrary.<sup>81</sup> Alternatively, one might try to avoid the problem of thresholds by conceiving of rights as absolute. But then we must recognize far fewer rights than we ordinarily do, because rights, as ordinarily conceived, can conflict. In a genuine conflict of rights, not all rights can be honored. So, if rights are absolute, they cannot conflict. But then we cannot have the rights we think we do. Instead, we must have a much narrower set of rights to much more highly circumscribed interests and liberties that could never conflict.

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<sup>80</sup> *Id.* at 30 n.\*.

<sup>81</sup> See, e.g., Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 905-10 (2000).

Neither the threshold nor the absolute conception of rights is literally incoherent. But each is sufficiently paradoxical, that it may not be a defect if the preeminent goods conception of rights cannot deliver either claim.

#### X. MILL'S INDIRECT THEORY OF RIGHTS

Secondary principle and preeminent goods conceptions of rights share some features in common because they are both compatible with direct utilitarianism. 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. Rights to do something that is wrong (suboptimal) can exist, and enforcing rights to do wrong can even be justified.

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.<sup>82</sup> Consider the preeminent goods conception. It treats the social enforceability of rights as a *consequence* of their importance. It does not treat social enforceability as the defining feature of rights.

However, at least one passage in Chapter V of *Utilitarianism* does treat social enforceability not just as a predictable consequence of independent value, but as a defining feature of rights. 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 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.<sup>83</sup>

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:

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<sup>82</sup> MILL, *supra* note 5, ch. V, para. 24, at 250.

<sup>83</sup> *Id.*

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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.<sup>84</sup>

These claims introduce a form of indirect utilitarianism into Mill's conception of rights. They imply that whether one possesses 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 it and/or punishing interference with it. This conception 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 as well.

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).

It is a little more complicated matter 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 by self-reproach or mild social censure – but 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.

If so, there can be rights to do things that are suboptimal and wrong. It is one thing for there to be a right to do something suboptimal or wrong. It is

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<sup>84</sup> *Id.* para. 25, at 250.

another thing to say that such a right should be respected or enforced. 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. Under the sanction theory of duty, it follows that rights violators act wrongly.

1. One has a right to  $x$  if and only if 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 if and only if some sort of sanction ought to be applied to its performance.
5. Hence, it is always wrong to violate rights.

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 could not 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 interference with  $B$ 's enjoyment of  $x$  is also 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 be wrong, because it would nonetheless be good or optimal to sanction; and that it would involve a violation of rights, because it would nonetheless be good or optimal for society to protect  $B$ 's bodily integrity by legal force or public opinion.

Do sanction utilitarian rights function as side constraints? On the one hand, their indirect utilitarian character means that rights do not depend on considerations of direct utility. Whether I have a right to freedom of speech does not depend on the utility of my speech but rather on the utility of protecting and enforcing my ability to speak. So, sanction rights do seem to constrain direct appeals to utility. On the other hand, sanction rights are claims that it would be wrong to interfere with because of the utility of enforcing those claims. For this reason, it is hard to see sanction rights as vindicating Nozick's idea that rights are side constraints, not justified by the good they

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promote. As we have seen, it is not clear that failure to deliver side constraints flouts an adequacy condition on rights.

We saw that it was a separate question, beyond the question whether rights are side constraints, whether rights are absolute. It is a complicated matter whether sanction rights are absolute. On the one hand, we just saw an argument showing that it is always wrong to violate rights. If I have a right to  $x$ , then society ought to protect me in the possession, enjoyment, or use of  $x$  and ought to punish those who would interfere with  $x$ . But if those who would interfere with  $x$  ought to be punished, then, according to the sanction theory of duty, they act wrongly. Hence, it is always wrong to violate rights. But wouldn't this conclusion imply that there could be no conflicts of rights? Why should Mill think that? Can't we imagine a situation in which different individuals have interests or liberties that are in conflict and cannot both be honored, perhaps a conflict 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? In such a case, might not both parties have claims that it would be useful to protect? The answer turns, I think, on an issue that I said Mill does not address squarely, namely, the precise standard of expediency for applying sanctions. Recall that we distinguished two conceptions of that standard – usefulness, as involving something like net benefit, and optimality. One can imagine that it might be useful to protect each of two mutually incompatible claims. What is harder to understand is how it could be optimal to protect each of two mutually incompatible claims.<sup>85</sup> This suggests that there could be conflicting rights according to the usefulness or net benefit criterion for applying sanctions but not according to the optimality criterion. If there can be a conflict of rights, rights cannot be absolute.

Clarification of this issue requires revisiting the claim, derived earlier from the sanction theory of rights and duty, that it is always wrong to violate rights. It is common to treat judgments that an action is wrong as final or conclusive moral verdicts based on proper weighting of all the morally relevant factors. If it were always wrong – in this sense – to violate moral rights, then that would be strong evidence that moral rights are absolute. Such a commitment would seem to require the optimality criterion for applying sanctions, for anything less than the optimality criterion would not be able to ensure that it was best to apply sanctions. And if it was not best to apply sanctions, it is unclear why it should be all-things-considered wrong to violate the right. We can make this point another way. Assume that the relevant criterion of expediency for applying sanctions is mere usefulness, not optimality. It might be useful to protect an individual's claim to  $x$ . If so, sanction theories of rights and duty would imply that it was wrong to violate this right. But that idea is compatible with it being better still not to protect the individual's claim, the usefulness of protection being overridden by the greater usefulness of not protecting. Surely

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<sup>85</sup> Here, I ignore the exotic but theoretically less interesting case in which protecting each of two mutually incompatible claims is exactly equi-optimal.

then we should treat its being wrong to violate the right as merely a *prima facie* or *pro tanto* moral claim, not a final or all-things-considered verdict.

This allows us to say that sanction rights are absolute just in case it is always all-things-considered (and not merely *pro tanto*) wrong to violate rights and that it is always all-things-considered wrong to violate rights just in case the criterion for applying sanctions is optimality. Use of any weaker criterion of expediency for applying sanctions will still allow us to say that it is always *pro tanto* wrong to violate rights, but cannot guarantee that it will be all-things-considered wrong to violate rights, that rights will not conflict, or that rights will be absolute.

Though it is not incoherent to insist that rights are absolute and cannot conflict, we saw earlier that this is a revisionary view. So while there is a reading of Mill's sanction theory of rights that would deliver these claims about rights, it is not clear this is the reading we should prefer.

#### CONCLUSION

We have seen that Mill has the resources for three distinct conceptions of rights: as secondary principles, as preeminent goods, and as interests society should protect with sanctions. These different conceptions both overlap and diverge in interesting ways.

	Deliberative Trumps	Trumps	Right to do Something Suboptimal	Right to do Wrong	Side Constraints	Absolute
Secondary Principles	Yes	Yes	Yes	Yes	No	No
Preeminent Goods	Yes	Yes	Yes	Yes	No	No
Sanction	Yes	Yes	Yes	Yes	No	Yes (Optimality) No (Benefit)

Perhaps the greatest overlap is between the secondary principle and preeminent goods conceptions. This is not so surprising, inasmuch as both are compatible with direct utilitarianism and 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.

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One apparent difference between them lies in their accounts of the existence of rights to do something suboptimal or something wrong. The preeminent goods conception allows that one person's right might be overridden if it conflicts with other weightier or more numerous rights and, hence, that there can be rights to do something suboptimal. However, because the preeminent goods conception is a form of act utilitarianism, it implies that in such cases it would be wrong not to violate the right. By contrast, the secondary principles conception has somewhat different implications. 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 is not 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. This way of formulating the secondary principle conception is compatible with the act utilitarian claim that the suboptimal act is wrong. Hence, this should be compatible with the act utilitarianism of the preeminent goods account. In cases in which principles about rights with optimal acceptance value require one to perform acts that are suboptimal, even when the weight of preeminent goods has been factored in, then an agent would be justified in following the principles about rights.

Neither conception recognizes rights that are side constraints on the good or rights that are absolute. Both recognize conflicts of rights, whose resolution is determined by direct utilitarian considerations.

Though different in important ways, Mill's indirect utilitarian conception of rights concurs with these two direct utilitarian conceptions on several issues. Because rights are not determined by direct utilitarian considerations, rights seem to act as both epistemic and metaphysical trumps in relation to direct appeals to utility. Not only will Mill's indirect utilitarian conception of rights recognize a right to do something that is suboptimal and a right to do something wrong, it can claim that it is always at least *pro tanto* wrong to violate rights. This contrasts with the other two conceptions of rights, which are direct utilitarian. The sanction theory of rights should also deny that rights are side constraints on the good. Whether it should claim that rights are absolute depends on whether the criterion for applying sanctions is optimality or mere usefulness.

In assessing the comparative adequacy of these three conceptions of rights, I think we face two main issues. One issue is which of these three utilitarian conceptions of rights is most attractive. That will depend in part on whether we should understand rights as absolute moral guarantees. If we should, that would favor the optimality version of the sanction theory of rights. But this is a controversial assumption about rights. Most views assume that rights can and do conflict. If so, this favors the secondary principle or preeminent goods conceptions of rights or perhaps the usefulness version of the sanction

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conception. A more important consideration will be the comparative merits of direct and indirect utilitarianism. I have outlined some reasons for thinking that direct utilitarianism is more plausible. If so, that would be reason to favor secondary principle or preeminent goods conceptions.

A different issue is whether any of these conceptions is plausible enough. Or, to put the point in terms of comparative plausibility, the issue is whether any of them is as plausible as non-utilitarian conceptions of rights. That will largely depend, I think, on the plausibility of the idea that rights are side constraints, a claim which all three utilitarian conceptions deny. And that will, in turn, depend at least in part on how paradoxical it is to construe rights as side constraints. While I have raised some of these issues, I have not tried to resolve them here.

Despite limitations on my inquiry and in some of my conclusions, I hope that this study of the architecture and resources of three different utilitarian conceptions of rights advances the historical and systematic issues about Mill's attempt to ground rights in utility that David Lyons initiated in his pioneering work on the topic. What is perhaps as interesting as the 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 recognize the possibility of rights to follow a suboptimal course of conduct and 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.