

PHIL 202: Ethics Core Course
Winter 2005; David O. Brink
Topic: Mill's Moral and Political Philosophy
Handout #3: Duty, Principles, Justice and Rights

SOME OPTIONS

- 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 human happiness.
- Indirect Utilitarianism: Any object of moral assessment should be assessed, not by the value of its consequences for human happiness, but by its conformity to something else (e.g. norms or motives) that has (have) good or optimal acceptance value.

A common form of Direct Utilitarianism is Act Utilitarianism. A common form of Indirect Utilitarianism is Rule Utilitarianism.

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

Act Utilitarianism appears to say that we should adhere to familiar moral precepts about honesty, fidelity, and nonmaleficence only when doing so has the best consequences. It is a counter-intuitive doctrine to the extent that we regard some of these precepts as categorical moral rules or principles. Rule Utilitarianism may seem less counter-intuitive, because it can explain why one ought to adhere to certain rules or precepts, even when doing so does not have the best consequences, provided doing so is generally optimal. Act Utilitarianism must condemn following rules when doing so is suboptimal; Rule Utilitarianism need not. But not everyone agrees that this makes Rule Utilitarianism superior to Act Utilitarianism. Some might think that we are wrong to embrace categorical moral rules and principles. Though these rules and principles might be good rules of thumb, they are not exceptionless generalizations. Moreover, Rule Utilitarianism may seem ad hoc. If utility is the appropriate test for rules, then why shouldn't we assess actions by the same criterion? Isn't rule utilitarianism a form of irrational rule worship?

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

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

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

Sidgwick makes essentially the same point too.

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 [Methods 413].

If so, utilitarianism does function as a standard of right action, but not necessarily as a decision procedure.

EVIDENCE FOR ACT UTILITARIANISM

Some of Mill's characterizations imply or at least suggest a form of direct utilitarianism, specifically act utilitarianism.

- Utilitarians are "those who stand up for utility as the test of right and wrong" (ii 1).
- Utilitarianism holds "that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness" (ii 2).
- Utilitarianism is a "standard of what is right in conduct" (ii 17).
- It requires that "utility or happiness [be] considered as the directive rule of human conduct" (ii 8).
- Utilitarianism is "the doctrine that utility or happiness is the criterion of right and wrong" (v 1).

A RULE UTILITARIAN READING?

But Mill sometimes focuses moral assessment on types of actions, and he expects moral agents to regulate their conduct in accord with various moral rules or principles that make no direct reference to utility. These facts suggest to some commentators that Mill may be some kind of indirect utilitarian, specifically a rule utilitarian. We need to examine this evidence for rule utilitarianism.

RIGHTNESS AND TENDENCIES

In his influential article "The Interpretation of the Philosophy of J.S. Mill" (1953), J.O. Urmson defends a rule utilitarian reading of Mill, not only as philosophically more sensible view, but also as one that makes better sense of Mill's texts. One of Urmson's textual arguments focuses on Mill's appeal to tendencies in the so-called proportionality formulation of utilitarianism.

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 [ii 2].

Urmson claimed that we could make sense of an action's tendency to produce good or bad consequences only as a claim about what is true of a class or type of actions. Token actions produce specifiable consequences; only types of actions have tendencies. On Urmson's

interpretation, Mill is really saying that an action is right if it is a token of a type of act that tends to have good or optimal consequences. But 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 felcific tendencies of actions. For instance, in his Introduction to the Principles of Morals and Legislation, Bentham writes

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

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

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

John Austin, who was clearly a rule, rather than an act, utilitarian, nonetheless shared Bentham's extensional understanding of the felcific tendencies of particular acts, as he makes clear in The Province of Jurisprudence Determined.

Now the tendency of a human action (as its tendency is thus understood) is the whole of its tendency: the sum of its probable consequences, insofar as they are important or material: the sum of its remote and collateral, as well as of its direct consequences, in so far as any of its consequences may influence the general happiness [/38].

Both Bentham and Austin are concerned (in these passages) with expected, rather than actual, utility, because both are concerned (in these passages) with good planning. But if we abstract from this difference between them and Mill in his statement of the proportionality doctrine, then it's clear that their extensional reading of felcific tendencies as properties of action tokens provides strong evidence against Urmson's reading and in favor of an act utilitarian reading of the proportionality doctrine.

Second, we might note another act utilitarian understanding of the proportionality doctrine. Particular actions have many consequences that are distributed both across persons and across times. The felcific or hedonic valence of these various consequences can be mixed. A given act may have consequences that are good for A and B but bad for C or bad for A and B in the short-run but better 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 (cf. Bentham, Principles IV 5). But then the proportionality doctrine would be asserting that an action is right insofar as it has beneficial consequences or insofar as its beneficial consequences predominate. But this is an act utilitarian claim.

Third, Mill sometimes understands tendencies as powers or dispositions of things to produce a certain sort of effect that will produce that effect unless some countervailing force interferes. For instance, in his understanding of the laws of mechanics, Mill denies that an object subjected to a force always moves in the direction of the force.

To accommodate the expression of the law to the real phenomena, we must say, not that the object moves, but that it tends to move, in the direction and with the velocity specified. We might, indeed, guard our expression in a different mode, by saying that the body moves in that manner unless prevented, or except insofar as prevented, by some counteracting cause [A System of Logic III.x.5/CW 444].

But tendencies in this sense are possessed not only by types of things but also by tokens. Moreover, tokens have the tendency even when they don't manifest it (produce the associated effect) due to interference. If Mill understands talk of tendencies in the proportionality doctrine in this way, then there's no need to read him, as Urmson does, as talking about types of actions, rather than action tokens. He would be ascribing to token actions powers to produce pleasure or pain – powers which, though present, may be masked by interfering factors.

But if we read Mill's tendency talk in the proportionality doctrine in this dispositional way, then he is endorsing something other than act utilitarianism, as traditionally conceived. Act utilitarianism is a form of direct utilitarianism, and it identifies the rightness of an act with the value of its consequences. These are actual consequences. But the dispositional version of the proportionality doctrine denies this. For on this view, rightness tracks not actual value but dispositional value – not actual consequences but the consequences an action would produce were it not interfered with. This view might be equivalent to rule utilitarianism if an action's dispositional value is the same as the normal or average value of the consequences of that type of action. If so, then there'd be merit to Urmson's rule utilitarian reading of the proportionality doctrine even though he was wrong to defend it by appeal to the claim that only action types have tendencies. However, there's reason to deny that

A's disposition to produce effect C should be understood as the claim that A-type things usually result in C-type effects.

For a genuine disposition may be regularly or systematically masked if interference is regular. So a dispositional reading of proportionality wouldn't result in rule utilitarianism. But it would result in an odd form of utilitarianism – one that implied that an action might be right even though it doesn't have good consequences, even though it does not belong to a class of actions that generally have good consequences, and even though that same action might not have good consequences in nearby possible worlds. This leads me to think that, even though Mill sometimes clearly understands tendencies as dispositions or powers that might not be manifest, this is not how he understands talk of tendencies in the proportionality doctrine. There it seems more plausible to read him as assuming a purely extensional reading of tendencies of the sort employed by Bentham and Austin in their own canonical statements of utilitarianism.

SECONDARY PRINCIPLES

Urmson also defends a rule utilitarian reading of Mill's claims about the importance of secondary principles and rules in our moral reasoning. He recognizes that an act utilitarian might appeal to rules or principles as rules of thumb in doing utilitarian calculations, but he insists that Mill's secondary principles are not mere rules of thumb.

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

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

The paradox of egoism 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. Mill appears to hold similar views about the need for secondary principles in the promotion of universal happiness. For instance, in Utilitarianism he defends the utilitarian's appeal to various moral precepts as secondary principles (ii 24-25). But it's not entirely clear how these secondary principles are related to the utilitarian first principle. Mill's discussion of the indirect pursuit of one's own happiness suggests two possible relationships.

- 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 it.
- Secondary principles are actually parts of the ultimate aim, as he seems to think that one's own happiness might have various higher activities as ingredients or proper parts.

The discussion in Utilitarianism suggests a different relationship.

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

Secondary principles, so understood, might sound like mere rules of thumb. But Mill seems to regard them as more than mere heuristics in a utility calculation. He seems to believe that secondary principles often satisfy two conditions.

1. Following the principle generally but imperfectly leads to optimal results.
2. The suboptimal results that adherence to the principle produces cannot be identified reliably and efficiently in advance.

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 clear that the effects of adhering to the principle would be disastrous and in cases in which secondary principles, each of which has a utilitarian justification, conflict (ii 19, 24-25). But, otherwise, they should regulate their conduct according to these secondary principles without recourse to the utilitarian first principle. Regulating one's behavior in this way by secondary principles is what will best promote happiness. Mill summarizes this picture in a couple of places. In A System of Logic he writes

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

the world, if feelings are cultivated which will make people, in certain cases, regardless of happiness [VI.xii.8].

Mill makes similar claims in his essay "On Bentham"

We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement in persons who differ in their ultimate standard; and about which there does exist a much greater unanimity among thinking persons, than might be supposed from their diametrical divergence on the great questions of moral metaphysics. ... Those who adopt utility as a standard can seldom apply it truly except through the secondary principles; those who reject it, generally do no more than erect those secondary principles into first principles. It is when two or more of the secondary principles conflict, that a direct appeal to some first principle becomes necessary; and then commences the practical importance of the utilitarian controversy ... [CW /90-91].

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

In "Two Concepts of Rules" Rawls motivates a rule utilitarian justification of punishment by appeal to a difference in legislative and judicial attitudes toward rules. Rawls asks us to distinguish the legislative issues of whether to punish conduct, which conduct to punish, and how to punish such conduct from the judicial issue about the conditions under which particular individuals ought to be punished. This is a special case of the more general distinction between reasons for having a practice and the reasons it proper operation. Forward-looking utilitarian reasons are relevant to these legislative issues, but only backward-looking retributive reasons are relevant to addressing the judicial issue.

The decision whether or not to use the law rather than some other mechanism of social control, and the decision as to what laws to have and what penalties to assign, may be settled by utilitarian arguments; but if one decides to have laws then one has decided on something whose working in particular cases is retributive in form [Collected Papers 23].

This is a rule utilitarian approach to punishment. Interestingly, Mill begins his own account of the relationship between first principles and secondary principles in A System of Logic by making the same distinction between legislative and judicial perspectives on punishment (VI.xii.2). So perhaps he too is drawing rule utilitarian conclusions.

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

Moreover, act utilitarianism permits one to act on discrete moral precepts or principles that make no direct reference to utility if this results in one performing the optimal action. Indeed, the act utilitarian can allow the agent to follow principles or rules even when this sometimes results in suboptimific 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 suboptimal 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 expect the agent to follow the optimal rules, rather than always perform the optimal action. This would be rule utilitarianism (not direct utilitarianism) if and 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 right actions. The suboptimal actions the agent thus performs will be wrong, but they can be cases of blameless wrongdoing.

SANCTIONS, DUTY, JUSTICE, AND RIGHTS

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. But in Chapter v of Utilitarianism Mill provides An indirect utilitarian account of duty, justice, and rights that is at odds with act utilitarianism. There, Mill claims

We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it – if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience [v 14].

Here Mill claims that one is under an obligation or duty to do something just in case failure to do it is wrong and that an action is wrong just in case some kind of external or internal sanction -- punishment, social censure, or self-reproach -- ought to be applied to its performance. This test distinguishes duty from expediency (v 14, 15); suboptimal or inexpedient acts are wrong only if one ought to apply some sort of sanction (at least, self-reproach) to them. Justice involves duties that are perfect duties -- that is, duties that are correlated with rights (v 15). An act is just just in case it is not unjust, and it is unjust just in case it is wrong and violates someone's rights (v 23). Someone has a right just in case she has a claim that society ought to protect by force of law or public opinion (v 24). Let's try to be clear about these various claims.

1. An act is wrong iff some sort of sanction ought to be applied to its performance.
2. An act is obligatory or one's duty iff failure to do it is wrong.
3. An act is permissible iff it is not wrong to perform it.
4. An act is supererogatory iff it permissibly but morally better than one's duty.
5. Hence, an act is obligatory or one's duty iff some sort of sanction ought to be applied to the failure to do it.
6. Hence, an act is permissible if it is not the case that some sort of sanction ought to be applied to its performance.
7. Not all inexpedient or suboptimal acts are wrong.
8. Hence, it is not always one's obligation or duty to perform the optimal act.
9. Hence, some suboptimal acts are permissible
10. Hence, it isn't always one's duty to perform the optimal act.
11. Hence, there can be supererogatory acts.
12. Justice is a species of duty in which the failure to act justly is not only wrong but also violates rights.

13. Someone has a right to x iff society ought to protect her claim to x by force of law or public opinion.

14. Hence, unjust acts are wrongs that society ought to prohibit by force of law or opinion.

15. Hence, just acts are duties that society ought to require by force of law or opinion.

These relationships among duty, justice, and rights do not yet introduce any utilitarian elements. But Mill does think that whether sanctions ought to be applied to an action (and hence whether it is wrong) and whether society ought to enforce an individual's claim (and hence whether she has a right) both depend upon the utility or expediency of doing so (v 25).

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. We might call it **sanction utilitarianism**. Sanction utilitarianism is inconsistent with act utilitarianism.

THE FORBIDDEN, PERMISSIBLE, OBLIGATORY, AND SUPEREROGATORY

What, if anything, hangs on this difference between direct and indirect utilitarianisms? 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. Commonsense moral thinking recognizes a fourfold moral distinction among

- (a) the forbidden,
- (b) the permissible,
- (c) the obligatory, and
- (d) the supererogatory.

The act utilitarian seems unable to account for this fourfold distinction. Because it makes the optimal obligatory and the suboptimal wrong, it appears to collapse the distinctions among (a)-(c) and make no room for (d). If the optimal is already one's duty, there appears to be no room for the supererogatory. By contrast, the sanction utilitarian does not have these problems. As (7)-(11) show, Mill's sanction utilitarianism can recognize that suboptimal acts are not always wrong and that there is a class of supererogatory acts.

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 (suboptimal acts) that is blameless or even praiseworthy. But then the direct utilitarian can draw a similar fourfold distinction among

- (a) actions whose commission is blameworthy,
- (b) acts whose omission is not blameworthy,
- (c) acts whose omission is blameworthy, and
- (d) acts whose omission is not blameworthy and whose performances is praiseworthy (or perhaps deserving of special recognition and praise).

Of course, these notions of praiseworthiness and blameworthiness must themselves be interpreted in maximizing consequentialist terms. While there is no a priori guarantee that the direct utilitarian fourfold classification will track perfectly the commonsense classification, 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's unclear that sanction utilitarianism enjoys any real advantage here over act utilitarianism.

MILL'S THEORY OF RIGHTS

What are the prospects for Mill's utilitarian theory of rights? Nowadays it is common to think that the utilitarian cannot recognize rights, because rights are conceived as "trumps" (Dworkin) or "side constraints" (Nozick) on the pursuit of collective goals such that it is wrong to violate rights even if doing so maximizes utility. How, if at all, might Mill reply to this perceived tension between utility and rights?

Rights as Secondary Principles. One response is for Mill to treat rights as secondary principles whose observance is justified on utilitarian grounds. Mill suggests this in a famous passage from On Liberty.

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being [i 11].

On this interpretation, rights are protected by rules that insulate an individual's interest or liberty from certain kinds of interference and that make no direct reference to the good consequences of insulation. We should observe such rules more or less uncritically, and set them aside only when adherence to them is clearly suboptimal or in cases of conflicts among such rules (rights). In such exceptional cases, we should make direct appeal to the principle of utility. Why should we regulate our conduct by such rules? Because doing so is generally but imperfectly optimal, and we are unable to discriminate for cases in which deviation from the rules is suboptimal without deviating from them in other cases in which it is not. This is what Berger calls the **strategy conception of rights**. It is generally but imperfectly optimal to honor rights. In cases in which it is not optimal, it may nonetheless be best to honor them. These would be cases of blameless wrongdoing.

Rights as Incomparable Goods. Why should we believe that there are interests or liberties that it is generally but imperfectly optimal to protect? Mill's answer is that some interests and liberties play a more fundamental role in human happiness than others. On this reading, rights protect **incomparable goods**. Recall that Mill links the idea of justice and rights insofar as all injustices are not only wrong but violate rights.

While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice – that of a right residing in an individual – implies and testifies to this more binding obligation [v 32; cf. v 33, 37-38].

Indeed, if the goods protected by rights are so important, we can understand why Mill might think that society ought to enforce them by law or opinion (v 24).

On the incomparable goods conception of rights, it is in fact always optimal to honor rights, except in cases of conflicts of rights. This account of rights could be fit within a direct conception of utilitarianism and would be compatible with act utilitarianism. It would explain why one person's right trumps ordinary appeals to collective advantage. But it would not

support the idea that rights are absolute protections. Rights should not be honored when doing so would be clearly suboptimal. Of course, if rights protect interests and liberties that are higher in the scale of value than other considerations, then there may be few, if any cases, in which interfering with a right to promote other collective goods would be optimal. Indeed, if Mill treats such interests and liberties as he treats higher pleasure – as being incomparably better than other goods – then it could never be better overall to sacrifice a right in the smallest way to achieve any amount of lesser goods. Of course, even if the goods that rights protect are incomparably better than other goods, they won't be incomparably better than each other. So we can imagine that honoring a right might be purchased at the price of honoring other, comparable rights. There should be no presumption in such conflicts that it is always optimal to honor an individual's rights. But that would be to recognize a conflict of rights, and Mill's conception of secondary principles implies that such conflicts should be resolved by direct appeal to the principle of utility. Presumably, Mill would be committed to the desirability of maximizing the observance of rights or minimizing their violation. This is the view Nozick calls a "utilitarianism of rights" with which he contrasts his own conception of rights as side constraints.

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

Nozick contrasts this conception of rights as goals with his own conception of rights as side constraints.

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

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

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

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

The strategy and incomparable goods conceptions of rights have a lot in common. They both justify honoring rights, except in cases of conflicts of rights in a way that is compatible with act utilitarianism. The incomparable goods conception implies that it is never optimal to violate a right, except in cases of conflicts of rights. The strategy conception implies that we should

honor rights, except in cases of conflicts of rights, either because this is optimal or, if not, because it is a case of blameless wrongdoing.

Mill's Indirect Theory of Rights. Notice that these direct utilitarian interpretations of Mill's conception of rights explain why Mill might believe that rights are considerations that are sufficiently important that they ought to be not simply honored but socially protected by force of law or opinion (v 24). Consider the incomparable goods conception. It treats the social enforceability of rights as consequence of their importance. It does not treat social enforceability as the defining feature of rights, as Mill seems at one point to suggest. He 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. He expands on this second element.

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 [v 24].

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

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? One point is that Mill can apparently say that it is always wrong to violate rights. Mill thinks that a right is something that society ought to protect me in the possession and exercise of, and he thinks that to protect me in this way is to punish (by force of law or opinion) those who interfere with my possession or exercise of that to which I have a right. But then rights violators ought to be punished by society. But then it follows that they act wrongly.

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

Can we also claim there are cases in which it would be wrong to perform the optimal act, because it would involve a violation of rights? If there are optimal acts that violate rights, the argument we have just examined allows Mill to say that it would be wrong to violate the right. But could there be cases in which it was optimal to violate a right? Put another way, could there be cases where society ought to enforce an individual's claim even though it would be optimal to violate it? There seems to be no problem in principle with this view. Whether A should interfere with B's enjoyment of x is one issue, and whether C should enforce B's claim to x is another. It's not clear why both couldn't be optimal relative to their alternatives. But would it make sense for C's enforcement of B's claim to x to be optimal if A's interferences with B's enjoyment of x is optimal? I think that we can imagine circumstances in which this might be true. Consider a familiar example of rights that seem to defy utilitarian analysis -- Organ Harvesting. Suppose that a surgeon (A) can save five lives (C-G) by harvesting and transplanting the organs of one healthy patient (B). If all else is equal, transplantation would seem to be optimal, yet it would seem to violate the rights of the unwilling donor. Perhaps this would be a case in which Mill could say that harvesting the organs could, in special

circumstances, be optimal but that it would nonetheless be wrong, because it would be good or optimal to sanction, and that it would nonetheless involve a violation of rights because it would be good or optimal for society to protect B's bodily integrity by legal force or public opinion.