

MILL ON JUSTICE: CHAPTER 5 of *UTILITARIANISM*

Lecture Notes

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In "Classical Utilitarianism" John Rawls asserts that utilitarianism is incompatible with justice and objectionable for that reason. Utilitarianism according to Rawls can imply that we should in certain situations treat people unfairly, violate their moral rights. Utilitarianism "does not take seriously the distinction between persons," he writes. By this he means that utilitarianism extends what is acceptable in choices that one person makes for her own life to situations of conflict of interest among distinct persons. It is prudent, and permissible, for me to accept the modest pain of going to the dentist now to avoid the bigger pain of a toothache later, but utilitarianism holds that if I can gain for Smith relief of a pain equivalent to toothache by imposing on Jones a smaller pain equivalent to going to the dentist and no other option I can choose produces more utility than I should impose on Jones.

In chapter 5 of *Utilitarianism* J. S. Mill takes up the supposed conflict between utilitarianism and justice. His argument is difficult, complex, and subtle. In the end the question arises whether he meets the objection or evades it.

Mill takes the problem to be that the sentiment of justice feels to most of us more compelling and morally more authoritative than the sentiment of benevolence associated to utilitarianism. Mill thinks that 'people are in general willing enough to allow that objectively the dictates of justice coincide with a part of the field of general expediency.' Still, the "subjective mental feeling of justice" is usually more imperative in its demands than the feeling "which commonly attaches to simple expediency" (p. 42).

We begin by asking what is the common quality that unites all modes of conduct and policy we deem just. It is thought normally to be unjust to (a) violate someone's legal rights, at least those that ought to be his rights, (b) not to treat people as they deserve, (c) to break faith with anyone, (d) to be partial in those situations where impartiality is required, and (e) to treat people unequally, though people disagree wildly as to what sort of equality might be morally required. Mill cannot find a common thread here, so breaks off this discussion and starts another.

Mill looks at the history of usage of the word and finds the idea of justice tied to the idea of conformity to law, at least law as it ought to be. We call conduct unjust that we do not think should be enforced by law, but what is thought unjust is always thought to be fit for punishment, either by law, or public opinion, or by pangs of conscience. But this is not the specific idea of injustice but the more general idea of a moral wrong. An act that is morally wrong is one that ought to be punished somehow (and an act is morally right, rather than

merely nice, if not doing that act would be morally wrong). To get the specific idea of injustice we add to the idea of a wrong act a particular person or persons wronged by that wrong act. Mill states, "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 his moral right" (p. 49). Example that illustrates Mill's point: Consider Minimally Decent Samaritanism: acting in an emergency situation to save someone's life when one can do so at small cost and risk to oneself. Some people think that Minimally Decent Samaritanism is conduct one ought to do, but if one does not do it, one has maybe been uncharitable, but violates no right of the person who is not saved from death. Others think that not only is failure to conform to the norm of Minimally Decent Samaritanism wrong, but it also violates a right that the person who could be saved has to the easy rescue. The people who hold the latter view will say that failing to be a Minimally decent Samaritan is unjust; those who hold the former view will deny such conduct is unjust.

Next, Mill asks what is the relation of justice so construed to utility. He gives several arguments for not supposing justice is a norm that should have independent moral force against the idea of the general welfare.

1. *The origin of justice is a primitive instinct.* Of the sense of justice he asserts that "the sentiment itself does not arise from anything which would commonly or correctly be termed an idea of expediency, but that, though the sentiment does not, whatever is moral in it does" (p. 50).

He goes on to say that the desire to punish someone who harms a person grows out of two primitive sentiments--the instinct of self-defense and the feeling of sympathy. We want to harm those we see as threatening to harm us and those with whom we sympathize. There isn't anything moral in these instincts, they need to be tamed and shaped by morality, which Mill identifies with the principle of utility. When that is done, I only want to retaliate against those who threaten me and those near and dear to me with harm if I see that retaliating promotes the general welfare (happiness) and does not merely satisfy my desire for retaliation.

2. *Justice is an ambiguous oracle.* Injustice occurs when there is a violation of some person's right. When someone has a right to something, he has "a valid claim on society to defend him in the possession of it" (p. 52). But rights claims multiply. On almost any side of any controversial issue, people on all sides of the dispute claim they have a right to win. Mill gives examples. Some say punishment is just only when done to benefit the person punished; others say this would be wrong and that punishment is acceptable only when needed to protect the legitimate interests of other people, others say punishment is always unjust. Some say the punishment should be exactly proportioned or matched to

the severity of the crime; others say that the only good justification for punishment is that it is necessary to deter that criminal or others from committing further crimes. Mill also gives the example of seemingly intractable disputes about just wages. A third example is taxation: again opposed views that cannot all be correct present themselves as right and just. If we wish to respect and protect people's rights, how can we decide what people's rights are? Mill says only utility can reasonably resolve these conflicting claims. The rights claim that is valid is the one protection of which best promotes the general happiness.

3. *Part of the explanation of the strength of the moral feeling that we ought to do what is just is that the subset of the moral rules promoting utility that concerns justice is the subset that regulates matters that are very important to people's lives and on which a lot of utility turns* The utilitarian does not admit that justice is a moral standard independent and distinct from utility but acknowledges that the part of (supposed) justice that coincide with what utilitarianism recommends is "the chief part, and incomparably the most sacred and binding part, of all morality" (p. 58). These rules that are in the overlap of justice and utility include rules forbidding people to hurt one another or interfere with their freedom without good reason. Punishing those who violate useful social rules and being disposed to reciprocate good for good are also norms of justice backed by utilitarianism. Of course no such justice rules are absolute; they admit of exceptions when circumstances are unusual and the general happiness is best served by making an exception.

4. *The core of justice is implied by the principle of utility.* Doing to each "according to his deserts, returning good for good, as well as repressing evil by evil, " requires us to "treat all equally well . . . who have deserved equally well of us" an requires society to "treat all equally well who have deserved equally well of it." This is "the highest abstract standard of social and distributive justice." But this rule itself is derived from the utilitarian first principle of morals, which requires that each person's happiness counts equally in calculations to determine social policy as every other person's. An equal claim of everyone to happiness and "an equal claim to all the means of happiness" except insofar as considerations of incentives qualify the claim is thus the norm of justice and implied by the utilitarian morality.

Evaluation of Mill's arguments. I take Mill's points in the order that he presents them.

1. By itself it is not clear that this has any argumentative force. The principle of utility might have its historical origin in a primitive sentiment of sympathy. If so, this does not tend to show that the principle of utility is a bad principle that should not be accepted. The same goes for the sentiment of justice.

2. Mill is pointing out that you can't beat a theory except with a theory. We should not then rest content with particular judgments that disagree with utilitarianism but should try to refine and order these judgments into an acceptable theory of justice. Mill challenges the opponent to produce such a theory but does not show it cannot be done.

Also, we might deny that justice never gives firm guidance. Even if there are kinds of case where justice tends to speak with a forked tongue, supporting all sides in a dispute, there may be other cases where justice is unambiguous. And even if justice considerations in no case determine the morally right answer, they might still rule out some wrong answers, and the utilitarian recommendation might be among these wrong answers.

3. Suppose justice partially overlaps with utility. This still leaves open the question what to say about the area where there is no overlap and utilitarian reasoning and claims about moral rights conflict.

4. The utilitarian norm of equality is a norm of equal consideration: In determining the right policy, do not ignore or discount anyone's interests. But this is compatible with extreme inequality in the policy that is chosen, if our aim is to maximize the sum of utility. For some, equal consideration might not seem equality enough. Also, neutrally and equally counting everyone's interests may itself be unjust. The justice theorist will say we should count as positive reason for a policy only that it satisfies legitimate interests. That slaveholders benefit from slavery is not a consideration, one might say, that should count in favor of slavery even if the slaveholders' interest is ultimately outweighed by the greater interests of those who suffer under slavery.

I don't raise these criticisms as decisive, just thoughts to start discussion.
Question: does Mill ever address a case where justice considerations seem to weigh heavily against the policy recommendation that it would seem utilitarianism should give?

Aside from the justice versus utility issue, chapter 5 is of interest for another reason.

Mill suggests a new proposal, apparently different from what he has asserted earlier in the book, about what the utilitarian criterion of right conduct is. The chapter 5 suggestion is that a wrong act is one that is fit to be punished or ought to be punished, and a utilitarian account of wrong acts then stipulates that these acts that ought to be punished are the ones punishing which would maximize utility. A right act is then one such that failure to do it is wrong. An act is

neither right nor wrong if it is not wrong to do it and not wrong not to do it either.

This seems to be a different idea from the scalar criterion suggested in chapter 1. That holds: Order all the possible acts a person could now do from best to worst by the standard of producing most utility (or least disutility). The closer an act is to the best choice, the more it is right, and the further it is from the best choice, the more it is wrong. (Act utilitarianism is the slightly different idea that one should always do the best act in this order and anything else one does is wrong.)

Consider an example: I can order fish or chicken or carne asada tacos at a restaurant one night, and more utility would be gained if I choose the fish tacos, least if I choose chicken. The act utilitarian test gives the result that I do what is wrong if I do not order fish tacos. The chapter 5 test gives the result that my act of ordering nonfish tacos would not be wrong because it would not maximize utility to set in place any social practice that punishes acts like this one in any way. The scalar test yields the result that it would be more right to order fish than carne asada and more wrong to order chicken than carne asada. In this example the chapter 5 test has some plausibility: since only small amounts of utility are at stake, why bring right and wrong into the evaluation of the choice? At some points in chapter 2 Mill hints at a rule utilitarian test, so he proposes four different utilitarian standards in all without choosing among them or noticing that they are different.