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Reconciling utility with liberal justice : John Stuart Mill's minimalist utilitarianism

John Robert Fitzpatrick

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To the Graduate Council:

I am submitting herewith a dissertation written by John Robert Fitzpatrick entitled "Reconciling utility with liberal justice : John Stuart Mill's minimalist utilitarianism." I have examined the final electronic copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Philosophy.

Betsy C. Postow, Major Professor

We have read this dissertation and recommend its acceptance:

Richard E. Aquila, Robert A. Gorman, David A. Reidy

Accepted for the Council:

Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

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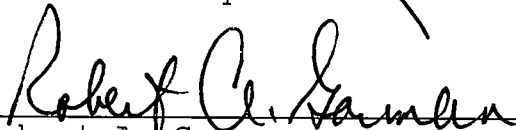


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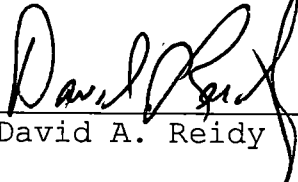
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and recommend its acceptance:



Richard E. Aquila

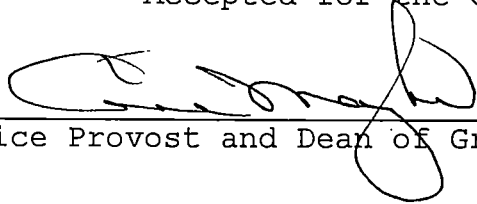


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RECONCILING UTILITY WITH LIBERAL JUSTICE:
JOHN STUART MILL'S MINIMALIST UTILITARIANISM

A Dissertation
Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

John R. Fitzpatrick

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Finally I must thank my director, Betsy Postow, but I do not know where to begin. I owe her an enormous intellectual debt, and her tireless work on this project, reading draft after draft with a thorough and insightful eye, cannot be underestimated; that she did so under such severe time constraints and with such good cheer was well beyond the call of duty. She is simply worthy of accolades that I lack the skill to deliver.

Any faults that may yet remain are, of course, entirely my own.

John R. Fitzpatrick

ABSTRACT

Many philosophers have argued that there are two John Stuart Mills. There is the rights supporting liberal Mill of On Liberty, and then there is the author of Utilitarianism. This reading often presupposes that there is no possibility of reconciling these two Mills, since it is purportedly impossible to be both a supporter of liberal justice and utilitarianism. I propose specific readings of On Liberty and Utilitarianism that make this claim far from credible.

In Chapter One, I address the most common objection to utilitarianism, namely, that utilitarianism cannot support rights at all. Properly understood, utilitarianism is at its core a moral theory that takes at least one right seriously, the right to equal consideration, and this is recognized even by sophisticated opponents of Utilitarianism such as Mark Rowlands. In fact, the noted political philosopher Ronald Dworkin has argued that there is no logical reason why utilitarians are required to accept the most narrow formulation of this right.

In Chapter Two I offer a reading of Mill's On Liberty. I suggest that there are two primary ways one can misread this work. The first is to insist that since Mill is one of the more important classical economists, he must be a strong supporter of libertarian property rights. The second mistake is to assume that the Harm Principle as raised by Mill in Chapter I of On Liberty is Mill's final word on this issue.

In Chapter Three, I argue that once Mill's utilitarianism is properly understood his claim that the rights he advocates in On Liberty are utilitarian in nature is both plausible and defensible. Following Rem B. Edwards, I argue that Mill is not a maximizing utilitarian. Once Mill is read as a moral minimalist, it is not difficult to reconcile his liberalism with his utilitarianism.

In Chapter Four, I answer the Rawlsian objection directly. John Rawls has suggested that utilitarianism cannot be successfully used to support principles of justice. I argue that Rawls' charges are not as damaging to a Millian theory of Justice as is commonly believed.

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INTRODUCTION

For at least the last fifty years many philosophers have argued that there are two John Stuart Mills.¹ There is the rights supporting liberal Mill of On Liberty, and then there is the author of Utilitarianism.² This reading often presupposes that there is no possibility of reconciling these two Mills, since it is purportedly impossible to be both a supporter of liberal justice and utilitarianism. On this view, "liberal utilitarianism" is a full-blooded oxymoron. Eventually I will propose specific readings of On Liberty and Utilitarianism that make this claim far from credible. I will

¹ For example, see Himmelfarb, Gertrude 1974, Liberalism and On Liberty: The Case of John Stuart Mill. A response to Himmelfarb's two Mills can be found in Dworkin, Ronald 1978b, "Liberty and Liberalism."

² Some commentators use the term "liberal" to suggest a supporter of a priori, natural, indefeasible, and/or God-given rights. I am using the term "liberal" to indicate a supporter of what Gerald Gauss has called the Fundamental Liberty Principle, namely, "freedom is normatively basic, and so the onus of justification is on those who would limit freedom. It follows from this that political authority and law must be justified, as they limit the liberty of citizens. Consequently, a central question of liberal political theory is whether political authority can be justified, and if so, how." Gerald F. Gauss' entry "Liberalism" in Stanford Encyclopedia of Philosophy (online at <http://plato.stanford.edu/entries/liberalism/>) Paragraph 2. This does not preclude a belief in, say, a priori rights, but it certainly does not require one. Similarly, I use the term "rights" broadly and inclusively, since as Gauss notes liberals disagree "about the concept of liberty, and as a result the liberal ideal of protecting individual liberty can lead to very different conceptions of the task of government." Ibid., Paragraph 4. One attempt to define rights broadly and inclusively is offered by Bowie, Norman E. and Robert I. Simon 1998 The Individual and the Political Order. These authors suggest that rights should be understood as entitlements or areas of "individual inviolability that may not be invaded on grounds of benevolence, social utility, the public interest, or charity" pp. 42-43. As we shall see, Mill's utilitarianism does not prevent him from demarcating an area of

offer a reading of Mill that suggests that he believes that we do have fundamental rights, and yet still manages to keep this work and Mill's overall moral theory under a utilitarian rubric. However, this will not satisfy sophisticated opponents of utilitarianism. Sophisticated opponents of Utilitarianism will admit that utilitarianism can support some sort of rights, but the system of rights that utilitarianism can support is not sufficient to protect the individual liberties necessary for a liberal theory of justice. John Rawls and other Rawlsians have argued that in utilitarian hands individual rights become so truncated or conditional that the rights defended by utilitarianism do not give individuals the individual protection that an acceptable theory of justice would provide. I argue that this view is mistaken, and properly understood Mill's liberal utilitarianism can support a system of rights rich enough to guarantee individual liberty. But to do this it will be necessary to first accomplish four goals which I take up in four chapters one devoted to each goal.

In Chapter One, I address the most common objection to utilitarianism, namely, that utilitarianism cannot support rights at all. I will argue that this objection usually rests on a simple confusion. Utilitarian opponents often present case studies that purportedly show that utilitarianism cannot

personal morality that would allow such entitlements. For Mill's

support rights in some highly artificial case, and then wish to leap to the conclusion that utilitarianism cannot support rights at all. Obviously, even when their analysis is correct, all they have shown is that utilitarianism cannot support rights in some particular case. Even to accomplish this meager goal the case study or thought experiment usually relies on making elaborate and specious assumptions about reality that should be discounted. I examine two examples provided by James Rachels and argue that they are not even damaging to the crudest forms of utilitarianism. I take up two more sophisticated examples in Chapter Four. I also believe that it is worth noting that utilitarian opponents often ignore the actual views of utilitarian thinkers. The classical utilitarians have a long history of defending the rights or offering moral consideration to disenfranchised groups. It should be noted that Kant has a very poor record in this regard, yet this is rarely mentioned in standard ethical treatises. Thus, classical utilitarianism compares well with Kantianism when the actual views of Bentham, the Mills, and Kant are addressed. Utilitarian opponents should at least explain why the classical utilitarians so badly misunderstood their own ethical theory; how is it that the classical utilitarians found moral consideration for the disenfranchised when their theory cannot support rights at all? Finally, properly understood, utilitarianism is at its core a moral

definition of rights, see below, Chapter Two, p. 102.

theory that takes at least one right seriously, the right to equal consideration, and this is recognized even by sophisticated opponents of Utilitarianism such as Mark Rowlands. In fact, the noted political philosopher Ronald Dworkin has not only argued that utilitarianism supports the right to equal consideration, but has also argued that there is no logical reason why utilitarians are required to accept the most narrow formulation of this right.

In Chapter Two I offer a reading of Mill's On Liberty. I suggest that there are two primary ways one can misread this work. The first is to insist that since Mill is one of the more important classical economists, he must be a strong supporter of libertarian property rights. This assumption rests on an incorrect understanding of classical economics in general, and in particular an incorrect reading of Mill's political economy. The second mistake is to assume that the Harm Principle as raised by Mill in Chapter I of On Liberty is Mill's final word on this issue. As Elizabeth Rappaport has argued this is simply Mill's first approximation; Mill reformulates the Harm Principle in Chapter IV, and offers us a Liberty Principle that is based on rights and obligations. Thus, Mill in On Liberty is arguing specifically for individual liberties that are cashed out in terms of rights. Yet, Mill argues that he does this on purely utilitarian grounds.

In Chapter Three, I argue that once Mill's utilitarianism is properly understood his claim that the rights he advocates in *On Liberty* are utilitarian in nature is both plausible and defensible. Following Rem B. Edwards, I argue that Mill is not a maximizing utilitarian. Once Mill is read as a moral minimalist, it is not difficult to reconcile his liberalism with his utilitarianism. However, this reading is clearly controversial so I argue for it in some length. In short, Mill is interested in a utilitarianism that gives proper weight to individual self-development and character formation. A maximizing utilitarianism does not provide the private moral sphere that Mill thinks is essential to allow individuals to pursue their own version of the good. My emphasis here is on Mill's use of secondary principles to guide our conduct, and to indicate when sanctions can be imposed on individuals violating those norms. Some secondary rules are so important as to be classified as rights, and should only be overridden when they conflict with other critical secondary rules. The principle of utility, for Mill, is a foundational axiological claim that should guide our choices of secondary rules, but is only appealed to directly when secondary rules are in conflict.

In Chapter Four, I answer the Rawlsian objection directly. John Rawls has suggested that utilitarianism cannot

be successfully used to support principles of justice. Although this argument is formulated against primarily the classical utilitarianism of Sidgwick, it is often interpreted as being meant to be applicable to Mill's utilitarianism as well. If Rawls' argument is correct, this would preclude any attempt to use Mill's political philosophy to develop a theory of justice, since clearly he is a utilitarian. Rawls' argument is both important and influential; thus my purpose in this section will be to show that this argument is far less damaging to developing a utilitarian theory of justice than is commonly believed. I will focus on two of Rawls' arguments, since I believe they have the greatest resonance in the literature: One, since utilitarians are committed to maximizing utility, they in principle cannot always protect individual or minority rights. It is always at least possible that the course of action that maximizes utility will violate individual rights. Two, utilitarianism does not treat individual desires as emanating from specific individuals. In either case, utilitarianism cannot take the distinction between persons seriously. I argue that these charges are not as damaging to a Millian theory of Justice as is commonly believed.

Finally, if my arguments have been successful, Mill can offer support for liberal principles of justice. This would be of great importance to liberal political philosophers, since

Mill does this while still maintaining many of the attractive features of utilitarianism. Thus, If the reading of Mill I offer is correct, Mill's liberal minimalist utilitarianism should be given greater consideration, especially by liberal theorists who may not be familiar with his work, and those who are wedded to the traditional two Mills.

CHAPTER ONE

UTILITARIANISM AND RIGHTS

Eventually I want to propose a specific reading of On Liberty; this reading suggests that Mill believes that we do have fundamental rights, and yet still manages to keep this work and Mill's overall moral theory under a utilitarian rubric. But to do this it will be necessary to first accomplish three goals. One, a common objection to utilitarianism is that utilitarianism cannot support rights at all. I will argue that this objection usually rests on a simple confusion. When it does not, it relies on making elaborate and specious assumptions about reality that should be discounted. Kantianism is rarely offered as a theory that cannot support individual rights, yet I will argue that under an unfavorable set of assumptions it would certainly fail this type of test. Two, utilitarian opponents often ignore the actual views of utilitarian thinkers. The classical utilitarians have a long history of defending the rights or offering moral consideration to disenfranchised groups. It should be noted that Kant has a very poor record in this regard. Thus, classical utilitarianism compares well with Kantianism when the actual views of Bentham, the Mills, and

Kant are addressed. Three, properly understood, utilitarianism is at its core a moral theory that takes at least one right seriously, the right to equal consideration, and as Ronald Dworkin has argued there is no logical reason why utilitarians are required to accept the most narrow formulation of this right. Even a superficial reading of On Liberty suggests that Mill's liberal political philosophy supports a very broad formulation of this right, and when Mill is read as a moral minimalist it should be possible to reconcile his liberal political philosophy with his utilitarianism.

James Rachels and Utilitarianism

Opponents of utilitarianism invariably argue that utilitarians simply cannot take rights seriously. One standard methodology is to create a counter-example. Consider the following true-life case offered by James Rachels: In October 1958 Angela York went to a Chino police station to report that she had been assaulted. The officer who took her statement, Ron Story, convinced York that as a part of standard procedure it was necessary for him to photograph her injuries. York objected to being photographed in the nude, since she did not believe that her injuries would be apparent, but Story convinced her that it was procedure, and then directed her to assume positions of an indecent nature. Story with the assistance of two other officers made copies of these

photographs, at city expense, and circulated them among the other members of their department. York eventually sued Story and his accomplices and won.³

Rachels wants us to consider the morality of the officers' actions. Clearly, York's legal rights had been violated (she won her lawsuit, after all). But did the pleasure afforded to the officers outweigh the pain inflicted upon York? According to Rachels it is at least possible that more "happiness than unhappiness was caused."⁴ Of course, Rachels must phrase this hypothetically since it is hard to imagine any positive utility arising from the real world consequences of this case. Thousands of citizens outraged at their police department. Every Chino police officer walking around under a cloud of embarrassment. Rachels does not tell us whether Story and other officers were fired or disciplined in any way, but it is hard to imagine in hindsight that this incident produced a balance of positive utility. How much utility does Rachels believe looking at third rate pornography produces? Is Rachels suggesting that after being caught and successfully sued even Story came out ahead? Even if Story were an ethical egoist, he would be forced to admit his actions were wrong.

Rachels does not explore the actual consequences of this

³ Rachels, James 1993, The Elements of Moral Philosophy, Second Edition, p. 107.

⁴ Ibid.

incident other than reporting that the officers lost their case. But he must be aware of this problem since he modifies York's case to avoid this line of analysis. He asks us to consider a Peeping Tom taking photographs of York through her window. Further, assume that he uses them for his own amusement, York is unaware of Tom's activities, and Tom is never caught. Since happiness is created for Tom and no negative utility is created for anyone, Rachels concludes that utilitarians must consider Tom's actions morally correct. But since "it is evident to moral common sense that they are not right," we should conclude that utilitarianism is a flawed moral view. From this example he draws the following moral: Utilitarianism is at "odds with the idea that people have rights that may not be trampled on merely because one anticipates good results."⁵

Of course, if utilitarians accepted Rachel's characterization of their position they would be required to support all sorts of weird positions. Consider the case of the drunk driver with the luck of Mr. Magoo (Mr. Magoo never understands what is really happening, but his actions always work out for the best.) Since this driver never harms anyone, should utilitarians support drunk driving? Consider, also, the case of the lucky rapist, who only rapes women with secret rape fantasies; or the lucky gambler who never loses with the

⁵ Ibid., p. 108.

children's lunch money. Given this line of reasoning, and saddled with the right assumptions, utilitarians could hardly object to any criminal or foolish behavior. But all is not as bad for the utilitarian as it seems.

There are several problems with Rachels' line of reasoning. First, he insists upon ignoring potential harms. Only moral kindergarteners assume that "getting away with it" justifies prior bad acts. I find it amazing that a professional philosopher would suggest this; it is akin to a chess master suggesting that a blunder is a good move if you go on to win the game. A solid class C player knows that a bad move is a bad move regardless of results. Most moral adults recognize when they have done something potentially harmful, and are aware of their "moral luck" when they are fortunate enough to get away with it. Most drunk drivers make it home safely. Drunk driving is a crime not because of the high probability of negative utility in any given instance, but because of the possibilities for horrible consequences involved. One hopes that most of the drunk drivers who make it home safely awaken with horror at the potentially awful consequences of their behavior. My point is that Rachels arbitrarily requires the utilitarian to analyze Tom's act as if it was inevitable that he would get away with it. However, it seems reasonable to suggest that the proper way to analyze this case is to evaluate the consequences that could have been

reasonably expected to occur.

A sophisticated example of the latter type of consequentialist analysis is offered by Joseph Nye in his Nuclear Ethics. In a chapter entitled "Consequences and Risks" he examines consequentialist arguments for and against the policy of MAD (mutually assured destruction) and nuclear deterrence. His conclusion is that while the claim that "deterrence has worked" is powerful moral evidence that nuclear disarmament advocates often underestimate, MAD advocates often assume that there is no further analysis to be done. He writes:

"Good consequentialist moral reasoning must rest on careful causal assessments of the relative risks of different deterrence policies and the alternatives to them, including an awareness of the broad bands of uncertainty that will necessarily be involved. It must relate risks to values for this and future generations, reduce disproportionate risk, and address the fair distribution of risk." ⁶

The simple claim that "deterrence has worked" ignores powerful evidence such as reports that during the 1962 Cuban missile crisis "President Kennedy may have believed the chances of some type of war were between one in three and one in two." If this statistic is remotely plausible the expected value of simply one week of a decades long policy was perhaps several hundred million deaths. Of course, this is an extreme estimate of the risks of Kennedy's Cuban policies, but a consequentialist analysis that ignores such possibilities

cannot be taken seriously. Almost any policy would be preferable to one that entailed a serious probability of deaths in such numbers.⁷ Evaluating a successful game of Russian roulette must involve some discussion of the number of bullets, the number of chambers, and where the gun was pointed.

Second, Rachels implicitly saddles utilitarians with numerous background assumptions that seem unreasonable or unfair. For the sake of argument I will assume that Tom had some secret method of conducting his crime that ensured he would escape justice. Even so, Rachels' argument only works if Tom has actually improved his own life possibilities. Utilitarians in this case are asked to accept that Tom's voyeurism is harmless fun, rather than symptomatic of significant sexual or psychological problems. If Tom's activity is harmful to himself, Rachels' scenario implodes. Utilitarians are also required to believe that there are no other activities that Tom might engage in that might better promote Tom's or the general happiness. Once again, for the sake of argument assume that Tom has no better way to spend his time. The utilitarian can well ask: What alternatives are available to Tom? In the age of Playboy, the VCR, and the internet Tom has numerous ways of accessing nude depictions of women that may be morally acceptable or, at the very least,

⁶ Nye, Joseph S. 1988, Nuclear Ethics, p. 80.

⁷ Ibid. p. 75.

morally preferable.

Third, Rachels has simply dressed Tom in the Ring of Gyges. For over two thousand years philosophers have struggled with Plato's paradox: Why should I obey conventional morality if I could become invisible with a twist of my ring? The utilitarian answer in most cases is that the harm one does to others is morally relevant. Rachels wants us to evaluate a case where there seems to be no harm if you get away undetected. But the suggestion that whether you get away with it or not is a good criterion for public policy is insane. Most criminals think they will get away with it. To suggest that criminal behavior is acceptable if one is clever or lucky enough is to invite anarchy, and only anarchists think anarchy promotes utility.

To summarize, the Tom scenario both rests on a simple confusion and relies on specious assumptions about reality. Presenting Tom's act as a fait accompli gives it a certain inevitability. Our ability to ask relevant questions about risks and alternatives is lost in this confusion. When we begin to examine risks and alternatives we can see the unrealistic assumptions necessary to make this scenario even moderately troubling.

Pig Utilitarianism

But perhaps my discussion of risks and alternatives, processes and procedures, and public policy issues is smuggling in some sophisticated form of utilitarian that Rachels is not attempting to address. Consider this example in light of what I shall call "pig utilitarianism." Pig utilitarianism is the crudest form of act utilitarianism. Pig utilitarians never consider risks or alternatives. Pig utilitarians do not believe that pushpin is equivalent to poetry. They think pushpin far superior to poetry. However, pushpin is far from an ideal behavior. One could be developing one's talents to a lesser degree drinking beer in front of the television. Pig utilitarians would rather be a pig unsatisfied, than Socrates satisfied. Socrates never does cool stuff. He sits around thinking about really boring things. Pigs at least have fun occasionally. Finally pig utilitarians live by the maxim all pigs are created equal, but some pigs--namely me, or perhaps my group--are more equal than others (However, as I will argue later in this chapter, there are reasons to suggest such a modification would count against the theory being considered utilitarian). Thus one is allowed to fudge the utilitarian calculus slightly in one's favor. I will concede that under pig utilitarianism Tom's actions are justifiable. So what!

The claim that large amounts of utility can override rights when there is no or little possibility of actual harm to any victim is less than radical. Thomas Sowell coined the term "cosmic justice" in response to such views. According to Sowell, any important policy issue must consider costs and benefits—both intended and unintended. He writes:

With justice, as with equality, the question is not whether more is better, but whether it is better at all costs. We need to consider what those who believe in the vision of cosmic justice will seldom consider—the nature of those costs and how they change the very nature of justice itself.⁸

Sowell suggests that policies that completely ignore costs are not simply quixotic, they are dangerous. Similarly, Nye has suggested that when the consequences are severe, as in nuclear deterrence, no sensible discussion can be based purely on principle. Is Rachels suggesting that in important cases involving fundamental rights, say, affirmative action, real world consequences should never be considered? Sowell has argued that affirmative action policies often "mismatch" minority students with institutions of higher learning far beyond their currently developed capacities. These students would do well in less competitive institutions, but are unaware of the lower possibility of graduation at the more prestigious institution. Since many of these students have limited financial assets, they have only one bite of the

⁸ Sowell, Thomas 2000, The Quest for Cosmic Justice, p. 27.

apple. Thus, preferential policies implemented for their "benefit" can often be far less than beneficial. For the sake of argument assume that not only is Sowell correct, but that affirmative action policies are far more damaging to the interests of minorities than Sowell and other neo-conservatives suggest. Is this type of consideration morally irrelevant? Why is "moral common sense" not violated in this case?⁹

In the alternative, what if color-blind approaches are simply ineffective at closing what Harvard law professor Christopher Edley calls the "opportunity gap," (i.e. the well documented differential treatment of minorities in this country)? Should we support race neutral policies on principle even if they preserve existing patterns of discrimination? Christopher Edley writes:

I have no doubt that many who adhere to the color-blind vision are indifferent to its comparative ineffectiveness and that in some cases this indifference is malign.[sic] But I see a kernel of truth here nonetheless. One might argue that although consequentialist calculations about effectiveness point in one direction, other important considerations sometimes outweigh them. At least, that is the truth I will acknowledge. But they lose me with the extreme view that these other considerations always outweigh arguments about effectiveness. [emphasis in original]¹⁰

⁹ Sowell, Thomas 1993, Inside American Education, pp. 133-141.

¹⁰ Edley, Christopher F. 1996, Not all Black and White, p. 92.

Utilitarianism and Privacy

The final difficulty that I have with Rachels' Tom example is that even if Rachels' analysis is correct, he is far from demonstrating what he wants to demonstrate. Rachels wants to show that utilitarianism cannot support rights, period! What he has purportedly shown is that in this one exceedingly trivial case some crude form of utilitarianism has violated a hardly significant privacy right. After all, if York was really concerned about being seen naked, she could close her blinds. She could wear a robe when she stands in front of her windows. In a recent oral argument before the Supreme Court Justice Stephen Breyer discussed when one has an "expectation of privacy."

Where you're walking in front of the window the answer is no. Where you're walking in front of the window and people pick it up with binoculars—every bird-watcher has binoculars. When they're picking it up with flashlights—every Boy Scout has a flashlight.¹¹

Justice Antonin Scalia added "you pull your curtains if you want privacy because you know people have binoculars."¹²

Paparazzi have been using telephoto lens cameras to

¹¹ Greenhouse, Linda 2001, "Justices Look at Heat-seeker's Ability to Pierce the Home." The issue in the case, *Kyllo v. United States* No. 99-8508, was whether the use of a thermal indicator by police to detect heat patterns within a private dwelling without first obtaining a search warrant constitutes an illegal search. (The use of high-intensity lights to grow marijuana indoors apparently provides a distinctive heat pattern.)

¹² *Ibid.* Scalia went on to write the majority opinion that deemed this search unconstitutional.

photograph celebrities for decades. The courts rarely find that these "journalists" have violated the law, even if their photographs are published or otherwise widely distributed. The courts usually find that the privacy rights of celebrities are not absolute. I fear that Rachels has smuggled in a common distaste for Tom's sexual proclivities. Would "moral common sense" be violated if Tom took these photographs for the purpose of selling them to the "World Weekly News" rather than to masturbate? And assuming that it was, does this further demonstrate that utilitarianism cannot support privacy rights in critical areas such as reproductive freedom? If Rachels believes this to be the case let him argue it directly: Show us why utilitarians must reject the reasoning of Justice Blackmun in Roe v. Wade. Many of the best arguments in support of Roe are highly consequentialist, e.g., the harm, inconvenience, and suffering that would result from women being unable to have access to their physicians in issues of family planning. The best argument against Roe was a principled one: No right to privacy exists in the constitution.¹³ The "privacy right" Tom has violated is either trivial or non-existent. Under Supreme Court precedents the Fourth Admendment protects "only those expectations of privacy that are 'reasonable.'" Someone who conducts business in front of an open window, for example, may be deemed to have

¹³ The Texas law in question made it illegal for physicians or others to perform or assist in abortions. There was no law against women killing or otherwise harming their fetuses. Thus, the critical issue was could

forfeited any reasonable expectation of privacy."¹⁴ Without some clarification, it is hard to see whether the York case offers anything approximating the standards for a reasonable expectation of privacy. Is Rachels suggesting that the best case against utilitarianism is so trivial? Would it be a refutation of Kantianism if it could be shown that the categorical imperative does not apply to spitting on the sidewalk?

Racial and Gender Justice

But I think a serious assessment of utilitarianism must begin with the important civil rights struggles of our era, namely, the struggles for racial and gender justice. The questions are: How comprehensive is a utilitarian theory of rights? Can it protect important rights of individuals and minority groups yet still be faithful to democratic ideals and the common good? How good is a utilitarian theory of rights when compared to its rivals? The usual answer is that Mill and utilitarianism fail, and in any case Kant and Kantianism are clearly superior. Writing on this issue Vincent Barry says:

But do individuals have moral rights? Are they merely by virtue of being human beings, entitled to act in certain ways and expect others to act in certain ways human rights? Without hesitation, Kant answered in the affirmative. He believed that all persons have unique and equal worth as human beings, which is theirs independently of the decisions or acts of anyone else.

the state prevent women from medical assistance in obtaining abortions.

¹⁴ Greenhouse, Linda 2001.

As a result, they are entitled—that is, have a moral right—to be treated with dignity and respect as free and equal persons; and all of us have a duty to so treat others.¹⁵

Barry's view is that utilitarians are somehow unable to suggest that, say, blacks and women are entitled to the same rights as white men. Barry writes:

Utilitarianism, in effect, treats all such "entitlements" as subordinate to the general good. Thus individuals are "entitled" to act in a certain way and entitled to have others allow or even aid them to so act only insofar as the greatest good is effected. The assertion of moral rights, therefore, decisively sets all nonconsequentialists, and Kant in particular, apart from utilitarians.¹⁶

Students of history, however, will find these results surprising. As a matter of historical fact utilitarians such as Bentham and the Mills were considered radicals on these issues. The Utilitarian Radicals were extreme egalitarians. They held then extreme views about extending the franchise to then disenfranchised groups. This is all well known. As a matter of historical fact John Stuart Mill's views on race and gender are still progressive (perhaps even radical) today, and no one but the vilest of bigots would accept Kant's. Eventually I wish to show that what these men actually believed is not simply an accident of history, and that there are important moral and philosophical lessons to be learned. But to accomplish this I first must examine what Immanuel Kant

¹⁵ Barry, Vincent 1986, Moral Issues in Business, pp. 56-7.

¹⁶ Ibid., p. 56.

and John Stuart Mill actually believed. I will begin with Kant.

Kant on Race

Kant's Observations on the Feeling of the Beautiful and Sublime is at its best a tribute to ethnic stereotyping. Page after page finds Kant waxing poetic on the purported national character of various Europeans; the French are like this, the Spanish are like that, the English have these characteristics, the Italians have those, and unsurprisingly the Germans are the best at combining the beautiful and the sublime. Since the Europeans all have various positive and negative attributes most of Kant's observations are harmless (perhaps silly) fun. He even allows in a footnote that among the Europeans there are exceptions to his various rules. However when he turns to Africa he has this to say:

The Negroes of Africa have by nature no feeling that rises above the trifling. Mr. Hume challenges anyone to cite a single example in which a Negro has shown talents, and asserts that among the hundreds of thousands of blacks who are transported elsewhere from their countries, although many of them have even been set free, still not a single one was ever found who presented anything great in art or science or any other praiseworthy quality, even though among the whites some continuously rise aloft from the lowest rabble, and through superior effort earn respect in the world. So fundamental is the difference between these two races of man, and it appears to be as great in regard to mental capacities as in color. The religion of fetishes so widespread among them is perhaps a sort of idolatry that sinks as deeply into the trifling as appears to be

possible to human nature. A bird feather, a cow's horn, a conch shell, or any other common object, as soon as it becomes consecrated by a few words, is an object of veneration and of invocation in swearing oaths. The blacks are very vain but in the Negro's way, and so talkative that they must be driven apart from each other with thrashing.¹⁷

Kant's views on race are almost self-explanatory. A Kantian apologist might wish to argue that Kant is simply making cultural observations. But his ringing endorsement of David Hume most certainly answers the question whether Kant finds black inferiority to be cultural or biological. In his essay "Of National Characters" (certainly Kant's source for the above) Hume finds "Negroes to be naturally inferior to whites." Noting major differences between Europeans and Africans Hume writes: "Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction between these breeds of men." Hume goes on to dismiss a report of an educated Black Jamaican since it is likely that he is "admired for slender accomplishments, like a parrot who speaks a few words plainly."¹⁸

¹⁷ Kant, Immanuel 1960. Observations on the Feeling of the Beautiful and Sublime pp. 111-3.

¹⁸ Hume, David 1741. Essays, Moral, Political and Literary, p. 213.

Racial Blindness

There are at least three ways of explaining the Kantian/Humean blindness about race. A first uncharitable reading suggests these authors are simply guilty of selective amnesia. Evidence that would refute their racial classifications is simply downplayed or ignored. Assuming their own cultural superiority, they ethnocentrically accept any differences between European and African cultures as proof of African primitivism without ever attempting to examine them from an African point of view. A multicultural attempt to see Africa through African eyes might well have led to a greater respect for divergent social constructions. There is probably some truth to this view.

A second uncharitable reading suggests that white racism was a result of the black slave trade. The cruelty inflicted upon blacks during slavery cannot be underestimated. The natural reaction is revulsion for the slavers, and pity for their victims, unless one can somehow be convinced that blacks are so fundamentally different that normal standards of inhumanity do not apply to them. Slavery can only be accepted in a state of psychological denial. Once again, this explanation probably contains an element of truth.

A third more charitable explanation is offered by Dinesh D'Souza. In The End of Racism he argues that the eighteenth

century Europeans were attempting with the limited tools available to them to explain the civilization gap between Europe and Africa. Europe had universities where philosophical and theological texts dating back thousands of years were studied. Africa still had preliterate societies. Europeans had calculus and analytic geometry. The Pythagoreans of ancient Greece knew about the irrationality of the square root of two. Some African societies had no numbers above two. There was a civilization gap to be explained, and the intellectuals of the modern era required an explanation with some scientific plausibility.¹⁹

Hume and Kant lived in the era before Darwin. A belief in the creationist account found in the Bible was almost universal. Bishop Usher's view that the earth was created in 4004 B.C. was by 1650 widely accepted. If humans were created by God less than 6000 years previously, a civilization gap of several thousand years seems enormous. Europeans also had a long history of accepting the biological origin of noble and base characteristics. For centuries this was the justification for a largely hereditary aristocracy. When one combines these two views, a biological explanation for racial differences is plausible. By analogy, if one runner beats another runner in a 6000 meter race by 3000 meters, we would probably believe the first runner to be much more naturally gifted. (Of course, if

¹⁹ D'Sousa, Dinesh 1986, The End of Racism, Chapter Two.

the race were 200,000 meters, a difference of 3000 meters would suggest a close race.)

Today a biological explanation of this sort seems implausible; almost nobody will accept a 6000 year old earth, and a hereditary ruling class. Darwinian evolution and meritocracy have replaced Usher's theology and aristocracy. But we should not judge eighteenth century ethnocentrists ethnocentrically. Hume and Kant should be judged in relation to the tools available to them. But we should not be unaware of the mistakes they made, and why they made them. In particular, I think modern Kantians should not simply ignore his racism. Later in this chapter I will discuss why.

Mill on Race

One can contrast Kant's racism with Mill's views on the racial issues of his era. Two stand out. The first is Mill's support for the North in the American Civil war. The fact that Mill supported the North in the Civil War is relatively well known and not terribly surprising. What is generally not known is how extreme his support was and how unpopular this view was even in English liberal circles. Much of England's economy depended on the cotton trade with the south. As Mill writes in his autobiography "It was not generally believed in England, for the first year or two of the war, that the quarrel was one

of slavery. There were men of high principle and unquestionable liberality of opinion, who thought it a dispute about tariffs."²⁰ Thus, with no high principle involved the Northern naval embargo of the South was considered an illegitimate abridgement on English free trade. In what is usually considered the definitive biography of Mill, The Life of John Stuart Mill, Michael St. John Packe writes about Mill's understanding of the war:

For Mill, who had studied its approach for years it was a clear-cut issue. The North's was "the good cause." John Brown was a "true hero." The South had launched "an aggressive enterprise of the slave-owners to extend the territory of slavery"; their success would be "a victory of the powers of evil".²¹

If Mill's views seem radical to us today, James Loewen claims it is because of the poverty of high school history textbooks. In Lies My Teacher Told Me Loewen argues persuasively that the history of the Civil War that most Americans have been taught is an unadulterated pro-confederacy white washing.²² In Loewen's view, as in Mill's, slavery was an evil institution, and the war was about slavery. The good guys beat the bad guys: end of story! But according to Loewen textbook publishers are so afraid of offending white southerners that the Confederacy can only be discussed in the most respectful terms. So, the myth of a noble South lives on. How else can one explain the reluctance of Republican presidential

²⁰ Mill, John Stuart 1873, The Autobiography of John Stuart Mill, Chapter VII, Paragraph 16-17.

²¹ Packe, Michael St. John 1954, The Life of John Stuart Mill, p. 423.

candidates to condemn in the mildest terms the Confederate flag? If Mill and Loewen are right--and I suspect they are-- modern American supporters of the confederacy should be considered on a par with modern German supporters of National Socialism. If all right thinking individuals now renounce the Southern slave trade as racist and inhuman, why treat the Confederacy so gingerly?

The second clear indication of the strength of Mill's racial commitment is the support he gave to the controversial John Brown. A closer examination of the abolitionist martyr Brown proves illuminating. Mill described John Brown as a hero; in his autobiography he writes: "The saying of this true hero, after his capture, that he was worth more for hanging than any other purpose, reminds one, by its combination of wit, wisdom, and self-devotion, of Sir Thomas More."

A comparison to More should not be taken lightly. He is a major figure in English history, and widely admired today almost five hundred years after his death. He was a prolific author whose best known work, Utopia, is still influential. He coined the term "utopia" which can be considered an example of his irony and wit; as Jenny Mezciems notes the Latin "utopia" "fuses together two Greek prefixes... 'eutopia' would mean 'good place' and 'outopia' would mean 'no

²² Loewen, James W. 1996, Lies my Teacher Told Me, Chapter Six.

place.'"²³ Thus a utopian society is both "happy" and "nowhere." He was executed in 1535 for refusing to acknowledge Henry VIII as Supreme Head of the English Church after Henry married his second wife, Anne Boleyn, in 1533 and was excommunicated for adultery. Numerous authors have compared More's martyrdom, irony, character, and intellect to that of Socrates.²⁴ His legend is still celebrated in our era. He was canonized as a Saint in 1935. His martyrdom was further chronicled in Richard Bolt's popular 1960 play "A Man for All Seasons." The 1966 film based on this play won six Oscars including best picture, best director, and best actor. More literally was a man for all seasons. When Mill compares Brown to More it should be considered high praise indeed. Mill hoped that eventually the entire North would come to accept the rightness of "the noble body of Abolitionists" and "the voluntary martyr" John Brown.

In contrast with Mill's praise, Loewen notes that the most popular high school history textbooks describe Brown as a murderer, a lunatic, or both. But this was certainly not the view of Brown in the North when he was hanged or during the war. Frederick Douglas called Brown "one of the greatest heroes known to American fame." Harriet Tubman wished to join Brown at Harper's Ferry but was prevented by illness. On the day of his execution Black-owned businesses across the North

²³ Mezciems, Jenny 1992, "Introduction to Utopia."

²⁴ For example, Chambers, R.W. 1935, Thomas More, pp. 16-19.

shut their doors in mourning.²⁵ Northern troops marched into battle singing "John Brown's Body."²⁶ As for Brown's purported lunacy, Loewen writes: "No black person who met John Brown thought him crazy." Henry David Thoreau eulogized Brown comparing him to Jesus of Nazareth and suggested similarities in their martyrdom at the hands of the state.²⁷ Thoreau spoke: "Some eighteen hundred years ago Christ was crucified; This morning, perchance Captain Brown was hung.. He is not Old Brown any longer; he is an angel of light."²⁸

Of course, this is hardly an uncontroversial way to describe a clearly controversial figure. Ken Chowder has called Brown the "father of American terrorism." In an article in American Heritage magazine he suggests that Brown had strengths and weaknesses that make him an oddly compelling figure to this day.

He gets compared to anarchists, leftist revolutionaries and right-wing extremists. The spinning of John Brown, in short, is still going strong. But what does that make him? This much at least, is certain: John Brown is a vital presence for all sorts of people today.. on the verge of his two hundredth birthday [May 9, 2000] John Brown is oddly present. Perhaps there is one compelling reason for his revival in this new millennium: Perhaps the violent, excessive, morally torn society John Brown represents so aptly was not just his own antebellum

²⁵ Loewen pp. 165-171.

²⁶ A sample lyric of this marching song is: "John Brown's body lies a-mouldering in his grave: His soul is marching on!" If this pattern seems familiar it is because the tune of "John Brown's Body" was so popular it later became the basis of the well known "Battle Hymn of the Republic." Wright 1996, p. 246.

²⁷ Loewen p. 170.

²⁸ Chowder, Ken 2000, "The Father of American Terrorism," p. 82.

America but this land, now."²⁹

Overall, Chowder offers a balanced view of Brown. Brown was an important player, perhaps the most important, in the fight to end American slavery. But many of his actions, e.g. the Pottawatomie massacre, give evidence of a fanatical belief in the rightness of his goals, and the willingness to use almost any means to accomplish them. Perhaps the best way to describe Brown is, paradoxically enough, as both a terrorist and a hero.³⁰

Kant and Women

Kant's views on women in the Observations are hardly more inspiring, but do require some textual exegesis. Kant wishes to distinguish between two modes of thought: the beautiful and the sublime. The beautiful is the social, amusing, friendly and good-hearted nature of our existence. This provides our ability to feel compassion and connect socially with others. The beautiful is that which makes one a good companion. It facilitates our appreciation of comedy. It is the quality that makes one popular and lovable. The sublime, on the other hand, is the rational, moral,

²⁹ Ibid., p. 91. Chowder also wrote "John Brown's Holy War" the documentary that appeared on PBS's The American Experience February 28, 2000.

³⁰ Atrocities were committed by both sides in the events that immediately preceded the war. For a review of the severity of the activities committed by activists both for and against expanding slavery into the new territories, see Wright 1996, Chapter 24 "Outlaws and Terrorists: Random Acts of Unkindness."

respectful, and noble nature of our being. This provides our ability to make considered judgments and rational analysis. It is the quality that makes one vital and esteemed. Obviously, it is best to have some blend of both qualities. A deficiency of the sublime would make one trivial and insignificant. A deficiency of the beautiful would make one abstruse and a bore.

Understanding is sublime, wit is beautiful. Courage is sublime and great, artfulness is little but beautiful... Veracity and honesty are simple and noble; jest and pleasant flattery are delicate and beautiful. Graciousness is the beauty of virtue. Unselfish zeal to serve is noble; refinement (politesse) and courtesy are beautiful. Sublime attributes stimulate esteem, but beautiful ones, love. People in whom especially the feeling for the beautiful rises seek their sincere, steadfast, and earnest friends only in need, but choose jesting, agreeable, and courteous companions for company. There is many a person whom one esteems much too highly to be able to love him. He inspires admiration, but is too far above us for us to dare approach him with the familiarity of love.³¹

According to Kant, woman's nature more than tends towards the beautiful. Even as children, women like to be dressed up. They take particular pleasure in being "adorned."

They "love pleasantries" and enjoy trivialities particularly when they are humorous.³² Women have a beautiful understanding, but lack a deep one. A woman that studies Greek or physics "might as well have a beard." The philosophy of 'women is not to reason but to sense.' Since Kantian moral agency is so dependent on the sublime, those that are lacking

³¹ Kant, Immanuel 1960, Observations on the Feeling of the Beautiful and Sublime, p. 51.

in it can hardly be taken seriously.

The virtue of a woman is a beautiful virtue. That of the male sex should be a noble virtue. Women will avoid the wicked not because it is unright, but because it is ugly; and virtuous actions mean to them such as are morally beautiful. Nothing of duty, nothing of compulsion, nothing of obligation! Woman is intolerant of all commands and all morose constraint. They do something only because it pleases them, and the art consists in making only that please them which is good. I hardly believe that the fair sex is capable of principles...³³

As I will argue in more detail later, this distinction makes it difficult to take women, as well as other marginalized groups, seriously as moral agents. But the first line of defense for the Kantian is to suggest that the view of women offered in the Observations is not characteristic of Kant's moral thought. Writing on this issue, feminist Natalie Alexander has examined the imagery and allusions to women in Kant's work. This includes the entire Kantian corpus, and Alexander claims that she paid careful attention to Kant's later works including the Critiques. She suggests that Kant's views about women's actual nature exhibit an incoherency about the nature of women. According to Alexander, on Kant's view, women do not share the same relationship with morality or rational agency that men do. Women are not rational agents but "sublime objects." Women are thus things for sublime agents to objectify. This Kantian image of women should be contrasted with a Kantian view of men: Men are autonomous subjects with

³² Ibid., p. 77.

³³ Ibid., p. 81.

their own "rational agency." She concludes:

I argue that the incoherence of Kant's views of women becomes clear. More finely crafted as nature's tools, women have a different relation to moral law, to rational agency than men do. In Kant's schema of relation between the sexes, the woman must make of herself the object of respect; woman herself is primarily a representation for men... the feminine image only serves, for Kant, to represent the masculine subject's own rational agency. There is no real place in Kant's moral theorizing for women as subjects, either as agents of their own desires or as rational moral agents.³⁴

Mill and Feminist Activism

Mill's credentials as a feminist are well known and I will not repeat them here. One incident in Mill's life is not as well known and is worth repeating. During Mill's lifetime poverty and a lack of information concerning birth control made infanticide common. When Mill was seventeen he came across an abandoned dead infant in a park. Mill's reaction was not to blame working class women, but to consider alternatives. He consulted with the liberal Malthusian Francis Place. Place convinced Mill that what was needed was for working class women to have better access to family planning information. Place was wealthy, and thus had the time and money to write and publish a book on population control. He also wrote and published a shorter and less abstruse pamphlet, one that could be practically applied by the working class.

Armed with these pamphlets, Mill and a friend distributed them in locations where working class women would be sure to find them. Mill and his friend were eventually arrested and jailed until a magistrate could be found. Packe reports that there are conflicting accounts of what happened next, but the "most likely scenario" is that they were jailed for a day or two on the charge of "attempting to corrupt the purity of English womanhood."³⁵

The Historical Mill and the Historical Kant

Mill thought a white abolitionist's decision to fight and die for the freedom of blacks heroic; Kant believed that blacks should be thrashed when they talk too much. Mill was a committed feminist who was actually arrested and apparently jailed for feminist activism; Kant believed women to be less than rational. And yet Mill is required to meet counterfactuals contrary to his beliefs, while Kant's actual beliefs are ignored. Why is this important? Because there can be no sensible discussion of a philosopher's political and ethical views without some examination of his or her metaphysics. To address the question "How should people live?" one must first answer the question "What are people like?" In addition, rights talk can be very vague. As I suggested earlier I am troubled by Kant's racism for more than historical reasons. To

³⁴ Alexander, Natelie 1999. "Sublime Impersonation: The Rhetoric of Personification in Kant" p. 267.

this I now turn my attention.

The second line of defense for Kantian apologists is to suggest that while racism and sexism were prevalent in his era, Kant's views are neither extreme nor indicative of some core moral problem for his theory. As D'Sousza has shown these views were commonplace, and after all, Kant is certainly no worse than many other significant philosophical figures such as, previously noted, David Hume. However, there is a troubling issue or two here, and these issues can only fruitfully be examined after a consideration of Kant's views on animals.

Kant and Animals

In a lecture on animals, recorded by his student, Georg Collins, Kant reportedly said:

But since all animals exist only as means, and not for their own sakes, in that they have no self-consciousness, whereas man is the end, such that I can no longer ask: Why does he exist?, as can be done with animals; our duties towards them are indirect duties to humanity.³⁶

Clearly animals have no rights, and our duties to them are non-existent. Our duties to animals are simply instrumental; to the extent that treating animals badly would prevent our cultivating our duty to humans, treating animals cruelly is

³⁵ Packe pp. 56-59.

³⁶ Collins, Georg L., "From the Lectures of Professor Kant: Konigsberg,

wrong. We should avoid treating animals badly, since we should develop our capacities to "promote the cause of humanity." Thus, we should avoid treating animals in ways that would undermine this goal. Collins' notes continue:

So if a man has his dog shot, because it can no longer earn a living for him, he is by no means in breach of any duty to the dog, since the latter is incapable of judgment, but he thereby damages the kindly and humane qualities in himself, which he ought to exercise in virtue of his duties to mankind.³⁷

Kant goes on to note that engaging in cruelty to animals could harm our capacity for compassion, and might lead to losing this capacity even for humans. He notes an example, in England it is commonly believed that butchers, doctors, and surgeons are so "inured to death" that they are incapable of making judgments about their fellow beings and are thus kept off of juries. There is nothing uniquely Kantian about the view that we should not kill animals for no or trivial reasons. But Kant suggests that it is natural for us to respect life in all its forms, and that we should not kill an animal for no reason. We should avoid this, since this tendency might subsequently be "transferred to man."³⁸ But Kant does suggest that cruelty to animals is justified if one has a good reason.

So when anatomists take living animals to experiment on, that is certain cruelty, though there it is employed for a good purpose; because animals are regarded as man's

Winter Semester, 1784-5," p. 212.

³⁷ Ibid., p. 213.

³⁸ Ibid.

instruments...³⁹

But there are two problems with this: The least troubling of the two is that much of Kant's empirical reasoning is suspicious. We no longer prevent butchers, doctors, and surgeons from serving on juries. Why is this the case? We reject Kant's notion that these professions disqualify people from making important moral judgments. In a capital case, as in any other, the defense attorneys have an obligation to remove from the jury those individuals that they find prejudicial to their client. In capital cases the issues become quite intense. But it would be rare for an attorney to strike a juror for simply being a butcher. Butchers, qua butchering, are not moral brutes. No attorney would assume this, and no attorney would remove a butcher from a jury panel without some other relevant social data. Similarly, I am aware of no data that supports the general idea. Many vivisectionists are committed humanists; conversely, Hitler loved his dogs. Dr. Robert Sharpe has argued in his extremely thorough book The Cruel Deception that all animal experimentation is morally wrong. But nowhere in his book does he suggest that vivisectionists eventually turn to human victims, or that experimenting on animals predisposes one towards human cruelty. Peter Singer has argued that this idea is simply absurd; Singer suggests

³⁹ Ibid.

no relationship between a willingness to kill humans in one situation and another. He has written:

There is, anyway, little historical evidence to suggest that a permissive attitude towards the killing of one category of human beings leads to a breakdown of restrictions against killing other humans. Ancient Greeks regularly killed or exposed infants, but appear to have been at least as scrupulous about taking the lives of their fellow-citizens as medieval Christians or modern Americans. In traditional Eskimo societies it was the custom for a man to kill his elderly parents, but the murder of a normal healthy adult was almost unheard of. I mention these practices not to suggest that they should be imitated, but only to indicate that lines can be drawn at places different from where we now draw them. If these societies could separate human beings into different categories without transferring their attitudes from one group to another, we with our more sophisticated legal systems and greater medical knowledge should be able to do the same.⁴⁰

This argument is reinforced by the current American political scene, for example, advocates of the death penalty often oppose euthanasia. Sharpe has argued, moreover, that Kant's suggestion that anatomists' dissection of animals is "employed for a good purpose" is nonsense. According to Sharpe, medical science was delayed almost 1400 years due to the false generalizations of vivisectionists. Animals and humans differ in important ways, and much of the information provided by animal anatomists was wrong. In any case, reliance on ancient Greek observations, such as those by Galen, was clearly wrong. Sharpe writes:

⁴⁰ Singer, Peter 1991, Practical Ethics, p. 157.

Galen's dogmatic style, together with the Church's reluctance to allow dissection of human cadavers, meant that his errors became enshrined in medical teaching for nearly 14 centuries. Right up until the time of Vesalius, everything relating to anatomy, physiology and disease was referred back to Galen as a final authority from whom there could be no appeal. Few had the courage or the desire to embark on fresh clinical observations.⁴¹

Kant's era should be noted as the time when a dogmatic acceptance of antiquity (Galen's medical "science") and religious prohibition against human dissection was being rejected. Thus, if Sharpe is correct, religious and moral arguments against human dissection were the major impediment to advancing medical science. Kant and other proponents of human "sacredness" were clearly on the wrong side of history. Kant's examples do not work, but as I will argue in a few pages, this is typical of his real world arguments.

Kant and the Capacity for Rationality

More importantly, Kant is clear that animals are means --not ends-in-themselves. Since animals lack sufficient capacity to reason, they are not part of the Kingdom of Ends. Clearly, one key to Kant's morality is rationality. If you are capable of having the insight to recognize the moral law, you are in the Kingdom of Ends; else, you are out. Of course, many sociopaths have the capacity to reason, and some of them can

⁴¹ Sharpe, Robert 1988, The Cruel Deception, p. 146.

reason quite well. Sociopaths lack some other capacity that allows one to act from duty. Perhaps fear of prison prevents some sociopaths from engaging in a life of crime. But to be a moral agent, in Kant's view, it is not enough to merely live in accordance with morality. Kant has suggested that the moral life is abstract and complicated; at least to the extent that acting on hypothetical and categorical imperatives requires abstract and complicated thought. In his famous distinction, Kant suggests that to live morally is to act from duty, not merely in accordance with duty. Thus, critically, it is not enough to simply have a functioning alternative moral code that allows one to act morally serendipitously; acting morally requires one to act from duty, to have a good will. The Kingdom of Ends is co-extensive with those beings capable of moral judgments. Beings incapable of acting rationally, from duty, and according to the categorical imperative are not ends-in-themselves.

But there are many other problems with rationality as the criterion for moral agency. First, what if this excludes many sentient creatures including marginal humans? What if it excludes most humans? What if virtually no creatures meet Kant's standards of rationality? This final suggestion is less absurd than most readings of Kant allow. Kantians invariably present "rationality" in vague enough terms that it does not cause intuitive concerns. But I believe that a reader familiar

with twentieth century debates about I.Q. and intelligence should find a reliance on rationality a troubling basis for according humans, let alone other sentient creatures, rights.⁴² As Christina Hoff has noted:

⁴² The issue of intelligence and moral behavior peaked in 1994 with the publication of Richard Herrnstein and Charles Murray's The Bell Curve. This book argues that a whole host of social events, as diverse as marriage stability, job stability, income, education completed, criminal behavior and other social indicators of well being, could be traced to native intelligence as measured by standard IQ tests. Much of the furor over this book revolved around the assertion that racial groups differ in native intelligence, but this was hardly an original contribution of Herrnstein and Murray. Psychometricians have been making this claim for decades. For example, the introductory paragraph to Jensen 1972 reads: "Educability and Group Differences deals with the fact that various subpopulations (social classes and ethnic groups) in the United States and elsewhere show marked differences in the distributions of those mental abilities most importantly related to educability and its occupational and socioeconomic correlates... My review of this evidence, with its impressive consistency, does, I believe, cast serious doubt on the currently popular explanations in terms of environment." The most radical responses to these claims are to suggest that intelligence and other achievement tests are the products of a hopelessly elitist or racist ideology, see Lemann, Nicholas 1999 The Big Test, or that they are too limited to be of any practical value, see Gardner, Howard 1993, Frames of Mind: The Theory of Multiple Intelligences, 1995, "Cracking Open the IQ Box" and 1999, Intelligence Reframed: Multiple Intelligences for the 21st Century, or to deny any innate differences in groups at all, see Dowling, Collette 2000, The Frailty Myth. However, since intelligence tests have some predictive validity, I take these approaches simply to be avoiding hard and uncomfortable questions. For a recent discussion about the predictive validity of SAT scores and their purported racial bias, see McWhorter, John H. 2000, Losing the Race, Chapter 3. According to economist Walter Williams "If I believed in conspiracies, I'd see attempts to banish the SAT as a college admission tool as part of the education establishment's ongoing efforts to keep parents, students and the taxpaying public in the dark about the fraudulent quality of primary and secondary education." Williams, Walter 2001 "Masking Education Fraud," Paragraph 10. As to the supposed racism in this work Thomas Sowell noted: "The Bell Curve is a very sober, very thorough, and very honest book--on a subject where sobriety, thoroughness, and honesty are only likely to provoke cries of outrage." Sowell 1995a "Ethnicity and IQ" p. 70. For a thoughtful and rigorous attempt at refutation of The Bell Curve, see Fischer et al. 1996 Inequality by Design. Incidentally, McWhorter, Williams, and Sowell are all black.

The trouble is that not all human beings are rational. Mentally retarded or severely brain-damaged human beings are sometimes much less intelligent than lower primates that have been successfully taught to employ primitive languages and make simple, logical inferences beyond the capacity of the normal three-year-old. The view that rationality is the qualifying condition for moral status has the awkward consequence of leaving unexplained our perceived obligations to nonrational humanity.⁴³

Second, how rational is enough? Why should we declare some beings to be perfectly rational, and decide those that fall beneath this standard to be excluded from moral agency? The civil-war era feminist and abolitionist Sojourner Truth had this to say:

They talk about this thing in the head; what do they call it? ["Intellect" whispered someone near by.] That's it. What's that got to do with women's rights or Negroes' rights? If my cup won't hold but a pint and yours holds a quart, wouldn't you be mean not to let me have my little half-measure full?⁴⁴

The idea that all human beings are equally rational is either tautologous or absurd. If one is simply defining human beings as "rational animals," as Aristotle did, then certainly all human beings are rational. But then the exclusion of animals from the Kingdom of Ends is completely arbitrary. Hoff has called the idea that all and only humans are rights holders the "humanist principle." She writes:

Without further argument the humanist principle is arbitrary. What must be adduced is an acceptable criterion for awarding special rights. But when we proffer a criterion based, say, on the capacity to

⁴³ Hoff later married the philosopher Fred Sommers and is better known as "Christina Hoff Sommers." Hoff 1991, "Immoral and Moral Uses of Animals," p. 364.

⁴⁴ Singer 1991, p. 347.

reason or suffer, it is clearly inadequate either because it is satisfied by some but not all members of the species Homo Sapiens, or because it is satisfied by them all—and many other animals as well.⁴⁵

But, on the other hand if Kant is suggesting that all people are equally intelligent, or have an equal capacity to make moral judgments based on the complicated system his ethics requires, he is saying something very odd. Consider the case of children: do they reason morally as well as adults? The theories of psychologists Jean Piaget and Lawrence Kohlberg suggest they do not. This is hardly a radical notion, but one has to explain why this is so. Their work suggests that abstract moral reasoning is a developed capacity. Like the ability to solve mathematical problems, there are various stages that must be negotiated in moral development. One must be able to add to be able to multiply. Very young children are developmentally incapable of the first, so they are developmentally incapable of the latter. But as children's brains mature they can learn to add, and then to subtract. Through a process of maturation and learning, children can become moral adults. But as this theory reaches its mature view in Kohlberg's work, few children actually grow up to be adult Kantians; many will never get close.⁴⁶

⁴⁵ Hoff 1991, p. 365.

⁴⁶ Kohlberg describes six stages of moral development that he divides into three categories of two stages: I. Pre-conventional II. Conventional. III. Post-conventional. In the first stage morality is

Kantians could, of course, recognize degrees of capacity for moral agency. They further could suggest that even those sentient creatures that have the limited capacity to act on hypothetical or categorical imperatives are still worthy of moral respect. However, this is difficult to square with the historical Kant. But the more important problem is that there seems to be no logical necessity for Kant to have done so. Kant's notion of rationality is broad enough to allow the exclusion of large numbers of sentient creatures from moral consideration. History abounds with examples of ethnocentrists who equate "different" with "inferior," and any moral theory that allows one to label the inferior as beyond moral consideration should be approached skeptically. Thus, Kant's racism, for example, is more than a historical anachronism, and Kantians ignore it at their own peril.

Bentham and Animals

Recall that Kant offers us a strict moral dichotomy in the case of animal rights; animals are not ends-in-

conformance to social standards offered by authority figures. In the second stage morality is acting in one's own interest. In the third stage morality is acting to gain social approval. In the fourth stage morality is acting in conformance with law and social custom. The fifth stage is roughly utilitarian, and the sixth stage is roughly Kantian. As the term would suggest, most individuals never evolve past the Conventional stages, few make it to stage five, and almost none make it to stage six. For a thorough and interesting discussion of Piaget, Kohlberg, and the cognitive-developmental school of psychology see Flanagan, Owen 1991, The Science of the Mind, Chapter 6.

themselves, and our duties to animals consist solely in not inhibiting human character development. Consider the more nuanced view from Bentham:

The day has been, I grieve to say in many places it is not yet past, in which the greater part of the species, under the denomination of slaves, have been treated by the law exactly upon the same footing as, in England for example, the inferior races of animals are still. The day may come, when the rest of animal creation may acquire those rights which never could have been withholden from them but by the hand of tyrrany. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons for abandoning a sensitive being to the same fate. What else is it that should trace this insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they reason? nor, Can they talk? but, Can they suffer?⁴⁷

It should be noted that Kant and Bentham are expressing these views at virtually the same time, so it is not that Bentham has any particular historical advantage. Bentham has a completely differing conception of what would cause us to give animals, or people of color for that matter, moral consideration. The importance of this passage is at least twofold. The first is that it is historically one of the earliest justifications and defenses of animal rights. It is probably quoted as often as anything else Bentham has

written, and is cited by many contemporary animal rights activists with approval. Second, Bentham is also making an important theoretical point. Utilitarians must take the suffering of all sentient creatures seriously, and this must offer at least some protection to the disenfranchised. One might argue, however, that this moral consideration is insignificant; when the interests of majorities are considered the suffering of minorities is invariably swamped.

Bentham on Paederasty

But Bentham does not seem to hold this view. Another "crime" punishable by death during Bentham's era was "paederasty."⁴⁸ Given the prevailing religious views, it would have been radical to merely suggest a lesser penalty. The American Civil Liberties Union's website indicates that every state in our country had laws against sodomy as recently as 1960. The vast majority did in 1970. Eighteen states still did as recently as 1998. Fourteen states and the Commonwealth of Puerto Rico still do. These laws were held constitutional by the United States Supreme Court as recently as 1986 in Bowers v. Hardwick; the ACLU called this

⁴⁷ Bentham, Jeremy 1789, Introduction to the Principles of Morals and Legislation. Chapter XVII, Section 1, Part IV.

⁴⁸ The modern use of this term often has connotations of child molestation, but Bentham is using it to indicate activities between adults.

"perhaps its most notorious decision this century."⁴⁹ Bentham, in an 1785 essay entitled "Offenses Against One's Self," argued for the complete decriminalization of all consensual sexual practices among adults, using laws against homosexual sodomy as his chief vehicle. This article was apparently considered so radical (disgusting?) that it was not published until 1978, over one hundred years later, when, of course, it resonated with the modern gay rights agenda. Bentham writes:

To what class of offences shall we refer these irregularities of the venereal appetite which are stiled unnatural? When hidden from the public eye there could be no colour for placing them any where else: could they find a place any where it would be here. I have been tormenting myself for years to find if possible a sufficient ground for treating them with the severity with which they are treated at this time of day by all European nations: but upon the principle utility I can find none...As to any primary mischief, it is evident that it produces no pain in anyone. On the contrary it produces pleasure, and that a pleasure which, by their perverted taste, is by this supposition preferred to that pleasure which is in general reputed the greatest. The partners are both willing. If either of them be unwilling, the act is not that which we have here in view: it is an offence totally different in its nature of effects: it is a personal injury; it is a kind of rape...As to any secondary mischief, it produces not any pain of apprehension. For what is there in it for any body to be afraid of? By the supposition, those only are the objects of it who choose to be so, who find a pleasure, for so it seems they do, in being so.⁵⁰

Once again, two points suggest themselves. First, Bentham describes his own personal disgust as to what he

⁴⁹ The ACLU's website is www.aclu.org. See specifically <http://www.aclu.org/issues/gay/sodomy.html> for the statistics cited above. Georgia's Supreme Court invalidated this statute in 1998.

clearly considers offensive behavior, a view apparently held by the vast majority of Europeans of his era. But Bentham rejects his own and others' intuitions in favor of a strict reliance on the principle of utility. This is not so surprising. But the second point he is making is quite surprising; he seems to suggest that this disgust is not morally important, and whatever painful sensations may be caused by this disgust should be discounted or ignored. He instead relies on the principle of utility in a more reasoned fashion: That is, if these activities do not really cause a balance of pain over pleasure in their practitioners, his own personal disgust is unreasonable. But one of the stock arguments against utilitarianism is that even the irrational feelings of large majorities will trump the behavior of minorities in all cases. If the pain produced by the behavior in the majority outweighs the minority's pleasure, the minority must yield. (A version of this argument, offered by Ronald Dworkin, will be discussed shortly.) Thus, utilitarianism requires that minorities would have to accept the mere prejudices of majorities. Bentham clearly rejects this line of thought. Why is this so? In a less than crystal clear passage he offers a hint:

Meanwhile the antipathy, whatever it may arise from, produces in persons how many so ever they be in whom it manifests itself, a particular kind of pain as often as

⁵⁰ Bentham, Jeremy 1785. "Offences Against One's Self," pp. 389-90.

the object by which the antipathy is excited presents itself to their thoughts. This pain, whenever it appears, is unquestionably to be placed to the account of the mischief of the offence, and this is one reason for the punishing of it. More than this--upon the view of any pain which these obnoxious persons are made to suffer, a pleasure results to those by whom the antipathy is entertained, and this pleasure affords an additional reason for the punishing of it. There remain however two reasons against punishing it. The antipathy in question (and the appetite of malevolence that results from it) as far as it is not warranted by the essential mischievousness of the offence is grounded only in prejudice. It may therefore be assuaged and reduced to such a measure as to be no longer painful only in bringing to view the considerations which shew it to be ill-grounded. The case is that of the accidental existence of an antipathy which [would have] no foundation [if] the principle of utility were to be admitted as a sufficient reason for gratifying it by the punishment of the object; in a word, if the propensity to punish were admitted in this or any case as a sufficient ground for punishing, one should never know where to stop. Upon monarchical principles, the Sovereign would be in the right to punish any man he did not like; upon popular principles, every man, or at least the majority of each community, would be in the right to punish every man upon no better reason...If this were admitted we should be forced to admit the propriety of applying punishment, and that to any amount, to any offence for instance which the government should find a pleasure in comprising under the name of heresy. I see not, I must confess, how a Protestant, or any person who should be for looking upon this ground as a sufficient ground for burning paederasts, could with consistency condemn the Spaniards for burning Moors or the Portuguese for burning Jews: for no paederast can be more odious to a person of unpolluted taste than a Moor is to a Spaniard or a Jew to an orthodox Portuguese.⁵¹

This passage is hard to swallow. First, Bentham indicates that the pain the majority feels is considerable, caused by the minority behavior, and hardly illusory. However, if this were justification for punishment, Bentham

⁵¹ Ibid., pp. 97-98. Brackets in original.

claims, utilitarianism could not be used to prevent any punishment for any offense. We could hang those individuals who lack good fashion sense, or otherwise offend popular taste. Bentham clearly wishes us to consider this a reductio ad absurdum argument against prosecuting paederasts. But many would argue that the obvious conclusion should be to reject utilitarianism. On this line of reasoning, Bentham's own analysis of consensual sodomy demonstrates unequivocally that his utilitarianism is incapable of defending minority rights of any sort. Perhaps this is the killing blow to utilitarianism. Even a cursory reading of Bentham's essay clearly indicates he did not believe this to be a reasonable reading, but perhaps he is simply confused (I will return to this point later). James Q. Wilson actually finds this economical path for rejecting all forms of utilitarianism convincing. In an over three hundred page discussion advocating a rather conservative version of Aristotelian virtue theory, utilitarianism is dismissed "because Mill's utilitarianism, strictly applied, would justify punishing an innocent man."⁵²

⁵² Wilson, James Q. 1993, The Moral Sense, p. 239.

Classical Utilitarianism and Rights

Wilson's eleven words are hardly an argument, and punishing the innocent is but one example. Of course, the suggestion that a set of theories as diverse as utilitarianism could be shown incapable of supporting any form of rights through one simple example should be doomed to failure. As Alan Gewirth has argued, a single article could not be expected to accomplish such a task. He writes:

It is well known that there are many varieties of utilitarianism, and this multiplicity is further complicated when we try to place historical utilitarian thinkers under one or another of these varieties. In addition, there are different senses in which utilitarianism, in any of its varieties, may be held to "justify" certain actions or policies. Also, there are many different kinds of rights, including moral rights, and there are familiar problems about the nature of rights and how their "existence" can be proved or justified. And, besides all these difficulties, there is the problem of just how rights differ from utilitarian norms. For if the difference between them cannot be clearly established, then it is also difficult to [establish] that "utilitarianism" is one kind of thing and "moral rights" another.⁵³

But Gewirth's line of reasoning did not deter Rachels, Berry, or Wilson from this truncated line of attack. Wilson's dismissal is truly enlightening. Since he is best known as one of the major conservative voices on crime

⁵³ Gewirth, Alan 1982. "Can Utilitarianism Justify Any Moral Rights?" in Gewirth, Alan 1982. Human Rights, p.143. Gewirth does not suggest in this essay that utilitarianism in any form is incapable of supporting rights; rather, he argues that Mill's utilitarianism as interpreted in one paper by David Lyons is incapable of directly supporting narrowly

issues, his example is amazing. Is it now the conservative view of punishment that a criminal justice system that justified punishing an innocent person under any circumstances would be illegitimate? A knee-jerk liberal ACLU member would not make that claim. This issue is usually framed by questions about due process. A better question should be whether a criminal justice system gives due consideration as to whether a defendant's rights have been violated. In a country with a jail and prison population of about two million, it would hardly be credible to suggest that it is possible that all of our prisoners are guilty of the crimes that they have been convicted. One is not required to do extensive research to find cases where innocent individuals have spent decades in prison.⁵⁴ Conservatives usually argue that the continued incarceration of the innocent is an unfortunate but inevitable price of a functional criminal justice system, and the effort necessary to weed out false claims of innocence from real ones is simply not cost effective.⁵⁵ In a similar vein, it would

constructed "moral rights."

⁵⁴ For example, Ronald Cotton was twice convicted of the rape of Jennifer Thompson. In his first trial she unequivocally identified him as her rapist. She recalls: "I was absolutely, positively, without-a-doubt certain he was the man who raped me when I got on that witness stand and testified against him...and nobody was going to tell me any different." In his second trial, Cotton's lawyers presented evidence that another man committed this crime. Thompson testified that she had never seen this man. Nine years later DNA evidence proved that the second man was guilty. After she learned this Thompson said: "I felt like my whole world had been turned upside down, like I had betrayed everybody, including myself." Hansen, Mark 2001, "Scoping Out Eyewitness Ids."

⁵⁵ For examples, one could consider conservative calls to limit writs of habeas corpus, DNA testing of convicts, and appeals based on "actual

hardly be a credible argument to dismiss the American criminal justice system "because... strictly applied [it] would punish an innocent man."⁵⁶

Thus, a fair investigation of utilitarianism would ask whether it balances the rights of defendants with other considerations adequately. Bentham clearly believed that utilitarianism could not support punishing adult consensual sexual activity regardless of how many people were offended or how much they were offended. The reason for this clears up what I take to be the gross confusion one finds in Wilson.

Most philosophical movements arise in opposition to some other philosophical movement. For example, logical positivism was an extreme response to some of the grandiose metaphysical speculations of early 20th century continental thought. The classical utilitarians took their opponents to be what they considered moral intuitionists.⁵⁷ The classical utilitarians believed that moral intuitions were often a

innocence."

⁵⁶ Wilson has been a hero in conservative circles since the 1975 publication of his Thinking About Crime. In this work he argues against "root cause" theories, and in favor of the deterrent value of "swift and sure" punishment. More recently he has argued that juvenile offenders should be considered "super-predators," and in favor of the "broken windows" approach to crime control. His civil libertarian opponents often argue that implementing these policies would both increase punishing the innocent, and disproportionately punish the guilty. Since the criminal justice policies advocated by Wilson are cold-bloodedly utilitarian, it is hard to know what to make of The Moral Sense.

product of the status quo, and this was a chief hindrance to moral progress. John Stuart Mill thought Bentham's most important insight was to question even our clearest moral intuitions carefully. In an essay critical for understanding Bentham's thought Mill wrote:

If we were asked to say, in the fewest possible words, what we conceive to be Bentham's place among these great intellectual benefactors of humanity; what he was, and what he was not; what kind of service he did and did not render to truth; we should say he was not a great philosopher, but he was a great reformer in philosophy... Bentham's method may be shortly described as the method of detail; of treating wholes by separating them into their parts, abstractions by resolving them into Things, classes and generalities by distinguishing them into the individuals of which they are made up; and breaking every question into pieces before attempting to solve it. ...Whatever originality there was in the method -- in the subjects he applied it to, and in the rigidity with which he adhered to it, there was the greatest. Hence his interminable classifications. Hence his elaborate demonstrations of the most acknowledged truths. That murder, incendiarism, robbery, are mischievous actions, he will not take for granted without proof; let the thing appear ever so self-evident, he will know the why and the how of it with the last degree of precision...⁵⁸

If Mill is correct, and the structure of Bentham's "Offenses Against One's Self" supports this reading, when Bentham notes that the average Victorian is disgusted by paederasty this is merely a starting point. Bentham wishes to question many of our preconceived intuitions. What makes an activity disgusting? Why is it disgusting? How does this disgust serve anyone's interests? Does this disgust promote

⁵⁷ See, for example, Mill, John Stuart 1863, Utilitarianism, Chapter One.

⁵⁸ Mill, John Stuart 1838, "Bentham," Paragraph 9. First published in

utility? Bentham is not suggesting that our moral intuitions are never relevant, but they must be examined closely. Otherwise, we are merely substituting dogma for careful moral reasoning. Mill's analysis of Bentham suggests that Bentham regards unsubstantiated opinions as morally irrelevant. Mill writes:

He required something more than opinion as a reason for opinion. Whenever he found a phrase used as an argument for or against anything, he insisted upon knowing what it meant; whether it appealed to any standard, or gave intimation of any matter of fact relevant to the question; and if he could not find that it did either, he treated it as an attempt on the part of the disputant to impose his own individual sentiment on other people, without giving them a reason for it; a contrivance for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept of the author's sentiment and opinion as a reason, and that a sufficient one, for itself.⁵⁹

In short, Bentham's view is that unless the moralist's intuitions can be justified, they should be considered of little moral significance. Thus, a sophisticated reading of Bentham offers little support for the claim that the mere feelings of majorities can trump fundamental interests of minorities. Majorities will rule when the principle of utility supports their claims, but this leaves room for minority rights.

London and Westminster Review, August 1838.

⁵⁹ *Ibid.*, Paragraph 10. Bentham's "Offenses" demonstrates Mill's reading in mind-numbing detail. It includes fifty sub-sections.

Utilitarianism, Egalitarianism, and the Right to Equal Consideration

In fact, it should be clear that utilitarianism in all of its forms supports some sort of rights. Historically utilitarianism was a radical theory primarily because of its egalitarianism, not its consequentialism. The idea that the utility of illiterate and landless peasants should be considered on a par with that of the landed aristocracy was shocking in an era barely removed from feudalism. When Bentham advocated moral consideration for animals, and the decriminalization of consensual sex acts, it is not the consequentialist nature of his arguments that was shocking, but that animals or despised minorities should be argued for at all. When Mill argued in behalf of working class women or black slaves, what offended his contemporaries is that white male aristocrats should be morally compelled to modify their behavior in response to claims originating outside their class. And when Peter Singer argues today for massive increases in aid to the third world, vegetarianism, and the ending of factory farms, it is not the consequentialism that enrages his opponents.⁶⁰ All these thinkers ask us to expand our definition of the moral community, to find moral consideration where we did not find it before. We are being asked to consider the suffering of those we previously did

not consider victims. Clearly, this egalitarianism is a central and essential component to utilitarian thought. Ronald Dworkin has actually argued that this egalitarianism is far more central, far more critical, to whatever intuitive appeal utilitarianism has as a moral theory. Dworkin writes:

Utilitarianism owes whatever appeal it has to what we might call its egalitarian cast...Suppose some version of utilitarianism provided that the preferences of some people were to count for less than those of others in the calculation how best to fulfill most preferences overall either because these people were in themselves less worthy or less attractive or less well loved people, or because the preferences in question combined to form a contemptible way of life. This would strike us as flatly unacceptable, and in any case much less appealing than standard forms of utilitarianism. In any of its standard versions, utilitarianism can claim to provide a conception of how government treats people as equals, or, in any case, how government respects the fundamental requirement that it must treat people as equals. Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced on the same scales, with no distinctions for persons or merit...[a corrupt version of utilitarianism] which gives less weight to some persons than to others, or discounts some preferences because they are ignoble, forfeits that claim. But if utilitarianism in practice is not checked by something like the right to moral independence (and by other allied rights) it will disintegrate, for all practical purposes, into exactly that version.⁶¹

Dworkin makes explicit and clear an aspect of utilitarianism that is often glossed over. Every commentator notes that utilitarianism has both a consequentialist and a utility promoting component. However, one would hope that

⁶⁰ See Singer, Peter 2000 Writings on an Ethical Life for a nice overview of his work.

⁶¹ Dworkin, Ronald 1981, "Do We Have a Right to Pornography?" pp. 360-361.

any competent commentator should note, at least in passing, that all utilitarians believe, in Bentham's famous utilitarian slogan: Everyone counts as one and only one. As Mill wrote in Utilitarianism:

I must again repeat, what the assailants of utilitarianism seldom have the justice to acknowledge, that the happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator. In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbour as yourself, constitute the ideal perfection of utilitarian morality.⁶²

Dworkin rightly suggests that this belief is a third essential component of the theory. Thus, utilitarianism is actually a tripartite theory: stating this explicitly--in a fairly generic form that should include utilitarianism in all its varieties--its three components are:

1. Consequentialist component: practices are evaluated primarily by their consequences.⁶³
2. Utility component: consequences are evaluated by their ability to promote (perhaps maximize) utility.⁶⁴
3. Equal consideration component: every individual's utility is given equal weight; when calculating

⁶² Mill, John Stuart 1863. Utilitarianism Chapter II, Paragraph 17.

⁶³ "Practices" functions here as a generic place holder; Various individual theorists may use acts, actions, rules, processes, procedures, or social systems as a whole, etc. To the best of my knowledge, John Rawls introduced this term. See Rawls, John 1955, "Two Concepts of Rules."

⁶⁴ Utility has also been variously interpreted with pleasure, happiness, or preference satisfaction being most common.

utility every person's (or sentient creature's) utility is considered as valuable as any other's.⁶⁵

The question then arises: How much weight should one give to this third component? Dworkin's suggestion is we should give it a great deal. In his above passage Dworkin suggests a weak reading of the third component offers a debilitated moral theory. Instead he suggests that utilitarians should adopt what he calls "the right to moral independence." As Dworkin describes this:

People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.⁶⁶

If utilitarians are willing to adopt the right to moral independence as a reasonable reading of the right to equal consideration, Dworkin argues that the mere prejudices of majorities are not sufficient to counter other important utilitarian considerations. Dworkin suggests, as a charitable reading of Bentham might, that blind prejudices should be rejected, on utilitarian grounds, as not being worthy of significant moral consideration. If the equal consideration component of utilitarianism is to be taken seriously, it cannot be overridden whenever majorities feel like doing so;

⁶⁵ Since much of this discussion has criticized James Rachels, I should note that he is a commentator who describes utilitarianism as a tripartite theory.

there must be some compelling majority interest. In any case, majorities cannot simply be allowed to deny any moral consideration to a despised minority. Dworkin argues that utilitarians cannot simply stand silent when majority persecutors wish to remove their victims from utilitarian calculation. Nazis may wish to deny that Jews are human or worthy of moral consideration, but the utilitarian must deny this. He writes:

[U]tilitarian theory must be neutral between personal preferences like the preferences for pinball and poetry, as a matter of the theory of justice, it cannot, without contradiction, be neutral between itself and Nazism. It cannot accept at once a duty to defeat the false theory that some people's preferences should count for more than other people's and a duty to strive to fulfill the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences. The distinction on which the reply to any argument rests, the distinction between the truth and the fact of the Nazi's political preferences, collapses, because if utilitarianism counts the fact of these preferences, it has denied what it cannot deny, which is that justice requires it to oppose them.⁶⁷

Although his argument is hard to follow in places, Dworkin's major point, as far as it goes, is clear. A utilitarian physicist cannot believe that witches are more real than atoms, simply because the majority loves "Touched by an Angel." A utilitarian geologist cannot believe the earth is 5000 years old, simply because a fundamentalist majority would like their religious text to be literally true. Similarly,

⁶⁶ Dworkin 1981, p. 353.

⁶⁷ Dworkin 1981, p. 363.

Dworkin will argue that the utilitarian liberal cannot believe that majorities receive important benefits from their irrational prejudices.⁶⁸

William Galston makes this point very clearly and persuasively. The liberal must recognize that all preferences should not be given equal consideration. After all, some individuals have preferences that include the random killing or maiming of others. But there should be room for the acceptance of various conceptions of the good. Galston writes:

The distinction between good and evil is objective, but the good things of life are heterogeneous, are not neatly rank-ordered, and cannot be combined into a single harmonious package. To live well is to choose a good life, which inevitably means excluding other worthy possibilities. The philosophical justification for social pluralism is the diversity of legitimate human goods. This same diversity undergirds what I am not alone in regarding as the liberal stance toward life—namely, a generous receptivity to ways of life other than one's own, and a deep commitment to making the effort to understand why others come to embrace outlooks that one regards as peculiar, even repellant.⁶⁹

Thus, a sophisticated liberal must have some criteria for distinguishing other legitimate ways of life from the illegitimate. One approach that could be used by liberal utilitarians is offered by Ronald Dworkin.

Dworkin envisions a society where many members are Sarah-lovers, i.e., a group of individuals that value having

⁶⁸ Of course, it goes without saying, that Dworkin must convince us that liberal utilitarianism is not a contradiction or an oxymoron.

their own preferences met, but also wish to see Sarah's preferences met.⁷⁰ Dworkin suggests that this second preference--the preference for Sarah's preferences--is an illegitimate form of double counting. The Sarah-lover wants his or her preferences counted twice; one for me, one for Sarah. Utilitarianism requires, however, that everyone's preferences must be counted equally. Similarly, Dworkin would find no reason to double count the preferences of a group of paederast-haters. The only exception Dworkin finds for this would be when preferences about other people's preferences are simply essential to meeting your own legitimate needs for safety or security, e.g., a society opposed to impaired drivers like Mothers Against Drunk Driving.⁷¹ To return to Bentham's case, on Dworkin's reading the majority has no compelling reasons for hanging paederasts, and obviously enough, everyone has a compelling interest in not being hanged. The only way to justify laws against consensual sex between adults is to apply the utilitarian calculus absurdly; one would have to first find factual evidence that the sexual minority actually harms the majority in some significant sense, overweight the interests of the majority, and then underweight the interests of the minority. Those who are not inclined to take Bentham seriously should examine how well his

⁶⁹ Galston, William 2001, "Who's a Liberal?" Paragraph 19.

⁷⁰ Dworkin 1981, pp. 365-366.

⁷¹ Of course, this is a perennial problem for the liberal: When do considerations of security and safety outweigh individual experiments in living? Mill's thoughts on this matter will be examined in Chapter Two.

"Offenses Against One's Self" shows this to be true.

The obvious problem with Dworkin's example is that it really does not show much. Dworkin has rather grossly stacked the deck. Since few members of his audience feel anything but revulsion for Nazism, or believe that Nazis gain any legitimate benefits from tormenting their victims (whether they be gypsies, homosexuals, Jews, people of color, communists, liberals, etc), our moral intuitions (in evaluating this Nazi dominated society) favor the minorities. We cannot seriously entertain the idea that Nazism, in any form, could promote utility. The Nazi also wishes to deny the actual humanity of his or her victims, and to strip them of any moral consideration. Clearly, no moral system could allow that. But not every advocate of majority rule is a Nazi. Similarly, advocates of majority rule do not necessarily deny any moral worth to minorities. Once again, the Nazi is something of a straw person.

All advocates of majority rule should not be painted with this crude brush. There must be some cases where the majorities have compelling interests, and rationally wish to act on those interests after giving minorities due consideration. Do we believe that majorities always win in such cases? If so, in Dworkin's famous phrase, we are not "taking rights seriously." If utilitarianism supports majority

rule, does it offer tangible benefits to minorities? Can the right to equal consideration offer minorities important protections under a utilitarian system? The Rawlsian animal rights activist Mark Rowlands has suggested that the answer to these questions is no. He writes:

Utilitarians can embrace the principle of equal consideration only in so far as it maximizes utility, and if the principle of equal consideration should ever clash with the requirement that utility be maximized, it is the former which the utilitarian must sacrifice. Utilitarianism, therefore, does not necessarily treat people with equal consideration; it does so only if such treatment maximizes utility. And this, at least prima facie, is not to genuinely accord that person equal consideration at all.⁷²

The obvious rejoinder is that as long as minorities have been treated fairly, and their interests taken seriously, we should accept majority rule as democratic and just. But Rowlands finds this answer unconvincing. He writes:

The utilitarian is likely to reply that considering the interests of all individuals concerned is precisely what it means to treat those individuals with equal consideration. And this remains true even when consideration of all affected interests entails, on utilitarian grounds, the sacrifice of certain individuals. Nevertheless, there is a clear divergence between the utilitarian conception of what it means to treat an individual with equal consideration and our intuitive understanding of this notion, and this raises the question of whether utilitarianism is genuinely capable of accounting for the conception of justice embodied in liberal ideology.⁷³

Thus, the stage is set. Rowlands tells us that the duty to maximize utility will always trump the right to equal

⁷² Rowlands, Mark 1998, Animal Rights, p. 53.

⁷³ Rowlands, p. 54.

consideration. Dworkin believes that utilitarianism is a rich enough theory to support the right to moral independence. Rowlands argues that the right to equal consideration would be so badly mangled and truncated in utilitarian hands as to be unrecognizable, and clearly no self-respecting liberal political philosopher would support any claim to the opposite. But if Dworkin has no right to claim himself a liberal political philosopher, then probably no one does.

It should be clear that there is a serious tension in any liberal utilitarianism. But as noted by Gewirth earlier, one cannot fruitfully engage this issue at the level of abstraction entertained by Rowlands and Dworkin. It is daunting enough to examine this tension with one thinker and one conception of justice. My purpose in the rest of this dissertation will be to examine this issue in the work of John Stuart Mill. Mill's utilitarianism will be filtered through the work of Rem B. Edwards. In Edwards' view, Mill is a minimizing utilitarian. Thus, part of the answer to Rowlands, and thus to other Rawlsians, is that Mill does not believe that we have an absolute duty to maximize utility. This reduces the tension but does not eliminate it. As Gewirth has noted:

It is the derivative position of rights in relation to the aggregated sum of utilities that differentiates utilitarianism from principles... that directly base rights on the actions-needs of individuals. And it is because of this difference that utilitarianism can

provide only accidental justifications for moral rights.⁷⁴

Gewirth wishes to support absolute moral rights. Thus, part of the answer to him is "so what." The rights that Gewirth claims utilitarianism cannot support are not supported by even many deontologists, e.g., John Rawls. One could also ask why "accidental justifications" are so obviously illegitimate. Is this a distinction without a difference? If not, it requires some extensive elaboration. Are the "accidental" justifications one finds in Bentham clearly inferior to the intuitive ones found in Kant? No one doubts Kant was a better philosopher than Bentham. If Bentham gets better answers, he must be working with better tools.

One might argue that Mill's utilitarianism is rich enough to support the system of rights he advocated in On Liberty, and this system of rights is worth defending. I take this to be a key question in Millian exegesis: Is Mill's moral theory compatible with the system of rights he advocated in On Liberty? However, this question begs the simpler one: Is the system of rights advocated in On Liberty worth defending? It is to this question I now turn my attention.

⁷⁴ Gewirth 1982, p. 160.

CHAPTER TWO

LIBERTARIANISM, CLASSICAL ECONOMICS, AND LIBERTY

Mill's On Liberty is correctly regarded as a classic defense of individual rights. But there is often some confusion about which rights Mill wishes to defend in On Liberty, and the basis for Mill's defense of liberty. Eventually in this chapter I shall present a full reading of On Liberty, but first I wish to clear away two common confusions. One, in general, the Classical Economists were not the extreme advocates of the free market that they are often commonly portrayed. Two, Mill is not a libertarian, if by this term one means a strong defender of property rights. This can be seen both through his contributions to political economy, and as he explicitly states it in On Liberty.

Fred Berger is one more of the many Mill revisionists of the 1970s who have rejected reading Mill as a maximizing utilitarian. He notes that Mill "held that some acts--self-regarding ones--concern only the agent and these raise no question of right and wrong." In Berger's view the fact that Mill is not a maximizing utilitarian should be recognizable to all since:

Virtually all commentators agree that Mill held that self-regarding acts are not liable to punishment, hence, it would follow that they cannot be moral wrongs even when they fail to maximize utility. On this ground alone, Mill was not, strictly speaking, an act- or rule-utilitarian, since, on the strict definitions, every act is either right or wrong.⁷⁵

He clearly suggests the importance that On Liberty has in this assessment, since it is where Mill explores the self-regarding/other regarding distinction in greatest detail. Mill's understanding of this distinction is perhaps the crucial element of On Liberty for this chapter. If one understands self-regarding conduct to include most economic activity, as the laissez faire libertarian suggests that Mill and others should do, then governmental influence in the marketplace, under any but clearly abnormal circumstances, would be morally suspect. However, I believe a close reading of Mill will show that this is not the case.

Libertarianism and Classical Political Economy

It was commonly held in the twentieth century, and perhaps still commonly held by many today, that the nineteenth century classical economists all held an extreme form of

⁷⁵ Berger, Fred 1984, Happiness, Justice and Freedom, pp. 65-6. Emphasis in original. The vast majority of the scholarly papers and books cited by Berger to justify the revisionist reading of Mill were published between 1968 and 1982, hence, I take the use of "1970s" here to indicate when the bulk of the revisionist research was done, and when it was achieving academic acceptance.

laissez faire economics. It is suggested that they believed that all governmental interference with the free market was suspect, since the market was best governed by market forces beyond our powers of understanding and control. Since Mill was one of the most important of the classical economists, I am afraid that this view clouds many readings of Mill's On Liberty. Supporters of limited government--often extremely limited--including laissez faire economic policies are generally called "libertarians" nowadays, and many of them claim to be the intellectual offspring of the classical economists.⁷⁶ Some libertarians cite Mill's On Liberty as if it were a libertarian manifesto.⁷⁷ These libertarians often write as if all the classical liberals and classical economists clearly supported the strongest form of laissez faire economics. Adam Smith's "invisible hand" is purportedly the paradigm and exemplar of this view. However recent critics have noted that this view is minimally a gross simplification of even Smith's actual views, and probably an out and out distortion. Jonathan Scheffler has argued that Smith's invisible hand is "one of the most distorted passages in economics literature."⁷⁸ As proof Scheffler cites the following passage from what he calls "the leading college text on the

⁷⁶ See, for example, Boaz 1997 Chapter Two.

⁷⁷ For Examples, see Hospers, John 1971 Libertarianism, p. 20, and Murray, Charles 1997 What it Means to be a Libertarian p. 171. Hospers presents Mill's Harm Principle as if it virtually forbids any governmental interference in the marketplace. Murray suggests libertarians should read Mill "for inspiration."

⁷⁸ Schlefer, Jonathan 1998. "Today's Most Mischevious Quotation," p. 16.

subject since the 1950s," Samuelson's Economics. Samuelson cites a crucial passage from Adam Smith's Wealth of Nations in the following misleading fashion:

Every individual endeavors to employ his capital so that its produce may be of greatest value. He generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an invisible hand to promote an end which was no part of his own intention. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it. [italics added by Schefler]⁷⁹

However, Samuelson and Nordhaus have "concocted" a "typical variant" of the received reading of The Wealth of Nations. The underlined portion of the above quote has been "reworked" by "chopping and splicing without using ellipses."⁸⁰ Smith actually wrote:

By preferring the support of domestic to foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an

⁷⁹ Ibid. Paul Samuelson has been a major figure in economics circles for at least fifty years. The first version of his textbook was published in 1951 and has gone through at least twelve editions. When he won the Nobel Prize in 1970 he was the first American to do so. He also founded the graduate program in economics at the Massachusetts Institute of Technology. William Nordhaus came on board with the twelfth edition, which I have not seen. However, Smith's quote is presented as Schefler reports in the fourth, fifth, tenth, and eleventh editions which I did locate (all as the introductory quote to chapter three, for example, Samuelson 1980, Economics eleventh edition, p. 41). Interestingly, Gary Yobe's study guide to the twelfth edition includes the quote with ellipses properly inserted, but with bracketed comments that increase the scope of Smith's actual usage. I suspect this may be proving that the invisible hand is a better tool for explaining the doctrine of laissez faire, than it is for explicating Smith's actual views.

⁸⁰ Ibid.

end which was no part of his intention.⁸¹

Thus, far from being a libertarian rallying cry, the "invisible hand" serves the limited purpose of promoting overall societal good by leading investors to domestic rather than foreign investment. Of course, someone advocating this theory today, would be required to engage in some fancy footwork; after all, in today's world it is very common for investors to "support foreign industry." Schefler goes on to note that a twentieth century perspective often obscures Smith's major agenda; he was a staunch opponent of British mercantilism, a system of monopolies where the third world was divided into various parcels and various companies were given an exclusive contract to trade certain goods with each. Obviously, one can oppose mercantilism without supporting laissez faire economics.

The issue is further clouded when one compares Smith's views in The Wealth of Nations with his earlier The Theory of Moral Sentiments. This earlier work emphasizes the universality and primacy of sympathy as a source of human morality. The difficulty of reconciling Smith's emphasis on sympathy in Moral Sentiments with the emphasis on self-interest in Wealth of Nations even has a name in the Smith secondary literature; it is called "the Adam Smith Problem."⁸²

⁸¹ Ibid., and Smith, Adam 1937, The Wealth of Nations, p. 423.

⁸² First coined by German scholars, "das Adam Smith Problem," in the late

Although I am not interested in solving this issue, it only takes a brief perusal of the secondary literature to recognize it is real. Those who wish to read Smith as an unabashed advocate of free market economics often "solve" this problem by ignoring it.

However, even if one ignores this problem, Smith is hardly a libertarian champion. Read alone, Smith's Wealth of Nations offers qualified support, for example, of public education.⁸³ Andrew Skinner combines this with Smith's other writings and finds an important role for the state in education: Education, on Skinner's reading, is an important public service for Smith.⁸⁴

This digression leads to a simple point: One easy misconception in reading On Liberty is to assume that since Mill was a classical economist, he must be advocating libertarianism, especially on economic matters. Those predisposed to read classical economists as unequivocal advocates of laissez faire economics will read Mill this way; but this is hardly the case. In fact he makes this quite clear in chapter five of this work.

nineteenth century. See Teichgraeber, "Free Trade" and Moral Philosophy: Rethinking the Sources of Adam Smith's Wealth of Nations, 1986 p. xiii. and his introduction in general, and Himmelfarb, Gertrude 1984, The Idea of Poverty, p. 47.

⁸³ Smith 1937, pp. 734-6.

⁸⁴ Skinner, Andrew 1995, "Adam Smith and the Role of the State: Education as a Public Service."

Again, trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society: accordingly, it was once held to be the duty of governments, in all cases which were considered of importance, to fix prices, and regulate the processes of manufacture. But it is now recognised, though not till after a long struggle, that both the cheapness and the good quality of commodities are most effectually provided for by leaving the producers and sellers perfectly free, under the sole check of equal freedom to the buyers for supplying themselves elsewhere. This is the so-called doctrine of Free Trade, which rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay. Restrictions on trade, or on production for purposes of trade, are indeed restraints; and all restraint, qua restraint, is an evil: but the restraints in question affect only that part of conduct which society is competent to restrain, and are wrong solely because they do not really produce the results which it is desired to produce by them. As the principle of individual liberty is not involved in the doctrine of Free Trade, so neither is it in most of the questions which arise respecting the limits of that doctrine; as for example, what amount of public control is admissible for the prevention of fraud by adulteration; how far sanitary precautions, or arrangements to protect workpeople employed in dangerous occupations, should be enforced on employers. Such questions involve considerations of liberty, only in so far as leaving people to themselves is always better, *caeteris paribus*, than controlling them: but that they may be legitimately controlled for these ends, is in principle undeniable. On the other hand, there are questions relating to interference with trade, which are essentially questions of liberty; such as the Maine Law, already touched upon; the prohibition of the importation of opium into China; the restriction of the sale of poisons; all cases, in short, where the object of the interference is to make it impossible or difficult to obtain a particular commodity. These interferences are objectionable, not as infringements on the liberty of the producer or seller, but on that of the buyer.⁸⁵

⁸⁵ Mill 1859, XXIII p. 293.

Mill and Political Economy

Thus, Mill does not find economic freedom to be among the freedoms he is defending in On Liberty. Economists who have read Mill carefully rarely make this mistake. In fact, Mill can be read as providing the gateway between nineteenth century and contemporary liberalism. Mill's utilitarianism, as I will argue in the following chapter, is not a direct utilitarianism. As we shall see, Mill's usual procedure is to appeal to general secondary principles. Mill suggests in the above passage that, all things being equal, governmental interference in the marketplace should be avoided. But he is not willing to make this an important secondary principle. A free market is generally more efficient, but restricting the economic freedom of producers or sellers does not violate any important secondary principles. While Mill's claim is that a free market is generally more efficient than other systems of governmental regulation, defending laissez faire economics in this fashion will require the libertarian to respond with philosophical anathema. As neo-conservative and self-pronounced libertarian Charles Murray notes:

I have been discussing the virtues of economic freedom without mentioning the point that is most broadly accepted: The freer a market is, the more abundantly it produces wealth...I have not dwelled on it because, to me as to many libertarians, it is a secondary issue. It would be morally superior to

socialism even if it were less efficient in producing wealth. Protecting economic freedom would still be the only way to assure that people can live free lives.⁸⁶

Mill has explicitly rejected in the previous quote that the extreme economic freedom libertarianism requires is fundamental to people leading free lives. For Mill, economic freedom is a matter of expediency. Even if Murray's assertion--that the freer a market is, the more wealth it produces--were empirically true (this is not, after all, crystal clear; the richest nations all have what economists call "mixed economies") producing wealth is not the only goal a society might wish to pursue. In fact, it is far from clear that maximizing wealth production is the primary economic goal of a just society. Mill has clearly suggested that other goals could have precedence. This leaves open the possibility that the government could be justified in restricting economic freedom when it interferes with more fundamental freedoms. Perhaps the twentieth century name most associated with laissez faire economics (at least in right-wing libertarian circles) is that of the Nobel Prize winning economist F. A. Hayek. In an interview with David Boaz he said:

I am personally convinced that the reason which led the intellectuals, particularly of the English-speaking world, to socialism was a man who is regarded as a great hero of classical liberalism, John Stuart Mill. In his famous textbook, Principles of Political Economy, which came out in 1848 and for some decades was a widely read text on the subject, he makes the following statement as

⁸⁶ Murray 1997, p. 27.

he passes from the theory of production to the theory of distribution: "The things once there, mankind, individually or collectively, can do with them as they like." Now, if that were true I would admit that it is a clear moral obligation to see that it is justly distributed. But it isn't true, because if we did do with that product whatever we pleased, people would never produce those things again.⁸⁷

Of course, the assertion that Mill led the intellectual world to socialism is something of a stretch, but Hayek's analysis of Mill's economic theory is clear enough: Under Mill's economic philosophy a socialist redistribution scheme becomes a moral possibility. In fact, by separating the laws of production from distribution, Mill frees economics from being a rigid, "dismal science," and opens economic theory to a far greater amount of moral discussion. To put Mill's quote, as previously cited by Hayek, in context:

It is not so with the Distribution of Wealth. That is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomsoever they please, and on whatever terms. Further, in the social state, in every state except total solitude, any disposal whatever of them can only take place by the consent of society, or rather of those who dispose of its active force. Even what a person has produced by his individual toil, unaided by any one, he cannot keep, unless by the permission of society. Not only can society take it from him, but individuals could and would take it from him, if society only remained passive; if it did not either interfere en masse, or employ and pay people for the purpose of preventing him from being disturbed in the possession. The distribution of wealth, therefore, depends on the laws and customs of society.

⁸⁷ Boaz, David 1997b, Libertarianism: A Primer, p. 50.

The rules by which it is determined, are what the opinions and feelings of the ruling portion of the community make them, and are very different in different ages and countries; and might be still more different, if mankind so chose.⁸⁸

If Mill is correct on this point, then one can ask the following question: Are some distribution schemes morally superior to others? Examining this issue in some depth, the noted economics popularizer, Robert Heilbroner, has this to say:

It [Mill's Principles of Political Economy] goes on to make a discovery of its own, a discovery of monumental importance...It consisted in pointing out that the true province of economic law was production and not distribution...What he meant was very clear: the economic laws of production concern nature. There is nothing arbitrary about whether labor is more productive in this use or that, nor is there anything capricious or optional about such economic phenomena as the diminishing powers of productivity of the soil. Scarcity and the obduracy of nature are real things and the economic rules of behavior which tells us how to maximize the fruits of our labor are as impersonal and as absolute as the laws of the expansion of gasses or the interaction of chemical substances...But--and this is perhaps the biggest but in economics--the laws of economics have nothing to do with distribution. Once we produce the wealth as best we can, we can do with it as we like...It was a body blow to the followers of Ricardo who had rigidified his objective findings into a straight jacket for society. For what Mill said was transparently obvious--once it had been said. Never mind if the "natural" action of society was to depress wages or to equalize profits or to raise rents or whatever. If society did not like the "natural" results of its activities, it had only to change them. Society could tax, subsidize, it could even expropriate and redistribute. It could give all its wealth to a King, or it could run a gigantic charity ward; it could give due heed to incentives, or it could--at its own risk--ignore them. But whatever it did, there was no "correct" distribution--at least none that economics had any claim

⁸⁸ Mill, John Stuart 1843, Principles of Political Economy, Book 2, Chapter 1, Paragraph 2.

to fathom. There was no appeal to laws to justify how society shared its fruits: there were only men sharing their wealth as they saw fit.⁸⁹

For example, Ricardo and other nineteenth century classical economists used the term "rent" to indicate, say, the productive capacity of a piece of land. If it costs twenty dollars to plant and harvest a particular acre of corn and one can sell the corn produced for thirty dollars the rent for the acre is ten dollars.⁹⁰ Mill's observation was that the rent is still ten dollars no matter how one distributes it. Given similar technologies the production is a fixed law. A feudal society that gives the rent to the King differs from a capitalist society that gives the rent to the farmer as a matter of distribution alone; the productive capacity remains the same. Hayek should be conceded that the way the rent is distributed may affect the decision whether to bother to plant the acre and how much effort goes into its cultivation in extreme cases, e.g., Soviet Agriculture, but clearly not every redistribution scheme will prevent economic activity. Peyton Manning, if his NFL contract is reasonable, has an economic worth to an NFL franchise of more than five million or so dollars a year. This is the objective value of a franchise player in the NFL. Having "name" players on your team increases revenues in many ways (ticket sales, television advertising rates, team merchandise sales, etc.). Manning will

⁸⁹ Heilbroner, Robert L. 1962 The Worldly Philosophers, pp. 129-30.

⁹⁰ Weidenaar, Dennis and Emanuel Weiler 1983, Economics: An Introduction to the World Around Us, p. 147.

"produce" some objective amount of revenue for an NFL team. If Manning wanted a salary above his objective value, no NFL team would sign him. But given the size of his value, Manning would have reason to play even if he is not the recipient of his total value. If Hayek were correct, when various governmental agencies take a large redistributive bite out of this, Manning would respond by refusing to play next year. Clearly there is some redistributive scheme so punitive that it would send Manning back to graduate school, but it would have to be an extreme one. People work for lots of reasons, and money is only one of them. The former Soviet Union paid its chess players peanuts, and still dominated the world in the same fashion that is found with today's millionaire American basketball players. The simple point is that if farmer's, chess players, and basketball players are allowed to keep enough of the rent, and afforded a life of sufficient dignity, they will continue to engage in their various endeavors. This makes the question of redistribution a matter of efficiency to some degree, but clearly a much smaller one than Hayek imagined.

Freedom and Individual Self-Development

If Mill is not defending libertarian economic freedom in On Liberty, what exactly is he defending? In the previous chapter I mentioned the importance of character formation for Mill. For Mill, as I will elaborate in the next chapter, character development is a "paramount end" which in some cases can even override in the short run the principle of utility. A thesis central to this dissertation is that the freedoms Mill is advocating in On Liberty are those that he finds essential to individual moral growth and character formation. The aphorism "you cannot legislate morality" is often interpreted vacuously; as if punitive laws, say, against drug use or prostitution simply will not work. Although behaviorists have claimed that positive and negative reinforcement are more efficient than punishment, clearly a sufficient punishment will have some deterrent effect. In one important sense much of all we legislate is morality. We have laws against murder precisely because we believe that some forms of homicide are unjustified and therefore wrong. But in another sense, this expression is true. Passing legislation may deter behavior, but it may not make people want to be moral. Similarly, Mill will recognize that laws that restrict fundamental freedoms, are contrary to public policy goals that require that citizens desire to be moral. Laws that stifle individual freedom may change

behavior, but they do so at a cost on individual moral growth and character development. The freedoms Mill is advocating in On Liberty are those freedoms that allow individuals to flourish, to find their own way, to be the best person they can possibly be. In the first chapter of On Liberty Mill writes:

But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself; and the objection which may be grounded on this contingency, will receive consideration in the sequel. This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.⁹¹

⁹¹ Mill, John Stuart 1859, On Liberty, Chapter I, Paragraph 4.

The principle freedoms that Mill is advocating are those of thought, expression, and association. According to Mill, if one is to be the master of one's own destiny, it is critical to have these freedoms, and in his scheme the latter two are clearly derivative from the first. Freedom of thought would be of little value if one was not free to test one's ideas in the intellectual marketplace. To develop one's thought in full it is necessary to subject one's ideas to the scrutiny of others. In order to do this you must be free to express yourself to others and be free to associate with others that find your questions to be critical ones.

No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.⁹²

The noted exception to this is when our conduct is "harmful" to others. This notion of harm is central to Mill's social and political philosophy, and On Liberty is the work where he explicates it most carefully. It is to this that I now turn my attention.

⁹² Ibid., Paragraph 15.

The Harm Principle

Many readers of Mill, particularly those in the legal community, find On Liberty to be advocating what has been come to be known as "the Harm Principle" (sometimes commentators use the alternate "Harm-to-Others Principle"). Supporters for this view generally stress the following passage.

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁹³

One could assume that this is Mill's final word on this issue.

⁹³ Ibid., Paragraph 11.

This would be a "lazy persons" reading of Mill, since if Mill really is wedded to the Harm Principle, it is difficult to understand the rest of this work. What is Mill trying to accomplish in the final four chapters? Chapter Four becomes particularly difficult on this reading: Why does Mill offer a different version of the Harm Principle here? Is it the same principle? I think that the careful answer is that the version offered in Chapter IV is an important improvement on the Harm Principle, but it requires close reading to see why Mill believes it to be so. Why not start with the improved version? Mill wants us to retrace his line of inquiry. He thinks his result is clearer if we follow the process that led him to it.

The Liberty Principle

One commentator, who actually does read Mill as doing this, is Elizabeth Rapaport in her "Editor's Introduction" to On Liberty. Rapaport finds that in On Liberty Mill states "not one but two principles of demarcation." The first of these states that the only justification for any social interference in an individual's actions is to prevent that person from doing harm to others. Rapaport calls this "Principle I" or the "Harm-to-Others Principle." On her account, Mill begins the book by raising Principle I. He then raises two objections to Principle 1. These two objections cast serious doubts about

the efficacy of Principle 1. Mill concedes that, as formulated, this principle simply will not work, and Rapaport notes, he "puts forward his second principle of demarcation". Why does Mill do this? Is he simply confused or trying to confuse his audience? Rapaport's answer is a resounding "no":

Mill's procedure is a model of open philosophical inquiry. In a way Mill's essay can be regarded as a textbook on how to conduct philosophical inquiry as Mill conceived it, a text that teaches by example, as much as it is a treatise on liberty. Mill is as much or more concerned with enabling his reader to appreciate the problem he is addressing and to engage with him in critical inquiry than in convincing his reader of the truth of his doctrines.⁹⁴

Thus the Harm-to Others Principle is merely a "rough first approximation" which Mill will eventually refine into a more accurate and more workable principle. Mill is not trying to sell his readers any particular doctrine of liberty. Rather, he wishes to begin with a carefully and articulately formulated starting point; one that his audience will also find as an extremely important social and political question. He will want to use a method that will allow others to follow his reasoning and then eventually allow others to improve on it. Mill clearly considers himself a progressive and his methodology can be seen as an extension of his commitment to progress. Showing people how to think critically is of much

⁹⁴ Rapaport, Elizabeth 1974 "Editor's introduction," pp. xv-xvi.

greater importance than telling them what to think. If one really has the right answers, or is open to improvements on one's answers, one should have no fear of a sophisticated audience.

Mill's Dialectic

One aspect of Rapaport's essay that I find striking is that she carries out the above discussion without ever using the word "dialectic" or any version of it. I think that Mill's methodology in On Liberty becomes extremely clear once you add this simple word. Given Mill's well-known Greco-*philia*, her omission is particularly surprising. If you start with the assumption that Mill will at times write dialectically then it is not difficult to apply this insight to this work. Mill starts with a thesis that he assumes is familiar enough to his audience. Certainly, some version of the Harm Principle predates Mill.⁹⁵ Principle I, on this account, is the endoxa, the opinion of the wise or the many, with which Mill wants to start. However, this thesis, as Mill is quick to note, raises certain problems or puzzles, aporia, and thus Principle I cries out for reformulation. Let us now read Mill dialectically and see how the central argument of On Liberty develops.

⁹⁵ It is clear that von Humbolt explicitly held a version of the harm principle, and it seems implicitly available in Bentham's "Offences."

Mill offers the Liberty principle (perhaps, here, it should be referred to as "the Harm-to-Others Principle") in chapter I of On Liberty and raises two objections to it. The first is the problem of externalities: clearly all my actions have some impact on others, and it is quite probable that any action I might take would influence someone adversely. Harm, in this vague sense, cannot be a discriminator between allowable and unallowable conduct. When one takes the last discounted plane ticket or the last seat at a prestigious law school one has harmed, in some real sense, the person who was next in line. But someone will have to be offered the last ticket or the last seat. We live in a world of finite resources. Clearly we will need a method for distinguishing unobjectionable harms from objectionable ones. Secondly, why should some degree of paternalism not be allowable? Do we really wish to abandon people this severely, never to enter into their sphere to help them? Why would a liberal wish to preclude even a weak form of paternalism? In more modern terms it can be argued that individuals have a right to "positive liberty" also. They have a right not to be ignored. Ultimately any coherent liberalism, Millian or otherwise, must have a response to these criticisms. Ultimately I will offer a Millian response to modern opponents of liberalism. Positive liberty is an important topic and any attempt to offer Mill to a modern reader must address the problems it raises for any

form of liberalism. But for now I wish to examine the response Mill gives in On Liberty to the opponents to be found in his era, that is, the objections from externalities and paternalism. Now these are clearly not creatures of straw; the force of these caused Mill to reformulate his principle in Chapter IV. Why does he raise the one formulation just to reject it? The answer that I have been suggesting is that this is Mill's version of a dialectic. He formulates, raises objections, and then reformulates. This is, as Rapaport has suggested, a good philosopher offering a model of how to do philosophy well. He works his readers into the philosophic discourse by showing the work he was required to do to get to where he now is. Like a competent logic instructor, he not only provides answers but also a guide for solving problems in general. In the remainder of this section, I will examine how Mill does this.

Freedom of Expression and Individuality

One weakness to Rapaport's essay is she does not discuss what Mill attempts to demonstrate in between the first and fourth chapters, or why we should attend to it. Many philosophers could correctly place Mill's well-known argument for free speech in Chapter II of On Liberty. But many discussions fail to place this argument in the context of the

entirety of the main point of On Liberty. What is the importance of free speech? It is Mill's clear assertion that facts, evidence, and good arguments do not arise de novo.

But, indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries.⁹⁶

Free speech is important because it is through the process of allowing free speech that one most reliably generates the facts, evidence, and good arguments that may lead to truthful opinions. Mill's arguments for this are well known, and frankly, I have little to add to this discussion. The important point is that Mill does argue for the importance to our well being of allowing an unfettered search for the truth. Mill summarizes his arguments as follows:

We have now recognized the necessity to the mental well being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds; which we will now briefly recapitulate.

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any object is rarely or never the whole truth, it is only by the collision of adverse opinions that the

⁹⁶ Ibid., Chapter II, Paragraph 17.

remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.⁹⁷

Of course, so far I have not argued that a search for the truth is important, since nothing I have argued so far has suggested that the truth is all that important. Perhaps, false beliefs, say, that sacrificing animals to the Water Gods will prevent hurricanes, or that Creation Science is as adequate a theory as Darwinism, or that the Holocaust never occurred, are valuable, if these "community-supporting" views lead to positive utility. But freedom of opinion, expression, and pursuit of our own conception of the good have another important purpose. Mill suggests that these freedoms are essential for developing our full capacities, and to prevent the development of our full capacities is to deny some important feature of our humanity. Mill writes:

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

⁹⁷ Ibid., Paragraphs 41-44.

and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to 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? It really is of importance, not only what men do, but also what manner of men they are that do it. Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself. Supposing it were possible to get houses built, corn grown, battles fought, causes tried, and even churches erected and prayers said, by machinery—by automatons in human form—it would be a considerable loss to exchange for these automatons even the men and women who at present inhabit the more civilized parts of the world, and who assuredly are but starved specimens of what nature can and will produce. Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.⁹⁸

But what is so wrong with such a diminished life? How can a utilitarian argue that the happiness of the individual should be considered paramount? What if it were the case that we could better promote happiness for the community as a whole in many cases, if we lived liked automatons? It is not clear why individuals should not sacrifice their interests for the greater good of society as a whole. It may not be obvious why we should reject the life of imitation out of hand.

⁹⁸ Ibid., Chapter III, Paragraph 4.

The Utility of Experiments in Living

However, it should be clear that the life of imitation is not one that encourages a robust marketplace of ideas. After all, we will not have a rich debate on the issues of the day if everyone is a product of, and offers a recitation of, the status quo. We would even have a radically diminished debate if relatively few individuals are encouraged to develop their individual capacities. Even if many of us choose the life of imitation, it would be important to make it possible for others to reject this path. We would need role models. Even if we should wish to copy our book of life from manuscripts of greater geniuses, we should encourage the flourishing of such geniuses. Mill writes:

I insist thus emphatically on the importance of genius, and the necessity of allowing it to unfold itself freely both in thought and in practice, being well aware that no one will deny the position in theory, but knowing also that almost every one, in reality, is totally indifferent to it. People think genius a fine thing if it enables a man to write an exciting poem, or paint a picture. But in its true sense, that of originality in thought and action, though no one says that it is not a thing to be admired, nearly all, at heart, think they can do very well without it. Unhappily this is too natural to be wondered at. Originality is the one thing which unoriginal minds cannot feel the use of. They cannot see what it is to do for them: how should they? If they could see what it would do for them, it would not be originality. The first service which originality has to render them, is that of opening their eyes: which being once fully done, they would have a chance of being themselves original. Meanwhile, recollecting that nothing was ever yet done which some one was not the first to do, and

that all good things which exist are the fruits of originality, let them be modest enough to believe that there is something still left for it to accomplish, and assure themselves that they are more in need of originality, the less they are conscious of the want.⁹⁹

Thus, even those who wish to lead a life of imitation should be willing to accept the need for others to reject it; if for no other reason than to offer themselves a multiplicity of lives of imitation. If no one experiments with their life, if no one is encouraged to find their own way, even those who have no desire to do so will be diminished. But a free marketplace of ideas depends on the willingness of many to engage in experiments in living. Without an acceptance of allowing others to engage in robust exploration of various experiments in living, we are unlikely to develop those unique perspectives that push the envelope, rock the boat, or upset the applecart. Today's cranks, kooks, and misfits may well contribute nothing to today's debate. But as Mill argues, it will be hard to know this in advance of allowing them their experiments in living. But if we shut down these experiments today, we will never know if they could contribute something to tomorrow's debate. Yesterday's cranks, kooks, and misfits may well turn out to be today's eccentrics, and some of today's eccentrics may well be tomorrow's geniuses. Mill writes:

In this age the mere example of non-conformity, the mere refusal to bend the knee to custom, is itself a service. Precisely because the tyranny of opinion is

⁹⁹ Ibid., Paragraph 13.

such as to make eccentricity a reproach, it is desirable, in order to break through that tyranny, that people should be eccentric. Eccentricity has always abounded when and where strength of character has abounded; and the amount of eccentricity in a society has generally been proportional to the amount of genius, mental vigor, and moral courage which it contained. That so few now dare to be eccentric, marks the chief danger of the time.¹⁰⁰

There are obvious costs to being eccentric; after all, by definition, others will often find you eccentric. But Mill suggests that our eccentrics perform for us an essential service. They are willing to take on a hostile society in the hope of discovering something meaningful beyond the status quo. As many conservatives are more than willing to tell us, most of these new ideas, opinions, and experiments in life turn out worse than the old ones, and, thus, our eccentrics are likely to fail. But this does not mean that they do not provide a useful service. The eccentrics offer their own lives as experiments in living in order to further the goal of creation of new role models, new ideas, new opinions, and new experiments in living. Ultimately, they provide the essential service of furthering our search for lives that are truly worth living. But it should be noted that Mill finds a clear connection between the search for a life that is worth living, and a search for the truth. He writes:

There are, it is alleged, certain beliefs, so useful, not to say indispensable to well-being, that it is as much the duty of governments to uphold those beliefs,

¹⁰⁰ Ibid., Paragraph 14.

as to protect any other of the interests of society. In a case of such necessity, and so directly in the line of their duty, something less than infallibility may, it is maintained, warrant, and even bind, governments, to act on their own opinion, confirmed by the general opinion of mankind. It is also often argued, and still oftener thought, that none but bad men would desire to weaken these salutary beliefs; and there can be nothing wrong, it is thought, in restraining bad men, and prohibiting what only such men would wish to practise. This mode of thinking makes the justification of restraints on discussion not a question of the truth of doctrines, but of their usefulness; and flatters itself by that means to escape the responsibility of claiming to be an infallible judge of opinions. But those who thus satisfy themselves, do not perceive that the assumption of infallibility is merely shifted from one point to another. The usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion and requiring discussion as much, as the opinion itself. There is the same need of an infallible judge of opinions to decide an opinion to be noxious, as to decide it to be false, unless the opinion condemned has full opportunity of defending itself. And it will not do to say that the heretic may be allowed to maintain the utility or harmlessness of his opinion, though forbidden to maintain its truth. The truth of an opinion is part of its utility.¹⁰¹

Thus, there is a clear connection between our search for a life worth living, those views that are essential for our well being, and a search for the truth. If the truth of an opinion is part of its utility, and we can find the truth of this opinion only in a free marketplace of ideas, then utilitarianism clearly must support a free marketplace of ideas. But a truly vigorous marketplace of ideas--one that is capable of discovering new truths about matters as fundamental as what models we should use to structure our own lives--must let eccentrics and their experiments in living flourish.

¹⁰¹ Ibid., Chapter II, Paragraph 10.

To summarize, I take what Mill wishes to accomplish in the second and third chapters of On Liberty to be a reasonably straightforward and valid argument. If we want a society that is capable of a meaningful search for the truth, we want a society in which there is a rich and robust marketplace of ideas. If we want a society in which there is a rich and robust marketplace of ideas, we must encourage eccentrics and their experiments in living. Thus, if we want a society that is capable of a meaningful search for the truth, we must encourage eccentrics and their experiments in living. But if the liberal utilitarian considers this argument to be sound, the need for a sphere of private morality where one can engage in one's own experiment in living seems clear. It should now prove possible to see what Mill wishes to accomplish in Chapter IV.

The Final Formulation of the Liberty Principle

Mill's clear and unequivocal purpose in On Liberty is "to make the fitting adjustment between individual independence and social control". He begins his reformulation of the Liberty principle in chapter IV by introducing a distinction between self-regarding and other-regarding behavior.

Each will receive its proper share if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society the part which chiefly interests society.¹⁰²

Mill thinks that since we all receive the protection of society we have two basic obligations to society; we must respect the rights of others that are members of our society and help maintain the defense of our society from outsiders.¹⁰³ Mill does not find that his society is based on a social contract; but, to the extent that we live in a society, we owe these minimal duties to it. To this extent our actions are other-regarding. Mill draws the line between self-regarding and other-regarding conduct by distinguishing between conduct that shows a defect of "prudence or personal dignity" and conduct that acts as an "offense against the rights of others". What makes this first group of cases self-regarding is they do not involve any "distinct and assignable obligations to others". We draw this distinction by looking at who bears the brunt of the consequences.

Normally, one should be allowed to spend one's money as one wishes, but parents who foolishly spend their money and neglect their children's education have violated an obligation

¹⁰² Ibid., Chapter IV, Paragraph 2.

¹⁰³ Ibid., Paragraph 3.

to them. Similarly, one should be allowed to decide one's own consumption of alcohol but a military officer who is drunk on duty is unable to fulfill his or her obligations to the public. These are examples, given by Mill, of conduct that while normally self-regarding and thus allowable has become other-regarding. The key here is that we can find either a "perceptible hurt" to an "assignable individual" or a "specific duty" to the public. In the cases I referred to earlier, taking the last discounted plane ticket or the last seat in a prestigious law school, it is clear that in some meaningful sense I have harmed the next person in line. But in most cases I will not have any clear and assignable obligation to relinquish my opportunity to the next person in line, and I clearly will not under normal circumstances violate their rights by exercising my options. Perhaps Mill's clearest attempt to define "rights" is found in this passage from Utilitarianism:

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 him to chance, or to his own exertions. Thus, a person is said to have a right to what he can earn in fair professional competition, because society ought not to allow any other person to hinder him from endeavoring to earn in that manner as much as he can.

But he has not a right to three hundred a year, though he may happen to be earning it; because society is not called on to provide that he shall earn that sum. On the contrary, if he owns ten thousand pounds three per cent stock, he has a right to three hundred a-year because society has come under an obligation to provide him with an income of that amount...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.¹⁰⁴

The point is that once we move away from talk about "harm" to talk about "rights and obligations" we have a fairly clear understanding of when and under what circumstances society will be warranted in interfering with the actions of an individual. The problem with the Harm Principle is that it puts too great a burden on the actor; you never really know when you are harming someone, and whether this harm is objectionable or not. It should be much clearer, however, to recognize when you are violating another's rights or ignoring clear and assignable obligations. We can recognize when a breach of trust or other issues of fidelity are involved. But there are two other reasons, according to Mill, why we should not allow the problem of externalities to prevent individual liberty. The first is that one does not usually inspire bad conduct by example. If the conduct really is bad then invariably "the example on the whole is more salutary than hurtful." Bad conduct will usually lead to bad consequences; the result will have an educational

¹⁰⁴ Mill, John Stuart 1863, Utilitarianism, Chapter V, Paragraphs 24-25.

effect on the public at large. Secondly a certain amount of bad conduct will arise in any pluralistic society. But this amount of bad conduct "society can afford to bear for the sake of the greater good of human freedom."

Mill also thinks his reformulated principle can withstand the objections raised from paternalism and positive liberty. There are two important objections that Mill will need to be able to respond to. The first is that freedom, in any meaningful sense, seems to incorporate more than free choice. It is also essential that one have reasonable alternatives from which to choose. The second is that really essential freedoms are not likely to be completely self-regarding. Freedom to worship, freedom of occupation, and many recreational freedoms can only be undertaken in a societal context.

Mill is clearly worried about these issues. He recognizes the social nature of human existence. He thinks that "human beings owe to each other help to distinguish the better from the worse" but he argues that this is a duty to persuade rather than coerce. Society, armed with the "power of education," public opinion, and "natural penalties," (the usual suffering that comes from violating societal norms) will certainly have an influence on the behavior of all members of society. Our social nature will guarantee it. We

exist as social creatures and we will be strongly influenced by the type of society in which we live. Armed with all this power, society need go no further. Not only should society refrain from going further than this; but, more basically as a simple psychological fact, it will fail when it attempts to go further than this. Coercion, as our current and previous attempts at drug and alcohol prohibition demonstrates, does not often work, or, minimally, will prove extremely costly. Prudence and temperance cannot be forced on individuals; they will naturally rebel. Society can also never know the individual as well as the individual does. The individual is the person most likely to know her or his own case. The individual will know his or her own interests and motivations. Finally, in what Mill thinks is his strongest point, society is likely to interfere wrongly and in the wrong place.

But the strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place. On questions of social morality, of duty to others, the opinion of the public, that is, of an overruling majority, though often wrong, is likely to be still oftener right; because on such questions they are only required to judge of their own interests; of the manner in which some mode of conduct, if allowed to be practised, would affect themselves. But the opinion of a similar majority, imposed as a law on the minority, on questions of self-regarding conduct, is quite as likely to be wrong as right; for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people; while very often it does not even mean that; the public, with the most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference. There are many

who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; as a religious bigot, when charged with disregarding the religious feelings of others, has been known to retort that they disregard his feelings, by persisting in their abominable worship or creed. But there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse.¹⁰⁵

The majority does a good job of deciding "questions of social morality" and "duty to others", but in self-regarding cases society is "quite as likely to be wrong as right." People will often find "an injury to themselves in conduct they have a distaste for." Unchecked, this would allow majorities to enforce their own mere preferences on minorities. But still, it seems possible to question why Mill is justified in preventing paternalistic actions to such a great degree, and how this is consistent with his utilitarianism. A superficial reading of Mill could turn his philosophy into an armchair activity for ivory tower intellectuals. Mill needs a morality that will allow his strong confidence in individuals to be compatible with other utilitarian goals; he needs a well-formulated moral theory to back up his notion of freedom. Mill, in my opinion has done this but one must examine Mill's liberalism in light of his utilitarian ethics carefully to find it. To this I now turn my attention.

¹⁰⁵ Mill 1859, Chapter IV, Paragraph 12.

CHAPTER THREE

MILL'S MINIMALIST ETHICS

Since the usual reading of Mill as a maximizing act-utilitarian, as illustrated by James Rachels and others, seems fraught with difficulties, I will consider other readings of Mill. One way to avoid these difficulties is offered by Rem B. Edwards. Similar interpretations of Mill may be found in the writings of D. G. Brown and David Lyons.¹⁰⁶ According to Edwards, Mill was not a maximizing act-utilitarian; he was a minimizing utilitarian. Minimizing utilitarianism, while still a consequentialist theory, is radically distinct from act or rule utilitarianism.¹⁰⁷ Both act and rule utilitarians are maximizing consequentialists for whom the correctness of actions or rules is determined by evaluating whether the largest possible utility or the smallest possible disutility results. They disagree about the processes that produce maximum possible utility. The act-utilitarian claims that this must be decided on a case-by-case basis, and the rule-utilitarian believes that it is

¹⁰⁶ These commentators, unlike Edwards, do not use the term "minimizing utilitarian." Their contributions to this interpretation of Mill will be explored in more detail later in this chapter. I will use the term "minimizing utilitarianism" to refer to Edwards' theory and his interpretation of Mill. I prefer the term "minimalist utilitarianism" since it lacks optimistic connotations which seem to confuse some readers.

¹⁰⁷ It should be noted that many commentators use the term "consequentialist" to imply maximization, for example, see Sheffler, Samuel 1988, *Consequentialism and its Critics*. I will use the term in its wider sense; a consequentialist theory is merely one that judges the rightness or wrongness of acts by evaluating their consequences.

best achieved by following those specific rules which would maximize utility if everyone acted upon them. In either case the utilitarian's duty to maximize utility is the fundamental moral principle that overrides all other moral considerations. Since Mill is commonly read as a maximizing utilitarian I wish to accomplish three goals in this chapter. One, I will present Edwards' reading of Mill. Two, I will offer some of my own modifications and clarifications to this reading. Three, I will marshal evidence against reading Mill as a maximizing utilitarian, and for reading Mill as a moral minimalist.

Edwards' Reading of Mill

Rem B. Edwards has argued that Mill is not a standard act or rule-utilitarian. Rather Edwards suggests that

Mill's utilitarianism was actually a minimizing utilitarianism which claims only that we are morally obligated to abstain from inflicting harm, to actively prevent harm, to actively provide for all persons or sentient beings certain minimal essentials of any sort of positive well being whatsoever, such as life, liberty, security, individuality and self-determination, food and shelter, basic education, equal opportunity to pursue happiness, etc., and beyond that to exercise a decent minimum of charity.¹⁰⁸

This differs from, say, Richard Brandt's version of

¹⁰⁸ Edwards, Rem B. 1986, *The Principle of Utility and Mill's Minimizing Utilitarianism*, p. 125.

rule-utilitarianism (Ideal Utilitarianism) in that Brandt would not limit himself to these criteria for moral obligation, since the ideal rules might suggest otherwise. According to Edwards, Mill's minimizing utilitarianism does not make a fundamental moral principle out of the principle of utility. Mill's minimizing utilitarianism merely affirms that it would be desirable to maximize happiness for the greatest number, but not that we are morally required to do so. Rather than being the fundamental principle of Mill's moral philosophy, the Principle of Utility really is better thought of as the "first axiom" of "general axiology" or what Mill termed "the Art of Life." The Art of Life has "three departments, Morality, Prudence or policy, and Aesthetics; the Right, the expedient, and the Beautiful."¹⁰⁹ According to Edwards, Mill held that "moral right and wrong, moral rules, moral obligation, and moral virtue" can be identified by reference to promoting happiness, "but the reference is clearly not one of simple identity."

Supplemental considerations are required to mark out the province of the moral and distinguish it from the provinces of prudence, aesthetic taste, politics, etc., all of which also have the Principle of Utility as their proper "foundation" or "criterion." None of them have it without qualifications as their inherent first principle, however. Additional conceptual features must be introduced to differentiate the first principle of general axiology from the first principles of the

¹⁰⁹ Mill, John Stuart 1843 A System of Logic, Book VI, Chapter XII, Section 6, Paragraph 2.

provinces thereof.¹¹⁰

Edwards also notes that the province of the moral must then be distinguished from non-moral domains of value like prudence, aesthetic taste, politics and law. Moral duties are distinguished from non-moral ones by two important supplemental considerations: One, moral duties must be worth the cost of social enforcement, which always has costs. Thus duties are morally obligatory only if their observance will result in value greater than the cost of enforcing them. Whether individuals are sanctioned through inculcating guilty consciences, social condemnation, or the civil and criminal penalties of the state, moral duties are only those that are worth the cost of enforcement. Two, these moral duties must be correlatable with rules for moral action that are easily taught and learned. Rules become very important under this system, but there is a clear distinction between Mill's utilitarianism and rule-utilitarianism. Rule-utilitarianism affirms that moral rules are justified if everyone's following them would have the best consequences. The minimalist utilitarian rejects this and considers the costs of implementing and enforcing moral rules as general social practices. Under minimalist utilitarianism, acts are morally wrong only when they violate "a moral rule that is worth the cost of being instituted and enforced as a general

¹¹⁰ Edwards 1986, p. 129.

social practice."¹¹¹ Thus, many desirable acts are not morally obligatory. In fact few desirable acts would meet the standards of moral obligation:

The costs of initiating, teaching, and enforcing these sanctions have to be taken into account in determining which acts are to count as morally obligatory. Once these costs are counted, Mill was convinced that only a relatively few desirable acts can be classified as moral obligations, i.e. as acts that society justifiably could coercively require of its members. Other desirable acts fall into non-moral domains such as those of manners, aesthetic tastes, prudential well being or expediency, exalted heroism, and saintly sacrifice.¹¹²

Only those desirable kinds of acts that are worth the price of initiating, teaching and enforcing become moral rules. Saintliness is an admirable quality, but to require sainthood of everyone as does maximizing act-utilitarianism would be absurd. The price associated with creating and maintaining such a state of affairs would be prohibitive.

What then is morally required? Restrained by

¹¹¹ Edwards, Rem B. and Glenn C. Graber 1988, Bio-ethics, p. 13. It should be noted that Brandt's Ideal Utilitarianism also considers these costs, and Brandt does so in language that is almost identical to several passages in Edwards 1986, and Edwards and Graber 1988. Since Brandt's work in this area predates Edwards' by several decades, and Edwards cites a work (Brandt 1967 cited in Edwards 1986) where Brandt makes several observations that would seem to influence Edwards' reading of Mill, Edwards not citing Brandt in this context is inexplicable. However, as I will argue shortly, Edwards is right in not reading Brandt as a maximizing utilitarian, and, thus, his philosophical point is correct.

¹¹² Edwards, Rem B. 1985, "J.S. Mill and Robert Veatch's Critique of Utilitarianism," p.183.

enforceability and teachability, as just explained, the principle of utility will help us to develop a set of "concrete action guiding rules" that are worth the price of initiating, teaching, and enforcing. The basic norm of morality then becomes:

To the extent that the results are possible, we are morally required to act in accord with those concrete secondary rules which demand (a) that we avoid harm to all other persons (or sentient beings) who are affected by our behavior and (b) that we protect and/or provide for everyone else (or every other sentient being certain minimal essential conditions of any sort of well being whatsoever, such as life, liberty, security, basic education, and basic health, and (c) that we engage in a decent minimum of charity or benevolence (and perhaps other "imperfect obligations" such as gratitude).¹¹³

Thus, minimalist utilitarianism provides a solid ground for moral rights. Those secondary rules that are worth their associated costs place moral claims upon us. As Edwards sees it, we violate another's rights when we ignore those moral rules that prevent: (a) harming others, and (b) ignoring minimally essential conditions for well being. Justice becomes the main component of moral obligation; it "consists in those perfect duties that protect and provide moral

¹¹³ Edwards and Graber 1988 p. 14. An imperfect obligation is one where a person is obliged to perform a certain action but not to any particular individual. For example, if I owe Jones five dollars, I have a perfect obligation to repay Jones. However, even though I have an imperfect duty to be charitable, I have no duty to give money to Planned Parenthood (assuming that I do agree with their goals)--I may prefer to give my money to the ACLU.

rights for everyone on every relevant occasion."¹¹⁴

A Point of Clarification

Before attempting to justify Edwards' reading of Mill, I wish to suggest why I think it is an important one to examine. In general, consequentialist moral theories can differ radically in how demanding they are. Standard versions of act- and rule-utilitarianism are often very demanding. Brandt's Ideal utilitarianism is less so. Brandt suggests modifying standard rule utilitarianism in two ways. First, he would agree with Edwards that moral rules should be easily taught, and worth the cost of enforcement. Second, he believes that the ideal set of rules should be the ones that would maximize happiness if they were accepted and generally followed by roughly ninety percent of the population. Thus, one is only morally required to contribute one's fair share; e.g., the duty to feed the homeless requires that one's contribution be large enough to insure that all the homeless were fed, if others meet their obligations as well. Edwards wishes to lower the demands further by suggesting that our fair share would not maximize the good, but rather minimize harm.¹¹⁵ Thus, Edwards is

¹¹⁴ Ibid.

¹¹⁵ Edwards does not explicitly endorse the second feature of Brandt's Ideal rule-utilitarianism, but I assume that he would, since otherwise there would be no reason to think that his utilitarianism is less onerous than Brandt's.

attempting to develop a less onerous utilitarianism that still maintains some of utilitarianism's attractive features.

In the previous chapters I have suggested that if Mill was a not a maximizing utilitarian then it would be possible reconcile Mill's liberalism with his consequentialist morality. It would then be possible to use this full-blooded Mill to construct a theory of justice. Mill is, however, commonly read as a maximizing utilitarian. In light of this fact, I wish to accomplish four purposes in the remainder of this chapter. One, I wish to suggest why so many readings of Mill are wrong. Two, I will demonstrate that Mill is not an ethical extremist. Moreover, if one takes Mill's liberalism seriously, the consistent reading suggests that Mill is a moral minimalist. Three, I will provide a detailed account of Mill's axiology and show that this allows reading Mill as a minimalist utilitarian. Four, I will show the importance that Mill placed on self-development and the formation of character, and how this reinforces reading Mill as a minimizing utilitarian.

Philosophy and Fashion

Philosophy, like any other human endeavor, has its fads

and fashions. There are eras where philosophy is revered and philosophers are heroes. The medieval church endowed Augustine, Anselm, and Aquinas with sainthood. Early twentieth century America considered John Dewey and William James among its public intellectuals. The French made Jean-Paul Sartre a major figure in their culture. However, American culture as we find it today is less than friendly to philosophy. There is currently no demand for philosophers to enter the public debate; and, with the possible exception of John Rawls, there are no living American philosophers who have made a major impact on contemporary political debate.

Even academic philosophy has its fashion statements. During the Middle-Ages the scholastics singled out Aristotle as beyond comparison; he was simply "the philosopher." During the Enlightenment, he was denounced as a hopelessly dogmatic essentialist whose views were antithetical to the new evolving scientific picture of the world. Only in the last hundred years has Aristotle received the charitable reading that a philosopher of his enormous abilities deserves. But Aristotle still is tarnished because his views are associated with a dogmatic scholastic Christianity. The way Aristotle was interpreted for hundreds of years still affects the way Aristotle is interpreted today.¹¹⁶

¹¹⁶ For example, consider what is called the Book I/Book X debate in Aristotelian scholarship. Book X supporters claim that in Book X of the Nicomachean Ethics Aristotle rejects the notion of a life of practical

Aristotle also suffers from having been so influential for so long. Post-modernists reject essentialism so passionately that one would almost assume something personal is at stake; after all, no one would seriously argue that there are no universal features of human existence. We all die, right? A new generation of philosophers tends to wish to distance themselves from their elders, particularly when their elders have achieved great distinction. Why else would America today have so few Dewey scholars? Why would so many American bookstores be stocked with obscure continental post-modernists, and be devoid of the works of major Anglo-American thinkers such as Dewey, James, Russell, Bentham, and the Mills?

In an era when philosophers have such a small influence upon public debate, it is hard to understand how influential Mill was in his own day. Perhaps the only philosopher whose specter looms as large over the twentieth century is Karl

activity in favor of one of contemplation. This view gains in plausibility if one wishes to find Aristotle's ethics compatible with a Christian life of devotion to God and prayer. This view is less plausible if one wishes to adopt a more modern Aristotle who is the defender of common sense everyday reality. My own views on this debate are similar to those of J.L. Ackrill. Ackrill argues for a "compatibilist" position in this debate, i.e., an active social life and a life of contemplation are both complementary and mutually reinforcing. See Ackrill, J. L. 1981 Aristotle the Philosopher, Chapter 7. Modern examples of this would be Noam Chomsky's linguistics and political activism, or John Nolt's study of formal logic and philosophy of mathematics coupled with his environmental activism. Interestingly, I think one can find some interesting parallels between Aristotle's Book I/ Book X debate and Mill's self-regarding/ other-regarding distinction.

Marx.¹¹⁷ In a century that has been dominated by Marxism, however, it is hard to realize how obscure Marx was during the period of Mill's greatest influence. As Thomas Sowell wrote in 1985:

Marx's legendary fame today makes it difficult to realize that he was an obscure figure with no substantial following in the early 1860s, that his writings were largely ignored, and that even a man as knowledgeable as John Stuart Mill could live for twenty years in the same city, writing on the same topics, in utter ignorance that someone named Karl Marx existed.¹¹⁸

Sowell's choice of Mill in this regard is far from accidental. Mill was as famous during his life as Marx was obscure.¹¹⁹ 1848 was an important year for what was then known as political economy. It was the year Marx and Engels published The Communist Manifesto, and Mill published his

¹¹⁷ Of course, this specter is beginning to fade. One sign of this is the spell-checker I am using does not recognize the words "Karl" or "Engels."

¹¹⁸ Sowell, Thomas 1985, Marxism: Philosophy and Economics, p. 179. As Sowell's endnote indicates "There is not one reference to Marx in all of Mill's voluminous writings, nor in his voluminous correspondence. Ibid., p. 264. See Also Thomson, David 1968 The Pelican History of England:8 England in the Nineteenth Century, p. 51. Sowell's interest in Marx dates back to his undergraduate honors thesis on Marx in 1958, and he published articles on Marx in various scholarly journals in America, Britain, and Canada during the 1960s. He also notes that his "philosophic, economic, and political orientation" has varied across the spectrum during this roughly thirty year period. Sowell 1985, p. 6. For those who know Sowell from his overly shrill anti-leftist diatribes in his weekly syndicated newspaper column two points should be noted: 1. There is no zealot like a reformed heathen. 2. Sowell is capable of careful scholarship, particularly on economic issues, when he puts his mind to it.

¹¹⁹ Most of Mill's major works were in publication by the early 1860s and Mill was elected to parliament in 1865. Mill was elected to office primarily on the strength of his reputation as a philosopher since he was unwilling to "canvass or incur any expense" on a campaign. Mill 1873, p. 198.

Principles of Political Economy. By the early 1860s Mill's Principles had gone into multiple editions and was widely regarded as the definitive work on political economy. During his lifetime Mill was considered a great thinker in this field, and Marx was virtually unknown.¹²⁰ It is one of those remarkable reversals of fortunes in intellectual history that these roles would be reversed in such a short period of time. Today Marx is either famous or infamous, depending upon your political views, as an economic thinker. One practically has to be a Mill scholar to know that such a view was held about Mill a hundred or so years ago.

So, as we have seen, the curtain rises and falls on philosophical fashion. By 1950 Marxism and various responses to Marxism dominated world thought. Marxism was such a powerful force that, in reaction to the perceived threat posed by Communism, a country founded on constitutionally guaranteed rights would allow a demagogue like McCarthy to violate egregiously the civil liberties of its citizens.¹²¹

On the other hand, in 1950 one might have asked: "John

¹²⁰ Mill's solid grasp of the principles of classical economics are generally accepted. Sowell in explicating Marx's notion of surplus value begins by quoting Mill's "Some Unsettled Questions of Political Economy" to explain Ricardo's unusual use of the term "value." Ricardo is not cited at all. Sowell 1985, p. 133.

¹²¹ Senator Joseph McCarthy (Republican, Wisconsin) gained prominence in 1950 charging that the State department was infested with Communists. Today "McCarthyism" is a term of derision applied to those who supposedly have engaged in reckless or indiscriminate charges of political disloyalty. See Hurwitz, Howard L. 1974, An Encyclopedic Dictionary of American History.

Stuart who?"

Perhaps the tide began to turn for Mill in the 1950s. In 1953 J. O. Urmson wrote an influential article that began a reexamination of Mill's ethical philosophy. Urmson began with a scathing denunciation of the Mill scholarship of his day:

It is a matter which should be of great interest to those who study the psychology of philosophers that the theories of some great philosophers of the past are studied with the most patient and accurate scholarship, while those of others are so burlesqued and travestied by critics and commentators that it is hard to believe that their works are ever seriously read with a sympathetic interest, or even that they are read at all. Amongst those who suffer most in this way John Stuart Mill is an outstanding example...even more perplexing is the almost universal misconception placed upon Mill's ethical doctrines; for his Utilitarianism is a work which every undergraduate is set to read and which one would therefore expect Mill's critics to have read at least once. But this, apparently, is not so; and instead of Mill's own doctrines a travesty is discussed, so the most common criticisms of him are simply irrelevant...[If Mill was interpreted with] half the sympathy automatically accorded to Plato, Leibniz, and Kant an essentially consistent thesis can be discovered which is very superior to that usually attributed to Mill and immune to the common run of criticisms.¹²²

Urmson finds Mill read incorrectly in primarily two ways. First he is read as an ethical naturalist who defined "rightness in terms of the natural consequences of actions,"

¹²² Urmson, J. O. 1953, "The Interpretation of the Moral Philosophy of J. S. Mill," pp. 14-5.

or alternately Mill is read as suggesting that an act is right if "it promotes the ultimate end better than any alternative, and otherwise it is wrong."¹²³ According to Urmson, if this were the case then Mill's work "would indeed be fit for little more than the halting eristic of philosophical infants."¹²⁴ The second view above, as Urmson suggests, was the dominant view about Mill at the time Urmson wrote, and I have shown in the previous chapters that it still surfaces in commonly accepted introductory texts today. To put this view in more modern terms, Mill is a maximizing act utilitarian. Urmson, as previously noted, finds this interpretation fatally flawed, and offers the following set of four propositions as a first step in a reasonable exegesis of Mill's moral philosophy instead:

A. A particular action is justified as being right by showing that it is in accord with some moral rule. It is shown to be wrong by showing that it transgresses some moral rule.

B. A moral rule is shown to be correct by showing that the recognition of the rule promotes the ultimate end.

C. Moral rules can be justified only in regard to matters in which the general welfare is more than negligibly effected.

D. Where no moral rule is applicable the question of the rightness or wrongness of particular acts does not arise, though the worth of actions can be estimated in different ways.¹²⁵

¹²³ Ibid., pp. 14-16.

¹²⁴ Ibid., p. 17.

¹²⁵ Ibid.

Urmson claims that this is no more than "a skeleton plan" for Mill's account in Utilitarianism, and that Mill "puts the matter more richly and more subtly in his book."¹²⁶ However, I think that there are at least three insightful points that come from Urmson's discussion.

First, Urmson recognizes the importance of rules (what Mill usually calls secondary principles) for Mill's moral philosophy. Second, many actions fall outside of the moral domain. These actions only affect the general good negligibly. Third, some non-moral acts are capable of being evaluated.

The Difficulty with the Maximizing Reading

Urmson's article provoked a great debate in the philosophic community: Is Mill a rule-utilitarian or is he an act-utilitarian?¹²⁷ But phrasing the debate this way misses much of what should be Urmson's point. Both rule and act-utilitarians are maximizing utilitarians. No maximizing utilitarian would accept that morality only concerns "matters in which the general welfare is more than negligibly affected." Mill in Utilitarianism makes this point so explicitly and so clearly it is hard to believe, as

¹²⁶ Ibid. p. 24.

¹²⁷ For a list of authors who read Mill as an act-utilitarian or as a rule utilitarian see Edwards 1986, p. 135.

Urmson has noted, that Mill's critics have actually bothered to read him. Mill clearly rejected the ethical extremist position. Mill actually believes that our opportunities to act in a manner in which the general welfare is more than negligibly affected are quite rare.¹²⁸ In answering the charge that utilitarianism would require us to "always act from the inducement of promoting the general interests of society" Mill in Utilitarianism writes:

The multiplication of happiness is, according to the utilitarian ethics, the object of virtue: the occasions on which any person (except one in a thousand) has it in his power to do this on an extended scale, in other words to be a public benefactor, are but exceptional; and on these occasions alone is he called on to consider public utility; in every other case, private utility, the interest or happiness of some few persons, is all he has to attend to.¹²⁹

One wonders what those who hold the view that Mill is a maximizing utilitarian make of such a passage. Why would it be plausible to suggest that an ethical extremist thinks that for most of us our opportunities to act from duty are

¹²⁸ Edwards has suggested that Urmson in this article can best be read as a rule-utilitarian. Edwards 1986, p. 135. But my analysis suggests that Urmson has opened the door for reading Mill as an ethical minimalist.

¹²⁹ Mill 1863, Chapter II, Paragraph 18. One reason that many of Mill's critics might be unaware of this passage is due to selective editing. For example, James Rachels in a recent anthology includes chapter II of Mill's Utilitarianism but edits this passage and the surrounding paragraphs out. Since Rachels, as noted in the previous chapter, wishes to read Mill as an act-utilitarian, this "editing" has a slightly unsavory aroma. Rachels, James 1989, The Right Thing to Do. However, this decision was not unique, for example, see Bowie, G. Lee, Michaels, Meredith W., and Solomon, Robert C. 1992, Twenty Questions: An Introduction to Philosophy.

exceptional, and in any case, would only apply to one person in a thousand? What could an ethical extremist possibly mean by "private utility," and why would an ethical extremist wish to suggest that in most cases public utility should be ignored in favor of private utility? In any case, the ethical extremist owes us a rather sophisticated theory of human psychology that would justify such an account. If we are morally required as the ethical extremist suggests, say, not to simply feed all the hungry peoples of the Third World, but provide them with a standard of living that maximizes utility, would this not require most Americans to radically change their behavior? To suggest that we could simply go forward without virtually every American being morally required radically to adjust their behavior, in my view, would be not taking ethical extremism seriously.¹³⁰

The Minimalist Reading

Two possible answers suggest themselves. Those that hold what Urmson calls the received view simply treat such a passage as an aberration. Mill, on their account, is simply sloppy and inconsistent. The more plausible interpretation is that the received view treats prudential choices as moral

¹³⁰ Mill's claim that only one person in a thousand has the opportunity to be a public benefactor is quite radical when one considers the time he is writing his major works and the social conditions in Ireland of this era.

choices; but, as noted by Louis P. Pojman, Mill's utilitarianism (along with Hobbesian contractarianism and most deontological ethics) "tends to be minimalist"

calling on us to adhere to a core of necessary rules (e.g., do not steal, harm, murder, or lie) in order for society to function. The accent is on social control: Morality is largely preventive, safeguarding rights and moral space where people may carry out their projects unhindered by the intrusions of others.¹³¹

Pojman wishes to distinguish between the "weak" form of Mill's utilitarianism and the "strong" form found in the work of Peter Singer.¹³² Strong utilitarians place most of life under the strict scrutiny of morality. For the strong utilitarian, if we were able to prevent anything with negative consequences from happening without sacrificing something of equal or greater worth we would be required to do so. Of course, it goes without saying that this places the bulk of our lives in the moral domain. Our duties to positively help those less fortunate than ourselves would be overwhelming. A "weak" utilitarianism, on Pojman's account, opens up a large domain of what is morally permissible; we are allowed a large area of morally neutral space in which to chart our own self development. But this desire for a

¹³¹ Pojman, Louis P. 1994, Ethics: Discovering Right and Wrong, p. 252.

¹³² Pojman does not indicate what relationship holds between the terms "weak" and "minimalist," but I am assuming that both these terms and, "strong" and "extremist," are logically equivalent. One should note that this reading of Singer may be incorrect. I will discuss Singer in more detail in the next chapter.

moral free space in which to cultivate our personality, desires, talents, and abilities is at the very core of liberalism. As Will Kymlicka put it, the liberal desires to live life from the inside--free to "form, revise, and act upon our plans of life."¹³³ The freedom to form and revise our own life projects, to be the person in charge of who we are, is crucial for the liberal. The connection between the liberal and the moral minimalist is quite clear in Daniel Callahan's characterization of the moral minimalist position:

It has been one that stressed the transcendence of the individual over the community, the need to tolerate all moral viewpoints, the autonomy of the self as the highest human good, the informed consent contract as the model of human relationships. We are obliged under the most generous reading of a minimalist ethic only to honor our voluntarily undertaken family obligations, to keep our promises, and to respect contracts freely entered into with other freely consenting adults. Beyond those minimal standards, we are free to do as we like, guided by nothing other than our private standards of good and evil.¹³⁴

In this passage Callahan describes a moral minimalist ethic. But it could easily be construed as a description of a liberal world-view. The autonomy that is stressed by Callahan is a distinctly liberal one. Freedom is the negative freedom to do as we like once those obligations

¹³³ Kymlicka, Will 1991, Liberalism, Community and Culture, p. 48.

¹³⁴ Callahan, Daniel 1981, "Minimal Ethics: On the Pacification of Morality," pp. 19-25.

that we have voluntarily entered into are met, but Callahan omits Mill's emphasis on the necessity for respecting basic human rights whether we have voluntarily chosen to do so or not. Perhaps it would be rash to suggest that all moral minimalists must be liberals; but clearly if Callahan's characterization is correct, moral minimalism is compatible with liberalism.

The virtue of reading Mill as a moral minimalist who emphasizes justice is readily apparent. When Mill is read as an ethical extremist there is an incredible tension between Mill's ethics and his liberalism. But moral minimalism as characterized by Pojman and Callahan fits liberalism like a tailor-made suit.

The questions are then simple: Is there textual support for reading Mill this way? Is there sufficient evidence that Mill was a moral minimalist? Does this evidence compare favorably with evidence that Mill is a moral maximalist? Is Mill's moral minimalism compatible with his utilitarianism? I will show that it is possible to answer all of these questions affirmatively.

Mill and Moral Extremism

I have already suggested that a close reading of Utilitarianism causes difficulties for the received view that reads Mill as a moral extremist. A moral extremist such as Shelly Kagan would hardly suggest that nine hundred and ninety-nine individuals out of a thousand, even in Mill's era, would not have the opportunity to more than negligibly affect the common good. Kagan has characterized moral extremism as follows:

Morality requires that you perform--of those acts not otherwise forbidden--that act which can be reasonably expected to lead to the best consequences overall...If this claim is correct, most of my actions are immoral, for almost nothing that I do makes optimal use of my time and resources...few of us believe this claim and none of us live in accordance with it.¹³⁵

For Kagan an important question is whether utilitarianism is too demanding. If utilitarians are required to live in accordance with this formulation of consequentialism, utilitarianism would certainly be a very demanding ethical philosophy. One might legitimately ask whether all maximizing utilitarians would assent to this formulation of consequentialism. Following Kagan, I will refer to a supporter of Kagan's moral extremism as "the Extremist."¹³⁶

¹³⁵ Kagan, Shelly 1991, The Limits of Morality, pp. 1-2.

¹³⁶ I will leave it as an open question whether it is possible for act-

Mill was no fan of the Extremist. He makes this perfectly clear in his Later Speculations of M. Comte. Comte, according to Mill, was a "morality intoxicated man." "Every question to him is a matter of morality, and no motive but that of morality is permitted."¹³⁷ The Extremist has a similar addiction. As Kagan notes, if the Extremist were to go to the movies, he or she would be guilty of a breach of morality. The time could be better spent caring for the sick or elderly. The money could be spent on famine relief.¹³⁸ For the Extremist the simplest daily activity becomes a major moral decision. Any indulgence beyond what is necessary for survival becomes immoral. But Mill clearly rejects this position when he finds it in Comte. Furthermore, he rejects it in a context where he explicitly states that utilitarians, for the most part, would not accept it either. Mill writes:

[According to Comte] we should endeavor to starve the whole of the desires which point to our personal satisfactions, by denying them all gratifications not strictly required by physical necessities. The golden rule of morality [for Comte] is to live for others...To do as we would be done by, and to love our neighbor as ourself are not sufficient for him: they partake, he thinks, of the nature of personal calculations. We should endeavor not to love ourselves at all.¹³⁹

utilitarians or rule-utilitarians to be more moderate than Kagan suggests. That is their problem not mine.

¹³⁷ Mill, John Stuart 1865 "Later Speculations of M. Comte," Paragraph 9.

¹³⁸ Kagan 1991, p. 1.

¹³⁹ Ibid.

Mill clearly suggests that the Extremist's morality is deficient in a crucial aspect of any worthwhile moral theory: A worthwhile moral theory provides a foundation for a life that is worth living. The extremist's life is one devoid of personal satisfaction. It is a life of almost total abnegation. Mill must reject such a theory. Utilitarianism is at some level, after all, about happiness; and however one wishes to define happiness, it is impossible to be happy without loving oneself at least a little. Mill wants a society that makes as many people happy as is possible, not one that demands that none of them is.

Mill also thinks that the Extremist errs in the belief that there are no supererogatory acts. Extremists may have choices between acts, of course; but they must always choose to act in a way that produces the best consequences. For Mill, the class of morally virtuous acts is much larger than the class of morally obligatory acts. There is a large class of acts that are morally virtuous and worth doing, but are not morally obligatory. Once again, we are allowed a large area of moral permissibility in which to chart our own self-development. It is desirable, of course, to encourage ourselves and others to perform acts of supererogation; such conduct is morally desirable, but not morally obligatory.

Mill clearly believes that an act of supererogation falls beyond the call of moral duty and should be done voluntarily. According to Mill, all Extremists like Comte are guilty of the same error. They make:

[T]he same ethical mistake as the theory of Calvinism, that every act in life should be done for the glory of God, and whatever is not duty is a sin. It does not perceive that between the region of duty and that of sin there is an intermediate space, the region of positive worthiness. It is not good that persons should be bound, by other people's opinion, to do everything that they would deserve praise for doing. There is a standard of altruism to which all should be required to come up, and a degree beyond it which is not obligatory, but meritorious. It is incumbent on everyone to restrain the pursuit of his personal objects within the limits consistent with the essential interests of others. What those limits are, it is the province of ethical science to determine; and to keep all individuals and aggregations of individuals within them, is the proper office of punishment and of moral blame.¹⁴⁰

For Mill it is clear that there is room in morality for people to live virtuous or even heroic lives, but it is important that no one is compelled to do so by the moral sanction of law, public opinion, or private conscience. There are minimal demands that society can make on everyone, for example, not to harm others or violate contractual agreements. We should praise and reward those who are extremely altruistic. We should teach our children to both be charitable and to have the greatest admiration for such altruists. In this way, Mill believes, we will obtain a

¹⁴⁰ Ibid., Paragraph 12.

society in which it is possible for human beings to flourish, and to construct lives that are worth living.

As a rule of conduct, to be enforced by moral sanctions, we think no more should be attempted than to prevent people from doing harm to others, or omitting to do such good as they have undertaken. Demanding no more than this, society, in any tolerable circumstances, obtains much more; for the natural activity of human nature, shut out from all noxious directions, will expand itself in useful ones. This is our conception of the moral rule prescribed by the religion of Humanity. But above this standard there is an unlimited range of moral worth, up to the most exalted heroism, which should be fostered by every positive encouragement, though not converted into an obligation. It is as much a part of our scheme as of M. Comte's, that the direct cultivation of altruism, and the subordination of egoism to it, far beyond the point of absolute moral duty, should be one of the chief aims of education, both individual and collective...Nor can any pains taken be too great, to form the habit, and develop the desire, of being useful to others and to the world, by the practice, independently of reward and of every personal consideration, of positive virtue beyond the bounds of prescribed duty. No efforts should be spared to associate the pupil's self-respect, and his desire to respect others, with service rendered to humanity; when possible, collectively, but at all events, what is always possible, in the persons of its collective members.¹⁴¹

By placing minimal moral constraints upon everyone, and by encouraging but not requiring supererogation, Mill suggests, a society can create a climate where people will desire to live virtuous lives. The proper way to promote moral heroism is to create an environment conducive to altruism. This can be done primarily through education and the examples that are offered by virtuous individuals in the

¹⁴¹ Ibid., Paragraph 14.

daily course of their lives. Given the right education and the right moral climate, people will desire to be altruistic; it becomes part of their personality and a key to their own self-respect.

Once again, moral sanctions are properly applied to those who harm others or refuse to honor their obligations; but this is completely consistent with moral minimalism. The importance of avoiding and preventing harm in Mill's overall system should not be underestimated, and I discussed Mill's Harm Principle in some detail in the previous chapter. For now, note that this emphasis on harm is what one would expect from moral minimalists who consider our moral obligations and duties to be primarily (i.e., most often and ordinarily) negative obligations and duties.¹⁴² We are morally required not to harm others, not to interfere in their projects and goals, not to prevent them from exercising their essential interests, not to violate our contracts with them, to not treat others in ways we would not wish to be treated. The extremist's conception of morality is essentially positive: We are morally required to comfort the afflicted, to donate much if not all of our resources above the subsistence level to those less fortunate than ourselves, to place the interests of others

¹⁴² Edwards does recognize some positive obligations and duties, and I will return to this point in the next chapter.

ahead of our own, to do as much for others as we possibly can through the most judicious use of our talents and resources, in a nutshell, to maximize goodness and minimize harm.

Mill's Utilitarianism and On Liberty

Mill considered On Liberty to be his magnum opus. His autobiography describes how he and wife revised this work extensively and affirms his own belief in its paramount importance. Several pages in Mill's autobiography are devoted to the discussion of On Liberty, Mill's thought processes during its composition, and his belief that it was his work that would most likely stand the test of time. Mill did not suggest that Utilitarianism would stand the test of time. Utilitarianism was a "little work" that received exactly one sentence in Mill's autobiography.¹⁴³ Yet Mill's moral philosophy is often evaluated today through anthologized versions of Utilitarianism that are usually

¹⁴³ Mill writes "The work of the years 1860 and 1861 consisted chiefly of two treatises, only one of which was intended for immediate publication. This was the 'Considerations on Representative Government'... The other treatise written at this time is the one which was published some years later [1869] under the title of 'The Subjection of Women'... Soon after this time I took from their repository a portion of the unpublished papers which I had written during the last years of our married life, and shaped them, with some additional matter, into the little work entitled 'Utilitarianism'; which was first published, in three parts, in successive numbers of Fraser's Magazine [1861], and afterwards reprinted in a volume." Mill 1873, Chapter VII, Paragraphs 27-29. This last sentence, once again, is the sole reference to Utilitarianism in the Autobiography.

truncated forms of this little work. In his autobiography Mill says that On Liberty was constructed so carefully that:

[T]here was not a single sentence of it that was not several times gone through by us together, turned over in many ways, and carefully weeded of any faults, either in thought or expression, that we detected in it...it far surpasses, as a mere specimen of composition, anything which had proceeded from me either before or since...The 'Liberty' is likely to survive longer than anything else I have written (with the possible exception of the 'Logic'), because [it is] a kind of philosophic text-book of a single truth...the importance, to man and society, of a large variety in types of character, and of giving full freedom to human nature to expand itself in innumerable and conflicting directions.¹⁴⁴

This philosophical text-book would be irrelevant to a discussion of Mill's moral philosophy, if it did not contain any direct connection between Mill's ethical theory and his liberalism. But On Liberty does contain such a connection; in fact, the connection is quite explicit.

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. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation. There are also many positive acts for the benefits of others that which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society to which he enjoys protection; and to perform certain acts of individual beneficence, such as saving a fellow creature's life, or interposing

¹⁴⁴ Ibid., Paragraphs 16-21.

to protect the defenseless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only because of his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make anyone answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception. Yet there are many cases clear enough and grave enough to justify that exception.¹⁴⁵

Lyons noted that it would be wrong to interpret this passage as suggesting Mill thinks that we have obligations to act to positively benefit others. "Positive acts for the benefit of others" in this passage does not mean "acts for the positive benefit of others."¹⁴⁶ Edwards suggests that this distinction is crucial because Mill only wishes to commit himself to positive obligations that would be necessary to meet "minimal essentials of well being."¹⁴⁷ The examples that Mill provides in this passage all concern abstaining from harming others or preventing the harm of others. Our duties to help others are actually quite minimal.

At this point the received reading of Mill should be seen to be obviously wrong. Over and over in passage after passage Mill rejects both ethical extremism and the view that utilitarians as a whole are committed to ethical extremism. Thus, Mill simply cannot be read in any coherent

¹⁴⁵ Mill 1859, Chapter II, Paragraph 13.

¹⁴⁶ Lyons, David 1982, "Benevolence and Justice in Mill," p. 50.

¹⁴⁷ Edwards 1985, p. 186.

fashion as a maximizing utilitarian. How, then, should he be read? What would a positive formulation of a non-maximizing utilitarianism look like?

Utilitarianism and A System of Logic

The received view is that Mill wrote very little about ethical theory per se, and, of the little that he did write on ethical theory, the bulk of it can be found in Utilitarianism. This is particularly odd since the received view often accepts Mill's A System of Logic as his most important work.¹⁴⁸ The incongruity of these two views is apparent when one realizes that Book VI of the latter work is entitled "On the Logic of the Moral Sciences." However, as Brown noted, by the early 1970s many Mill scholars had come to believe that the account of moral reasoning in A System Of Logic should govern our understanding of Utilitarianism.¹⁴⁹ Brown's view is, of course, consistent

¹⁴⁸ For example see Denise, Theodore C., Peterfreund, Sheldon P., and White, Nicholas P. 1996 Great Traditions in Ethics. "Mill's major works cover a variety of subjects, but his System of Logic (1843) [sic] is regarded as his most important philosophical contribution." p. 200. Unlike many of his critics Mill was careful in his use of articles, and the claim the one has developed "a system" leaves open the possibility of other systems. Similarly, it is common to see the article "the" added to Mill's Principles of Political Economy which would definitely imply that Mill thought his list was exhaustive. After listing several of Mill's works they mention "the essay Utilitarianism (1861), his only explicit contribution to ethics." Denise et. al. also note that "Unlike most philosophers, John Stuart Mill did not attempt to originate an ethical theory, but rather to defend the ethical theory to which he was born" a claim they do not apply to Henry Sidgwick due to his "revision of the foundation of utilitarianism." pp. 200, 260. As usual, Mill is just "Bentham Lite."

¹⁴⁹ Brown, D. G. 1974, "Mill's Act-Utilitarianism," p. 67.

with Mill's telling us in his autobiography that Utilitarianism is a little work and that A System of Logic ranks with On Liberty as his most important works. The problem with relying on Utilitarianism as a full account of Mill's ethical views is that he seems to write in this work with two voices. At times he speaks in a very general tone that would apply to utilitarian theories as a whole, but at other times he makes very specific pronouncements that would be at odds with the utilitarianism of his father and Bentham. But Mill's speaking in general terms is often blown out of all proportion.

According to Fred Berger, the following passage is most often cited when commentators attempt to justify reading Mill as a maximizing act-utilitarian.¹⁵⁰ In Chapter II of Utilitarianism Mill writes:

The creed which accepts as the foundation 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. To give a clear view of the moral standard set up by the theory, much more requires to be said; in particular, what things it includes in the ideas of pain and pleasure; and to what extent this is left an open question. But these supplementary explanations do not affect the theory of life on which this theory of morality is grounded—namely, that pleasure, and freedom from pain, are the only things desirable as ends; and that all desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable either for the pleasure

¹⁵⁰ Berger 1984, p. 68.

inherent in themselves, or as means to the promotion of pleasure and the prevention of pain.¹⁵¹

Of course, the main problem for reading this passage as the expression of a maximizing act-utilitarian Mill is that if Mill is suggesting that we should maximize utility, why does he not simply use this phrase? As M. S. J. Packe notes in his biography of Mill, he was certainly familiar with the word "maximize," since it was Bentham who coined and popularized its usage.¹⁵² This problem becomes quite acute for the maximizing act-utilitarian reading, since its supporters must explain why Mill uses "promote" (and, indeed, "tends to promote") when he means "maximize." After all, in standard usage, these words have quite distinct meanings. The only example that I am aware of where "promote" can mean something close to "maximize" comes from chess.¹⁵³ But neither Mill's autobiography or Packe's biography indicate that Mill was an occasional, let alone serious, chess player. It should be clear that good exegesis will not involve interpreting words outside their normal meaning without some textual analysis or support, or at least some explanation for how some specific community uses its technical terms. Since supporters of the maximizing act-

¹⁵¹ Mill 1863, Chapter II, Paragraph 2.

¹⁵² Packe 1954, p. 17.

¹⁵³ Chess players often say "promote a pawn" as shorthand for "promote a pawn to a queen," and occasionally use the phrase "under-promote" to indicate a promotion to a lesser piece. But there is nothing incorrect with the expression "promote to a bishop." In general, "promote a pawn" means promote to any one of several pieces, not simply the one with the maximum value.

utilitarian reading, in my experience, never offer any textual analysis or support for their reading, or any evidence that the classical utilitarians have a specific technical meaning for "promote," why are they not guilty of a Humpty-Dumptyism?¹⁵⁴ It takes just a few sentences--note my chess player example--to present a coherent account of when a specific community's use of the term "promote" should be interpreted as "maximize." Of course, the phrase "in proportion as they tend to promote" does not roll off the tongue easily for those who were educated in the latter half of the twentieth century. For this reason, Berger has examined the use of these words in the writings of Bentham and John Austin, two critically important influences on Mill's education. Berger writes:

The important fact to focus on is that a particular act can have numerous and manifold consequences. Moreover, an act can have consequences for many persons over a range of time. Some of these consequences may be good for some people and bad for others, thus making some people happy and others unhappy. Furthermore, it may have both good and bad consequences for the same person. In such cases, it makes sense to say that the act tends to promote happiness if, on balance, it produces more happiness than unhappiness, that is, if it acts predominately in the direction of happiness. The greater the difference between the total of bad

¹⁵⁴ Humpty Dumpty is famous for not letting a little thing like the meaning of words get in his way. In a famous passage from Through the Looking Glass, and What Alice saw There, Lewis Carroll (the pen name for the logician Charles L. Dodgson, 1832-1898) writes: 'I don't know what you mean by "glory",' Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't -- till I tell you. I meant "there's a nice knock-down argument for you!'" 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'

consequences, the greater is its tendency to produce good, We might add that it also makes sense to say that an act has some tendency to good if it has any good consequences, though, of course, that need not be its predominant tendency...Bentham and Austin explicitly adopted such a meaning for "tendency" in explicating their versions of utilitarianism...Mill's use of this concept in regard to the rules governing conduct turns out to be equivalent to that of Bentham and Austin.¹⁵⁵

Thus, if Berger is correct, Mill's "acts are right in proportion as they tend to promote happiness, wrong as they tend to promote the reverse" is best interpreted as something like "acts are right if they are likely, on balance, to produce more happiness than unhappiness." This reading, of course, does not support the minimalist interpretation. However, it does suggest that this passage does little to advance the maximizing act-utilitarian position. It says nothing to the issue of whether one right act is preferable to another, let alone whether one would be morally required to perform one right act over another. Also, it should be noted that Berger suggests that Mill uses "this concept in regard to the rules governing conduct." If Berger's analysis is correct, it counts heavily against the act-utilitarian reading of Mill.

A System of Logic is quite helpful in clarifying the ambiguities about rules one finds in Utilitarianism. To begin this discussion it will be helpful to note the distinction that Mill makes between an art and a science.

¹⁵⁵ Berger 1984, pp. 68-69.

Today if one were to discuss the art of bread baking, one's audience would immediately have visions of a fabulously well paid and famous French pastry chef producing unique delicacies at a trendy Manhattan bistro. But what Mill meant by the art of bread baking would be the process the folks who work at the Kern's Bakery on Chapman Highway in Knoxville Tennessee employ to make bread on a daily basis. Clearly some science is involved in baking bread; and at a very general level one would use principles of biology, chemistry, and physics to bake bread. But a recipe does not resemble a science text-book. Instead it is a list of imperatives: heat the oven to x degrees, mix y amounts of flour with z amounts of yeast, etc. Of course, a trained scientist could give an account based on the relevant scientific theories about why you heat the oven to x degrees, but this is not what the folks at the bakery require. What they require is instead a set of secondary rules that have been derived from the relevant sciences.

The grounds, then, of every rule of art, are to be found in the theorems of science. An art, or a body of art, consists of the rules, together with as much of the speculative propositions as comprises the justification of those rules. The complete art of any matter, includes a selection of such a portion from the science, as is necessary to show on what conditions the effects, which the art aims at producing, depend. And art in general, consists of the truths of science, arranged in the most convenient order for practice, instead of the order which is most convenient for thought. Science groups and arranges its truths, so as to enable us to take in at one view as much as possible of the general order of the universe. Art...follows them only into such of their detailed consequences as

have led to the formation of rules of conduct.¹⁵⁶ Science consists of theorems that are arranged specifically to allow us to conceptualize the universe. An art, or body of art, exists primarily to provide rules of conduct that put the truths of science into practical use. To bake bread one does not need to engage in conceptualizing anything at all. One simply needs a recipe.

What should an art provide? Science can explain how it is possible to bake bread, but it cannot provide a reason for doing so. Science can explain how different varieties of bread are possible, but it cannot explain why one would be preferable to another.

But though the reasoning that connects the end or purpose of every art with its means, belongs to the domain of Science, the definition of the end itself belongs to Art, and forms its peculiar province. Every art has one first principle, or general major premise not borrowed from science; that which enunciates the object aimed at, and affirms it to be a desirable object...Propositions of science assert a matter of fact; an existence, a coexistence, a succession, or a resemblance. The propositions now spoken of do not assert anything that is, but enjoin or recommend that something should be.¹⁵⁷

Medicine as an art assumes that it is valuable to cure the sick. Agriculture as an art assumes that it is important to grow some plants rather than others, to grow some plants in conjunction with others, or perhaps not to grow some plants at all. Science tells us it is possible to increase the

¹⁵⁶ Mill, John Stuart 1843, Book VI, Chapter XII, Section 5.

¹⁵⁷ Ibid., Section 6, Paragraph 1.

amount of grain grown per acre by third world farmers, but it would be up to an art to tell us whether we should do so.

One of the keys for understanding Mill's ethical theory is to get a clear conception of what Mill means by an art, and then to realize that for Mill morality is an art and not a science. In fact morality is a sub-art, a subset of what Mill calls the "Art of Life." Once we get clear on the difference between art and science we could form:

a body of doctrine, which is properly called the Art of Life, in its three departments, Morality, Prudence or Policy, and Aesthetics; the Right, the Expedient, and the Beautiful or Noble, in human conduct and works. To this art, (which, in the main, is unfortunately still to be created) all other arts are subordinate; since its principles are those which must determine whether the special aim of any art is worthy and desirable, and what is its place in the scale of desirable things. Every art is thus a joint result of laws of nature disclosed by science, and of the general principles of what has been called Teleology, or the Doctrine of Ends.¹⁵⁸

Morality, for Mill, is a sub-art and merely a piece of Mill's overall axiological picture. But recall that the key function of an art is to adapt our scientific understanding in a way that allows us to accomplish practical goals. Science tells us what we can do, not what we should do. Science tells us how to bake bread, but the art of bread making exists because human beings believe it is desirable to do so. If there is a Millian Art of Life, then there must

¹⁵⁸ Ibid.

be a purpose for this art. If there is a teleology, there must be a telos. Finally, it is possible to place the Principle of Utility in Mill's larger axiological scheme.

Without attempting in this place to justify my opinion or even to define the kind of justification which it admits of, I merely declare my conviction, that the general principle to which all rules of practice ought to conform, and the test by which they should be tried, is that of conduciveness to the happiness of mankind, or rather all sentient beings: in other words, that the promotion of happiness is the ultimate principle of teleology.¹⁵⁹

Mill does not mention maximizing happiness in this passage. He is merely looking for a principle to ground his axiology. He wants a criterion to which rules should be made to conform. This criterion would provide a test to determine if a rule is valid. One criterion for a rule's being moral is that it promotes happiness. Another would be that it passes the Brandt/Edwards teachability test. Another would be that it does not conflict with other moral rules. As the ACLU's Nadine Strossen could argue a sexual harassment regulation would be invalid if it did not promote happiness. But even if a regulation did promote happiness in the abstract, it would have to be evaluated in terms of its teachability and whether it would conflict with free speech considerations.

¹⁵⁹ Ibid., Section 7, Paragraph 4.

The Principle of Utility

Thus, promoting happiness is simply one criterion for an act to be moral. After a close reading of Mill's Utilitarianism Brown found that Mill constructed multiple versions of the Principle of Utility that Mill considered equivalent. Happiness could be "pleasure and freedom from pain" or "an existence exempt as far as possible from pain, and as rich as possible in enjoyment, both in point of quantity and quality of happiness." Happiness then could be "desirable as an end," the "ultimate end of action," "good as an end," "in itself good," or "intrinsically good."¹⁶⁰ Combining these two lists one could form ten possible formulations of the principle of utility.¹⁶¹ What Brown finds is that all of these formulations can be summarized to form the following core version of the principle of utility: "Happiness is the only thing desirable as an end."¹⁶²

I will suggest later that this is more than a little misleading, but probably is sufficient for many applications. One clear defect in this formulation of the Principle of Utility is it omits the imperative element of

¹⁶⁰ Brown, D. G. 1973, "What is Mill's Principle of Utility?" p. 4.

¹⁶¹ For some inexplicable reason Brown suggests that this would produce at least fifteen different versions. Ibid. Edwards also suggests that "Brown found at least fifteen different versions." Edwards 1986. p. 127. My simplistic mathematical understanding is that to calculate the possible combinations of a list of x objects with a list of y objects you multiply x times y. In this case $2*5=10$.

¹⁶² Brown 1973, p. 5.

Mill's morality, i.e., as Edwards notes, it omits "it is desirable to promote."¹⁶³ As I have previously suggested, this principle is the first principle for all three parts of Mill's Art of Life. Moral acts, expedient acts, and aesthetic acts will all have the principle of utility as their first principle, and moral acts will promote happiness. But simply because an act promotes happiness, does not mean that it is morally obligatory, especially if the happiness is one's own. The minimalist aspect of Mill's utilitarianism allows Mill to suggest that performing acts that promote happiness is either prudentially or morally praiseworthy, but in only a limited number of cases are acts that promote happiness morally obligatory. Mill discusses moral obligation in detail in Utilitarianism.

The idea of penal sanction, which is the essence of law, enters not only into the conception of justice, but into that of any kind of wrong. We do not call anything wrong, unless we mean 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 to be the real turning point of the distinction between morality and simple expediency. It is part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing which may be exacted from a person, as one exacts a debt. Unless we think that it may be exacted from him, we do not call it his duty. Reasons of prudence, or the interests of other people, may militate against exacting it; but the person himself, it is clearly understood, would not be entitled to complain. There are other things, on the contrary, which we wish people to

¹⁶³ Edwards 1986, pp. 127-9.

do, which we like or admire them for doing, perhaps dislike or despise them for not doing, but yet admit that they are not bound to do; it is not a case of moral obligation; we do not blame them, that is, we do not think that they are proper objects of punishment.¹⁶⁴

Mill clearly wanted the domain of moral duties to be limited. The above passage explains that there are cases of immoral acts, and that morality should be enforced, but "immoral" is a much stronger word than "inexpedient." When a person behaves inexpediently he or she has acted in a manner that promotes personal disutility, or perhaps harms others in non-objectionable ways, but when a person acts immorally, he or she has promoted disutility for others in a way that deserves punishment, whether it be legal sanction, the condemnation of others, or their own personal feeling of guilt.

Mill, as I have noted in Chapter II, in his 1838 essay "Bentham," both compliments and criticizes Bentham's work. Recall that on Mill's account, Bentham was "not a great philosopher, but a great reformer in philosophy." Mill found much of Bentham's contribution to be entirely negative in showing the ambiguity and unclarity, if not outright error, of his opponents. Mill considered Bentham's primary positive contribution to be his methodology. Bentham introduced into morals and politics "those habits of thought and modes of

¹⁶⁴ Mill 1863, Chapter V, Paragraph 14.

investigation" that make scientific inquiry possible.¹⁶⁵ Mill does not consider Bentham the inventor of the principle of utility. Mill actually found this principle in the philosophies of Socrates and Aristotle.¹⁶⁶ Bentham's use of the principle of utility, however, does offer a keen insight that Mill considers invaluable as a contribution to axiological methodology.

It is probable, however, that to the principle of utility we owe all that Bentham did; that it was necessary to him to find a first principle which he could receive as self-evident, and to which he could attach all his other doctrines as logical consequences: that to him systematic unity was an indispensable condition of his confidence in his own intellect...Whether Happiness be or not be the end to which morality should be referred--that it be referred to an end of some sort, and not left in the dominion of vague feeling or inexplicable conviction, that it be made a matter of reason and calculation, and not merely of sentiment, is essential to the very idea of moral philosophy; is, in fact, what renders argument or discussion on moral questions possible.¹⁶⁷

Bentham's key contribution, Mill insists, is the principle that morality must be grounded in something. Mill was more than distrustful of intuitionism. People's intuitions are often hopelessly flawed. One can meet people today who doubt the importance of the North winning the Civil War.¹⁶⁸ Even

¹⁶⁵ Mill, John Stuart 1838, "Bentham," Paragraph 9.

¹⁶⁶ In the opening paragraph of Utilitarianism Mill suggests that if Plato is to be believed, the passage in the Protagoras where Socrates is weighing pleasures and pains would indicate that Socrates was a utilitarian. See the Protagoras 354a-355c. I take this to be further evidence that Mill is using the term "utilitarianism" in a very inclusive sense in this work. Aristotle is described as a "judicious" utilitarian in Chapter II of On Liberty. For a discussion of the history of the Principle of Utility see Edwards 1986, p. 127.

¹⁶⁷ Mill 1838, Paragraph 62.

¹⁶⁸ If one believes that moral progress is a possibility, but not an

the best of us recognize that our intuitions, at least upon occasion, fail us. As a mathematics professor of mine, Frank H. Beatrous, Jr., once put it "that is why we prove things." He joked "I doubt my intuitions are correct one time in twenty." If anything, the moral problems Mill wants to wrestle with are more counter-intuitive than pure mathematics. Without a ground to our axiology all we would have is our intuitions, and Mill finds this unacceptable. If we cannot reason and engage in ethical calculation, Mill suggests that moral philosophy and moral argumentation become impossible.

However, Mill also suggests that "under proper explanation" he will accept Bentham's principle of utility, but must disagree "that all right thinking on the details of morals depends on its express assertion." Mill writes:

We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of secondary ends, concerning which there may be, and often is, agreement among persons who differ in their ultimate standard; and about which there does in fact prevail a much greater unanimity among thinking persons... 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

inevitability, then it was critical for slavery to end in the United States. This is a view that I believe most liberals and Marxists share. The website lewrockwell.com contains essay after essay written by articulate and academically credentialed individuals who are vitriolic in their condemnation of The War of Northern Aggression, and that war criminal Abraham Lincoln. Despite these weird aberrations, one can find the libertarian case against an expanding United States military articulated rather well.

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; which is, in other respects, a question of arrangement and logical subordination rather than of practice; important principally in a purely scientific point of view, for the sake of the systematic unity and coherency of ethical philosophy.¹⁶⁹

In almost all practical situations Mill would never appeal to the principle of utility. It would involve unnecessary and overly complex calculation. It may be that the calculation is too complex to complete. Mill suggested in Utilitarianism that it is necessary to apply secondary rules in all practical situations regardless of our moral theory. Even fundamentalist Christians who have faith in the literal truth and inerrancy of the Bible cannot stop to read the entirety of the Bible to find an applicable passage every time they must make a decision. This is why they study the Bible; one then knows where the relevant passage is. Similarly, utilitarians will not always be able to calculate; but it is not necessary to do so. We have thousands of years of human history to guide in the formation of our secondary principles. Secondary principles under normal circumstances will suffice. The principle of utility primarily provides a methodology to facilitate conflict resolution when secondary principles are at odds with each other.

¹⁶⁹ Mill 1838, Paragraph 62.

The following kind of case illustrates this point: If we decrease the prosecution's burden of proof in rape cases, we could decrease the prevalence of rape; but more innocent defendants will be convicted and unjustly punished. Should this be done? There is no easy answer. Either decision ensures that innocent people will suffer. Without a first principle to apply there is no reasonable way to even formulate a procedure to resolve such conflicts.

The principle of utility gives us a methodology. We can ask how much rape victims suffer. We can ask how much innocent convicts suffer. We can try hypothetically to weigh the change in utility that the proposed legislation would produce and ask whether it is positive or negative. We may not be able in practice to answer these questions. As Aristotle noted long ago, ethics is not geometry. Ethics is much less precise, and we can adequately engage in ethical discussion only if we seek the amount of accuracy that is possible for the discipline.¹⁷⁰ The principle of utility makes Mill's ethics complete. We may not in practice be able to resolve a particular dilemma, but in theory we always can find a just resolution. Intuitionists may also claim that their ethics is complete. Perhaps for any case they have a clear intuition, but the ethical intuitionist lacks any

¹⁷⁰ Aristotle, Nicomachean Ethics, 1094b 13-27.

procedure to rectify mistakes. Any of Mill's secondary principles is in principle capable of being proved wrong. If adopting the Harm Principle actually could be shown to produce more harm than good in the long run Mill would be forced to reject it. Thus, the Principle of Utility offers a procedure that could show any of Mill's secondary principles false. But since Mill wants his ethics to be scientific this is to be expected. A debate between moral intuitionists is unenlightening. How exactly should one attempt to try to convince others that their moral intuitions are wrong? What procedure does one use? Utilitarians who disagree about secondary rules can appeal to the Principle of Utility.

Utility and Character Formation

Mill also wished to stress another failure in Bentham's system. Bentham completely ignores the formation of character and the importance of self-development in the formation of character. He ignores the importance of helping others to engage in the moral process.

Morality consists of two parts. One of these is self-education; the training, by the human being himself, of his affections and will. That department is a blank in Bentham's system. The other and co-equal part, the regulation of his outward actions, must be altogether halting and imperfect without the first; for how can we judge in what manner many an action will affect even the worldly interests of ourselves and others, unless we take in, as part of the question, its influence on

the regulation of our, or their, affections and desires? A moralist on Bentham's principles may get as far as this, that he ought not to slay, burn, or steal; but what will be his qualifications for regulating the nicer shade of human behavior, or for laying down even the greater moralities as to those facts in human life which tend to influence the depth of character quite independently of any influence on worldly circumstances--such, for instance, as the sexual relations, or those of family in general, or any other social and sympathetic connexions of any intimate kind? The moralities of these questions depend essentially on considerations which Bentham never so much as took into the account; and when he happened to be in the right, it was always, and necessarily, on wrong or in sufficient grounds.¹⁷¹

Alan Ryan has written that "Mill's concern with self-development and moral progress is a strand in his philosophy to which almost everything else is subordinate."¹⁷² Precisely for this reason, Mill must distance himself from Bentham. Bentham never considers the long-term utility that is inherent in character formation. How could he? For Bentham, as I have noted, pushpin could be considered better than poetry! It is not necessary for my purposes to engage in a lengthy discussion of what Mill meant by higher and lower pleasures. It is enough to recognize that Mill believed that the long-term utility of any society is greatly enhanced by encouraging members of that society to reach their full potential. Perhaps the best way individuals can contribute to society is by becoming the best person they possibly can. In the penultimate paragraph of A System of Logic Mill wrote:

¹⁷¹ Mill 1838, Paragraph 39.

¹⁷² Ryan, Alan 1988, The Philosophy of John Stuart Mill, p. 255.

I do not mean to assert that the promotion of happiness should be itself the end of all actions, or even of 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. I fully admit that this is true: that the cultivation of an ideal nobleness of will and conduct, should be to individual human beings an end, to which the specific pursuit either of their own happiness or of that of others (except so far as included in that idea) should, in any case of conflict, give way. But I hold that the very question, what constitutes this elevation of character, is itself to be decided by a reference to happiness as the standard. The character itself should be, to the individual, a paramount end, simply because the existence of this ideal nobleness of character, or of a near approach to it, in any abundance, would go further than all things else towards making human life happy; both in the comparatively humble sense, of pleasure and freedom from pain, and in the higher meaning, of rendering life, not what it now is almost universally, puerile and insignificant--but such as human beings with highly developed faculties can care to have.¹⁷³

Brown was thus wrong when he asserted that for Mill happiness is the only thing desirable as an end. Clearly there is a second primary principle, namely, develop a virtuous character. Often the most important contribution we can make to society is to develop our talents and our capacities for virtuous conduct. This is perhaps the primary reason that Mill must reject the Extremist's conception of morality. The Extremist is so focused in the here and now

¹⁷³ Mill 1843, Book VI, Chapter XII, Section 7, Paragraph 5.

that the importance of the full development of one's own character is never considered. The Extremist does not appreciate the long-term benefits to my own character development and the resulting benefits to my own happiness and the happiness of others that might ensue from a decision to go to the movies. I should visit the sick instead. But if I never go to the movies or engage in activities that enrich my personality, why would anyone wish for me to visit them? The Extremist is a prig and a bore. Having spent all of his or her life attempting to maximize utility, he or she ends up with little to contribute to it.

John Gray characterized Mill as an indirect utilitarian.¹⁷⁴ As in the paradox of hedonism, Mill thinks it will often be counter-productive to try to maximize utility. The sophisticated hedonist recognizes that short-term pains may lead to long-term pleasures. Similarly, the sophisticated utilitarian must think in terms of the long run. The greatest amount of utility will be produced by not pursuing it directly. By calling Mill an indirect utilitarian, Gray makes explicit a key feature of Mill's utilitarianism that any respectable Millian exegesis must include.

¹⁷⁴ Gray, John 1996a, Mill On Liberty: A Defense.

In discussing the inadequacy of virtue theory, James Rachels, who perhaps has been treated unfairly in this dissertation, makes an observation as keen and insightful as his Millian exegesis is flawed. Virtue theory is flawed in that many commendable acts do not seem to have a corresponding virtue. However virtue theory should be part of a complete moral theory. A total theory is needed that both gives an account of right actions and also a related account of virtuous character that does justice to both. Rachels suggests this is possible:

Our overall theory might begin by taking human welfare--or the welfare of all sentient creatures, for that matter--as the surpassingly important value. We might say that, from a moral point of view, we should want a society in which all people can live happy and satisfying lives. We could then go on to consider the question of what sorts of actions and social policies would contribute to this goal and the question of what qualities of character are needed to create and sustain individual lives. An inquiry into the nature of virtue could profitably be conducted from within the perspective that such a larger view would provide. Each would illuminate the other; and if each part of the overall theory had to be adjusted here and there to accommodate the other, so much the better for truth.¹⁷⁵

This is a compelling, if brief, account of what an adequate virtue theory would look like. If Rachels had been discussing Mill, it would be a nice summary of what Mill wished to accomplish. Although this is not Rachels' intention, his summary meshes nicely with the overall axiology that I have ascribed to Mill in this chapter. Mill

¹⁷⁵ Rachels 1993, p. 179.

certainly begins by taking promoting the welfare of sentient beings as his first principle. Mill wants a society where people live satisfying lives. Mill certainly wants individuals to develop their natural gifts and capacities, to be capable of appreciating the higher pleasures. All of this is consistent with wanting people to live virtuous lives. Perhaps the key reason for adopting secondary principles as our primary guide to life is that these secondary principles can be adjusted to reconcile our desires for human happiness with our desires for human progress and moral development.

This distinction I am drawing between Bentham and Mill is hardly original. It is a commonplace in the literature to distinguish Bentham's hedonistic utilitarianism from Mill's eudaimonistic utilitarianism. But having made this distinction, it is often dropped too quickly. A hedonist may well justify actions based on maximizing hedons. A eudaimonist will need a richer set of criteria. I will return to this point in the next chapter.

In the part of the autobiography where he discusses the moral influences of his early youth, Mill emphasizes how strongly he was affected by the character of Socrates, how Socrates stood in his mind as a "model of ideal excellence,"

and how strong were his father's exhortations of the Socratic virtues. He also remembered how his father impressed upon him the lesson of the "Choice of Hercules."¹⁷⁶

Early in his adulthood, Hercules considered the road he should follow in life. While he pondered this question two women approached him. The first, named Happiness (her enemies called her Vice), suggested to Hercules that he should follow her. He would live a life without hardships of any kind. He would experience all the pleasures of life without labors of any kind. The second, named Virtue, suggested that without labor none of the goods that are worth having would be available. She told Hercules that to be honored by others one must be honorable. It takes sacrifice to accomplish the goals that make life worth living.

Hercules chose to follow virtue. James Mill stressed the importance of this choice to his son. Any account of either Mill's utilitarianism should be able to explain why this is so. I believe that the account of John Stuart Mill's utilitarianism offered in this chapter does so more than adequately. Hercules recognized that the pleasures of a life of virtue are qualitatively superior to the pleasures of a

¹⁷⁶ Mill 1873, Chapter II, Paragraph 7. See also Semmel 1984, Chapter One, and Xenophon 1994, Memorabilia, Book II, Chapter I, Paragraphs 21-34.

life of vice. Mill rejected Bentham's utilitarianism partly because Bentham was unable to recognize this.

Edwards' reading of Mill is an adequate account of Mill's utilitarianism. Edwards tells us what Mill believed. My only addition to Edwards is to ask why. The answer is that Mill wished to adopt an axiology that is not grounded in intuitions. He wanted to use the principle of utility as a foundation of an axiology that allows human beings the largest possible capacity for self-development and character formation. He wanted a utilitarianism that is fully consistent with human progress and moral development. The received view prevents us from seeing why human freedom is important to Mill and the relationship between freedom and self-development, and the formation of character. Edwards' characterization of Mill allows us to see this and more. Read as a minimalist utilitarian, Mill can be consistently viewed both as a consequentialist, and as a supporter of rights.

CHAPTER FOUR

THE RAWLSIAN OBJECTION

In an often cited and anthologized section of his A Theory of Justice John Rawls has suggested that utilitarianism cannot be successfully used to support principles of justice.¹⁷⁷ Although this argument is formulated against what he calls "classical utilitarianism," it is often interpreted as being meant to be applicable to utilitarianism in all of its various forms. If Rawls' argument is correct, this would preclude any attempt to use John Stuart Mill's political philosophy to develop a theory of justice, since clearly the author of Utilitarianism is some form of utilitarian. Rawls' argument is both important and influential; thus my purpose in this section will be to show that this argument is far less damaging to developing a utilitarian theory of justice than is commonly believed. I will focus on two of Rawls' arguments, since I believe they have the greatest resonance in the literature, and quite rightly so. As I have argued previously, the crude objections to utilitarianism are not convincing; utilitarianism must support some sort of rights. The Rawlsian objection is the critical one: Utilitarianism

¹⁷⁷ See, for example, Kymlicka, Will 1990, Contemporary Political Philosophy: An Introduction, and Sheffler 1988.

cannot support a theory of justice rich enough to support individual rights. I will begin by reviewing Rawls' two arguments, make a few clarifications, and then offer a Millian defense.

Rawls' Objection(s)

According to Rawls, the principle of utility in its "classical form" is to be understood "as defining the good...as the satisfaction of rational desires" and in its application the principle of utility would require that "the appropriate terms of social cooperation are settled by whatever in the circumstances will achieve the greatest sum of satisfaction of the rational desires of individuals." Since it is natural to believe that "rationality is maximizing something" and that in morals it must be "maximizing the good" Rawls recognizes that there is no reason to "deny the initial plausibility and attractiveness" of the utilitarian conception.¹⁷⁸

But Rawls finds it a "striking" feature of any utilitarian conception of justice that it can only matter indirectly how satisfactions are distributed. If we would adopt a utilitarian theory of justice, on Rawls' account, as

¹⁷⁸ Rawls, John 1971b, A Theory of Justice, pp. 22-27.

a society we would be committed to allocating our resources (rights and duties, opportunities and privileges, and various forms of wealth) in a way that would maximize the sum of satisfactions if we are able to do so. Thus, no distribution of maximum satisfactions would be inherently preferable to any others. There would be no reason why the lesser losses of minorities could not be justified by the greater gains of majorities, and most importantly, in principle, there is no reason why violating what we normally intuit as important rights or liberties of minorities could not only be justified but also morally required when doing so would lead to an overall gain in social utility. Of course, it may be that in a society like ours where commitments to rights and liberties are strongly felt our common sense views and moral intuitions about rights and liberties are coextensive with maximizing satisfactions. However, this would be an empirical claim that may simply be peculiar to certain forms of social organization found in modern western democracies. But Rawls suggests that utilitarians must always consider rights and liberties as derivative from maximizing the satisfaction of rational desires. If slavery, preventive detention, or burning witches at the stake led to the maximizing of satisfactions, the utilitarian could offer no principles of justice that

would condemn their use.¹⁷⁹

The utilitarian is also, according to Rawls, stuck with a faulty notion of rational choice. It makes sense for any given individual at one point in his or her life to refuse temporarily to satisfy current desires in order to maximize lifelong prospects. But the utilitarian conflates the rational choices made by an individual, living an individual life over time, with the rational choices of a society allocating resources to various individuals. One sacrifices the attainment of current desires because one expects to have more of one's own desires met in the future. The reasonableness of sacrificing the attainment of desires of a few individuals in society for the collective maximization of desire satisfaction clearly does not follow from this analogy; it would only follow if the individuals asked to sacrifice the fulfillment of their desires would be the beneficiaries of overall satisfaction of desires or the recipients of desire maximization in the future. But Rawls suggests that the utilitarian cannot in principle offer this safeguard. The utilitarian cannot offer principles of justice that contradict the principle of utility. Consequently, utilitarianism cannot offer a theory of justice that takes the distinction between individual

¹⁷⁹ Ibid.

persons seriously.¹⁸⁰

Rawls, with these two arguments, is attempting to show that utilitarianism cannot be used to support a theory of justice that is rich enough to respect individual rights. In the first case, the desires of minorities or individuals will be overridden when this maximizes utility. The rights of minorities will be sacrificed when the aggregate good to majorities is sufficient. In the second case, utilitarianism never even attempts to treat desires as emanating from specific individuals. The importance to the individual of being able to fulfill one's desires is ignored. Consequently, the utilitarian cannot treat individuals as specific ends-in-themselves. Thus, in either case, the utilitarian cannot in principle take individual rights seriously.

Bentham and Rights

Of course, a classical utilitarian like Jeremy Bentham, would find little in Rawls' argument to be threatening. For Bentham all rights talk is to some degree or other dubious, all abstract rights talk is nonsense, and all talk of natural rights is "nonsense upon stilts." Bentham would find

¹⁸⁰ Ibid.

no permanent, immutable features of human existence that would justify absolute principles of justice. For Bentham, rights make sense only in the context of legal rights, and even then legal rights are justified by appeal to the principle of utility. In An Introduction to the Principles of Morals and Legislation Bentham writes:

Admitting any other principle other than the principle of utility to be a right principle, a principle that it is right for a man to pursue; admitting (what is not true) that the word right can have a meaning without reference to utility let him say whether there is any such thing as a motive that a man can have to pursue the dictates of it: if there is, let him say what that motive is, and how it is to be distinguished from those which enforce the dictates of utility: if not, then lastly let him say what it is this other principle can be good for?¹⁸¹

As I have said, according to Bentham any talk of natural rights is "stark nonsense." The use of the term "rights" makes sense only in the context of legal rights. If the term "right" refers to anything at all, on Bentham's account, it refers to a legal right. Bentham makes his views on this subject clear in his "Supply Without Burthen."

Of a natural right who has any idea? I, for my part, I [sic] have none: a natural right is a round square [or] an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me right and legal right are the same thing, for I know no other. Right and law are correlative terms: as

¹⁸¹ Bentham, Jeremy 1982, An Introduction to the Principles of Morals and Legislation, p.16, emphasis in original.

much so as son and father. Right is with me the child of law: from different operations of the law result different sorts of rights. A natural right is a son that never had a father.¹⁸²

But even legal rights are somewhat suspect if one thinks it is possible to give them some ontological status; for Bentham, rights talk is invariably a shorthand way of discussing issues that should be addressed formally in terms of the principle of utility. To refer to rights as real things is nonsense, although perhaps acceptable nonsense, if one understands that technically what one is saying is false. One can ask one's friends if Santa brought them any nice presents this year and be aware of that for which this is a euphemism. One can talk without confusion about Santa Claus as long as one does not really believe in his existence. But referring to natural rights as real things is akin to believing in ghosts. Steintrager in Bentham makes this point strikingly clear:

For Bentham there were two different types of fictions or, to speak more accurately, there were fictional entities and fabulous entities. It was the latter that had to be purged from jurisprudence while the former needed only to be established on firmer foundations. Legal rights were fictional entities, and Bentham did not deny that they had an important place in political life. Quite the contrary, life would be intolerable without them. Natural rights, in contrast, were fabulous entities. They were akin to the chimeras of the poets. Unfortunately, the language of the law was infested with such

¹⁸² Bentham, Jeremy 1795 "Supply Without Burthen," p. 334.

entities.¹⁸³

Any fair reading of Mill would suggest that on this issue he disagreed with his father and Bentham. Mill's views on rights are a central issue to my project, and I have discussed them in some detail in the previous chapters. For present purposes let me say that a Benthamite utilitarian can afford to ignore Rawls. If forced to respond, the Benthamite could declare: "So what?" A modern Benthamite utilitarian could give R. M. Hare's response.¹⁸⁴ On Hare's account, most examples where utilitarians supposedly will violate people's rights are so phony or artificially contrived as to be essentially worthless. Assume, however, that it is possible to construct a realistic example where violating someone's rights would be consistent with the principle of utility, and yet strongly inconsistent with our everyday moral sensibilities. According to Hare if our moral intuitions suggest principles of justice that run counter to the principle of utility, then so much the worse for our intuitions.¹⁸⁵ The intuitions that are worth inculcating are those that can be justified by the principle of utility. This shows to the Benthamite

¹⁸³ Steintrager, James 1977 Bentham, p. 27.

¹⁸⁴ Hare, R. M. 1971. "A Defense of Utilitarianism."

¹⁸⁵ Hare 1971 p. 127.

that we cannot rely on moral intuitions when the cases become complicated; rights are, once again, fictional entities. But the Millian utilitarian cannot ignore Rawls' argument, since if Rawls' argument is correct, it would be impossible to reconcile Mill's utilitarianism with his commitment to individual rights and liberties. Rawls' argument requires a response from Mill's defenders.

As I see it, the key to Rawls' argument is that utilitarians are committed as a first principle to social practices that maximize overall utility. It is certainly how Rowlands presents the criticism as I have noted in Chapter One. All other moral principles, including liberal principles of justice, are derived from the principle of utility, and thus the term "liberal utilitarian" is a full-fledged oxymoron. Liberals are committed to first principles that no maximizing utilitarian would accept. I have been supporting a reading of Mill on which he is not a maximizing utilitarian. In my view, any reading of Mill as a maximizing utilitarian actually leads to an internally inconsistent and ultimately incoherent Mill. Mill's commitments to liberalism, liberal feminism, representative democracy, individual rights, and so on, are incompatible with being a maximizing utilitarian.

When he is read as a maximizing utilitarian, Mill's political philosophy becomes an incoherent mess; but unfortunately many commentators have read him exactly this way.

The utilitarian opponent often refuses to recognize clear distinctions between Bentham and Mill, and this prevents him or her from subjecting these authors to careful analysis. This seems to be a common error in many otherwise excellent ethical treatises. John Hospers' Human Conduct is such a work. Hospers' discussion of utilitarianism focuses mainly on Mill. But his Mill is clearly a Benthamite act-utilitarian for whom the "main tenet of utilitarianism is the maximization of intrinsic good." In passing, Hospers notes a distinction between Bentham's hedonistic utilitarianism that maximizes happiness and G. E. Moore's ideal utilitarianism that maximizes intrinsic good. In practice, he claims, this distinction is negligible, and substituting "intrinsic good" for "happiness" would have little effect on Mill's arguments.

Gray and Green Utilitarianism

However, I take this to be an attempt to "define happiness down." This attempt has captured the hearts and minds of the anti-utilitarians so completely, that Mill's actual views on what leads to actual human happiness and under what conditions human beings actually flourish get lost in the shuffle. Once "hedons," "preference satisfactions," "intrinsic good" or "rational desires" become substituted for "happiness" a distinctly twentieth century bias has been fostered on an enlightenment thinker, and a rich segment of Mill is truncated. Consider the following quote from Mill's Principles of Political Economy:

There is room in the world, no doubt, and even in old countries, for a great increase of population, supposing the arts of life to go on improving, and capital to increase. But even if innocuous, I confess I see very little reason for desiring it. The density of population necessary to enable mankind to obtain, in the greatest degree, all the advantages both of co-operation and of social intercourse, has, in all the most populous countries, been attained. A population may be too crowded, though all be amply supplied with food and raiment. It is not good for man to be kept perforce at all times in the presence of his species. A world from which solitude is extirpated, is a very poor ideal. Solitude, in the sense of being often alone, is essential to any depth of meditation or of character; and solitude in the presence of natural beauty and grandeur, is the cradle of thoughts and aspirations which are not only good for the individual, but which society could ill do without. Nor is there much satisfaction in contemplating the world with nothing left to the spontaneous activity of nature; with every rood of land brought into cultivation, which

is capable of growing food for human beings; every flowery waste or natural pasture ploughed up, all quadrupeds or birds which are not domesticated for man's use exterminated as his rivals for food, every hedgerow or superfluous tree rooted out, and scarcely a place left where a wild shrub or flower could grow without being eradicated as a weed in the name of improved agriculture. If the earth must lose that great portion of its pleasantness which it owes to things that the unlimited increase of wealth and population would extirpate from it, for the mere purpose of enabling it to support a larger, but not a better or a happier population, I sincerely hope, for the sake of posterity, that they will be content to be stationary, long before necessity compels them to it.¹⁸⁶

In his book, Ecology and Utility, Lincoln Allison argues for a distinction between gray utilitarianism and green utilitarianism. According to Allison, we can distinguish between green utilitarians who wish to emphasize environmental considerations from gray utilitarians who wish to emphasize wealth production. We can also distinguish between utilitarians who think that hedonistic preference satisfaction should be preferred to a more Aristotelian sense of well being, and those who have the opposite view. He writes:

I have argued that, in the content of their social criticism, a broad and skeptical utilitarian philosophy and the 'green' outlook have a great deal in common. Both have good reason to be skeptical about economic growth and to argue that our institutions systematically undervalue certain kinds of benefits and satisfactions and coerce us into excessively short-sighted frameworks of decision-making. The argument can be characterized as a criticism of the narrow, precise utilitarianism which has been evolved by economics and bureaucracy from the point of view of an interpretation of the same philosophy which is unashamedly vaguer and more intuitive.¹⁸⁷

¹⁸⁶ Mill 1848, Book IV, Chapter VI, Section 2, Paragraph 4.

¹⁸⁷ Allison, Lincoln 1991, Ecology and Utility: The Philosophical

I take Allison to be offering a reading of the utilitarianism I wish to support. I would have preferred that Allison in the final sentence of the passage I have just quoted to have used slightly different language--I would have preferred "more qualitative than quantitative" instead of "vaguer," and that he had used "common-sense oriented" or "less counter-intuitive" rather than "intuitive."--but, he is offering us a way to distinguish between utilitarianisms we may or may not wish to support. To follow up the previous passage Mill in the next paragraph writes:

It is scarcely necessary to remark that a stationary condition of capital and population implies no stationary state of human improvement. There would be as much scope as ever for all kinds of mental culture, and moral and social progress; as much room for improving the Art of Living, and much more likelihood of its being improved, when minds ceased to be grossed by the art of getting on. Even the industrial arts might be as earnestly and as successfully cultivated, with this sole difference, that instead of serving no purpose but the increase of wealth, industrial improvements would produce their legitimate effect, that of abridging labour. Hitherto it is questionable if all the mechanical inventions yet made have lightened the day's toil of any human being. They have enabled a greater population to live the same life of drudgery and imprisonment, and an increased number of manufacturers and others to make fortunes. They have increased the comforts of the middle classes. But they have not yet begun to effect those great changes in human destiny, which it is in their nature and in their futurity to accomplish. Only when, in addition to just institutions, the increase of mankind shall be under the deliberate guidance of judicious foresight, can the conquests made from the powers of nature by the intellect and energy of

Dilemmas of Planetary Management, p. 88-89.

scientific discoverers, become the common property of the species, and the means of improving and elevating the universal lot.¹⁸⁸

If you are convinced that all utilitarians are gray utilitarians sitting around with a pile of hedons and a calculating machine, and that they are endeavoring to calculate that distribution that will produce the maximally optimific satisfaction of desires, then I suppose Mill is hopelessly confused. Mill does not even have enough sense to live in accordance with a hedonistic world-view. Packe reports:

Mill used to reach his office at ten o'clock. While studying his dispatches, he would eat the breakfast prepared for him by the messengers—a boiled egg, tea, bread and butter; he ate or drank nothing further until his simple dinner at six when he got home.¹⁸⁹

If one already "knows" what the classical utilitarians believed, and what the classical economists believed, then the previously cited passages from Mill's Principles of Political Economy make little sense; Mill is simply inconsistent, and does not understand his own doctrines. Of course, for those who are more charitably inclined, I have offered a different reading of Mill. In any case, as I stated in Chapter One, the actual views of a philosopher should have some influence on any exegesis of that philosopher's work. Once one has read the stationary state chapter from Mill's Principles, it should change the way one reads the following very famous paragraph from

¹⁸⁸ Mill 1848, Book IV, Chapter VI, Section 2, Paragraph 5 .

¹⁸⁹ Packe 1954, p. 290.

Utilitarianism:

Whoever supposes that this preference takes place at a sacrifice of happiness- that the superior being, in anything like equal circumstances, is not happier than the inferior- confounds the two very different ideas, of happiness, and content. It is indisputable that the being whose capacities of enjoyment are low, has the greatest chance of having them fully satisfied; and a highly endowed being will always feel that any happiness which he can look for, as the world is constituted, is imperfect. But he can learn to bear its imperfections, if they are at all bearable; and they will not make him envy the being who is indeed unconscious of the imperfections, but only because he feels not at all the good which those imperfections qualify. It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides.¹⁹⁰

Mill is usually read here as advocating what John Rawls has called the Aristotelian Principle, namely, that a human being with refined capacities will choose to engage in those activities which make full use of their refined capacities.¹⁹¹ For example, a mathematician who enjoys card games would ordinarily prefer to play contract bridge rather than Go Fish. The opportunity to make interesting probability calculations is much more prevalent in the first game than it is in the latter. As far as it goes, this reading is correct. But Mill's views on a stationary state suggest a more complex reading than this; Mill argues that our refined capacities are not simply intellectual. There are many sources of beauty in the world, and a person of

¹⁹⁰ Mill 1863, Chapter II, Paragraph 6.

¹⁹¹ Rawls, John 1971b, pp. 424-433.

sufficient character will find pleasure in many of them. Thus, Hospers and others should take great care when they wish to tell us what Mill means by "happiness." The problem with using the term "intrinsic good" is that it either allows one to ignore the eudaimonistic character of Mill's utilitarianism, or that it disinclines one from making clear distinctions between various utilitarian thinkers and various forms of utilitarianism. In Hospers' case, he makes both errors.

Hospers' Two Mills

The other difficulty with Hospers' approach, as in many other cases, is that by presenting Mill as a maximizing utilitarian who makes no distinction between public and private conduct, Hospers is prevented from saying much about Mill's actual views on justice and rights. Hospers' chapter on justice contains no references to Mill. In his chapter on rights Hospers carefully analyzes Mill's argument in favor of free speech in detail; but his Mill offers nothing concerning the other rights Hospers analyze's in depth, such as, the right to life, the right to a minimum standard of existence, economic rights, legal rights, etc. He even finds no room for a Millian contribution to the issue of paternalistic legislation, a central issue in On Liberty.

Having presented Mill as an act utilitarian, Hospers cannot find a place for Mill in areas where Mill clearly wished to be heard. Hospers allows Mill to speak on freedom of speech, but he carefully avoids any direct connection with his own formulation of Mill's utilitarianism. Hospers does not attempt to reconcile Mill's liberal defense of free speech with his utilitarianism.

This omission I assume to be deliberate, and is directly caused by Hospers interpreting Mill as an act utilitarian.¹⁹² In his discussion about utilitarians' attitude towards moral rules he makes a Millian defense of rights problematic.

According to utilitarianism, such rules are on the whole good, useful, and worthwhile, but they may have exceptions. None of them is sacrosanct. If killing is wrong, it is not because there is something intrinsically bad about killing itself, but because killing leads to a diminution of human happiness...[the utilitarian] would nevertheless admit the possibility of exceptions; if you had had the opportunity to assassinate Hitler in 1943 and did not, the utilitarian would probably say that you were doing wrong in not killing him.¹⁹³

Mill is once again unable to be a champion of rights. On

¹⁹² One might suspect that it is not deliberate because so few philosophers have read Mill carefully enough to realize that his position is quite different from Bentham's. But Hospers' careful and excellent exegesis of Mill's argument for free speech would suggest otherwise.

¹⁹³ Hospers, John 1961, Human Conduct: an Introduction to the Problems of Ethics, p. 204, mphasis in original.

Hospers' account, any "utilitarian right" would have exceptions and be subject to the condition that respecting this right would actually maximize utility. As I argued in Chapter One, this is hopelessly misleading: Every utilitarian theory recognizes some form of the right to equal consideration, that this right has no exceptions, and as I have argued in Chapter Two there are compelling reasons to believe both that Mill adopted a very rich version of this right, and that he had compelling reasons for doing so. Hospers inconsistently suggests that freedom of speech is a curious Millian exception, supposedly because censorship always leads to a diminution of human happiness, although he never directly makes this argument. In any case, it is not clear why Hospers finds Mill's advocacy of free speech compelling or why it would have no exceptions. Does letting the Nazis march in Jewish neighborhoods always maximize utility? Once again, if Mill is an act-utilitarian, the positions he endorses in On Liberty are largely incoherent.

Punishing the Innocent

It is now possible to construct the Millian defense against Rawlsian objections to utilitarianism. Rawls' first objection was that in principle utilitarians are always required to violate individual or group rights when this

would maximize utility. A typical example, offered by Robert Veatch, is that utilitarians are committed to punishing the innocent.¹⁹⁴ Veatch is another advocate of economical utilitarian exegesis who finds no substantive differences between Mill and Bentham: "one might be tempted to say-- along with Bentham, Mill, and the utilitarians...[that] one is obligated to choose the one course that would maximize net aggregate total consequences."¹⁹⁵ Presumably there are cases where punishing innocent persons would lead to the maximization of utility. However, as Edwards has adequately shown, this charge would only work against the most simple-minded utilitarian, and it makes little or no sense when leveled at Mill.¹⁹⁶ Since the minimalist utilitarian is not obligated to maximize utility, there is no requirement to punish the innocent to maximize utility.

Of course, even the standard arguments that suggest that a maximizing utilitarian would intentionally punish the innocent are far from strong. A 1955 essay by John Rawls, "Two Concepts of Rules," makes this abundantly clear. As we have seen, Rawls changed his mind on the virtues of

¹⁹⁴ Veatch, Robert M. 1981, A Theory of Medical Ethics, p. 261.

¹⁹⁵ Ibid., p. 186.

¹⁹⁶ Even levelled at Bentham this would be an odd charge. Recall that the only rights Bentham was willing to acknowledge were legal rights. These, one assumes, would prevent punishing the "innocent." The laws in question may be unjust, by Veatch's standards, but for one to be held for punishment, Bentham would require that one must violate the law. Thus, the more interesting charge to level at Bentham is that he would support unjust laws, if these laws would maximize utility.

utilitarianism by 1971, and the first edition of A Theory of Justice. But his 1955 arguments remain sound. First, Rawls notes that as a matter of historical fact the classical utilitarians were great advocates of reforms in the criminal law.

On the other hand, utilitarians agree that punishment is to be inflicted only for the violation of law. They regard this much as understood from the concept of punishment itself. The point of the utilitarian account concerns the institution as a system of rules: utilitarianism seeks to limit its use by declaring it justifiable only if it can be shown to foster effectively the good of society. Historically it is a protest against the indiscriminate and ineffective use of the criminal law. It seeks to dissuade us from assigning to penal institutions the improper, if not sacrilegious, task of matching suffering with moral turpitude. Like others, utilitarians want penal institutions designed so that, as far as humanly possible, only those who break the law run afoul of it. They hold that no official should have discretionary power to inflict penalties whenever he thinks it for the benefit of society; for on utilitarian grounds an institution granting such power could not be justified.¹⁹⁷

Rawls also suggests that even the phrase "punish the

innocent" is conceptually flawed. One could torture the innocent. One could persecute them, maltreat, or otherwise brutalize them. But to say you "punished" someone implies minimally that you thought they were guilty of something, and that the infliction of harm upon them was justified by their guilt.¹⁹⁸ Rawls writes:

Try to imagine, then, an institution (which we may call "telishment") which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society. The discretion of officials is limited, however, by the rule that they may not condemn an innocent man to undergo such an ordeal unless there is, at the time, a wave of offenses similar to that with which they charge him and telish him for. We may imagine that the officials having the discretionary authority are the judges of the higher courts in consultation with the chief of police, the minister of justice, and a committee of the legislature.¹⁹⁹

Rawls rightly suggests that the practice of telishment would require a substantial infrastructure, and the costs of this infrastructure are much higher than the anti-utilitarian usually assumes. For example, one could never be assured that the actual culprit was off the street. There would also be extensive costs in implementing telishment. Once one considers all these costs the actual practice of "punishing the innocent" could hardly be justified on utilitarian grounds. Rawls writes:

¹⁹⁷ Rawls, John 1955, "Two Concepts of Rules," p. 178.

¹⁹⁸ One might also wish to note that the term "punishment" normally connotes proportionality. A parent who broke a disobedient child's arm would ordinarily be accused of abuse.

¹⁹⁹ Rawls 1955, p. 180.

Once one realizes that one is involved in setting up an institution, one sees that the hazards are very great. For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? How is one to limit the risks involved in allowing such systematic deception? How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like? In addition to these considerations, it is obvious that people will come to have a very different attitude towards their penal system when telishment is adjoined to it. They will be uncertain as to whether a convicted man has been punished or telished. They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won't at any time fall on them. If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely.²⁰⁰

Rawls rightly suggests that the practice of telishment would destroy the public's faith in the criminal justice system. But this is not its worst feature. Telishment would irretrievably damage the deterrent function of punishment. One may question how rational criminals are, and to what extent their behavior conforms to rational cost/benefit analysis. But surely some criminals, and many law-abiding citizens, will modify their behavior based on expected outcomes. But telishment destroys this feature of a criminal justice system. Rawls concludes:

It happens in general that as one drops off the defining features of punishment one ends up with an institution whose utilitarian justification is highly doubtful. One reason for this is that punishment works like a kind of price system: By altering the prices one has to pay for the performance of actions, it supplies

²⁰⁰ Ibid., pp. 180-181.

a motive for avoiding some actions and doing others. The defining features are essential if punishment is to work in this way; so that an institution which lacks these features, for example, an institution which is set up to "punish" the innocent, is likely to have about as much point as a price system (if one may call it that) where the prices of things change at random from day to day and one learns the price of something after one has agreed to buy it.²⁰¹

Of course, Rawls arguments would apply, *mutatis mutandis*, to a minimizing utilitarianism as well. Edwards has argued, however, that the practice of "punishing the innocent" would be even less likely under a minimizing utilitarianism. Edwards asks us to contrast a social practice of telishment, i.e., inflicting harm on the innocent to maximize the good, with a social practice of "minishment," i.e., inflicting harm on the innocent to prevent greater harm to others. Edwards accepts Rawls analysis of telishment, and concludes that as a social practice minishment could never be justified on utilitarian grounds. Edwards writes:

Even a maximizing utilitarian would not want to adopt a rule which says that "We should inflict harm on innocent persons if greater good for others will result." The minimizing counterpart, however, would be that "if and only if nothing but harm will come of it no matter what we do, we should inflict harm on persons (whether innocent or not) only if greater harm for others may thereby be prevented." Put into the language of rights, "we should violate the rights of individual persons only when this is necessary to avoid an even greater violation of the rights of others, who are also individual persons."²⁰²

²⁰¹ Ibid., p. 181.

²⁰² Edwards 1985, pp. 194-195.

Edwards also suggests that the odd exception to the rule where an instance of minishment could be justified would not only be quite rare, it would not be as obviously wrong as telishment. Mill seems to concur; in the penultimate paragraph of Utilitarianism he writes:

It appears from what has been said, that justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner. In such cases, as we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case. By this useful accommodation of language, the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice.

I will say more about this passage later. For now, it should be noted that this seems to leave Mill open to Rawls' second objection, namely, that utilitarianism cannot take the distinction between persons seriously. Why is it just to force the medical practitioner or any other expert into involuntary servitude? A direct appeal to the principle of utility would seem to leave Mill open to the charge that his utilitarianism cannot take individual rights seriously. It is to this point that I now turn my attention.

Slavery and Individual Rights

The example that Rawls often uses to show that utilitarianism is deficient in this regard is the practice of slavery. However, it is important to note that he is not suggesting that utilitarianism would actually support slavery. As we have just seen, Rawls has argued quite persuasively that utilitarianism cannot support the practice of telishment. Clearly, if utilitarianism cannot support the practice of telishment, it could not support the practice of slavery. First, one could argue against slavery in the same fashion as Rawls did against telishment. Once one considers the actual costs to society as a whole of slavery, the horrible suffering of the slaves, and the limited benefits to the slave owners, it becomes a practical impossibility to justify such a social practice on utilitarian grounds. Second, if slavery, as the term is ordinarily used, is not only a more extreme and severe form of rights violation than telishment, it is something far worse (Gone With the Wind is pure fiction, not historical fiction). I assume that the image that the term "slavery" brings to mind is that "peculiar institution" as it was practiced in the antebellum South. In his 1845 autobiography Frederick Douglas discusses the character and conduct of a relatively cruel overseer named Austin Gore. Gore would "torture the slightest look, word, or gesture, on the part of the slave, into impudence,

and treat it accordingly."²⁰³ He would accept no explanation from the slaves, "to be accused was to be convicted, and to be convicted was to be punished."²⁰⁴ Douglas reports a particularly gruesome example of Gore's conduct:

His savage barbarity was equaled by the consummate coolness with which he committed the grossest and most savage deeds upon the slaves under his charge. Mr. Gore once undertook to whip one of Colonel Lloyd's slaves, by the name of Denby. He had given Denby but a few stripes, when, to get rid of the scourging, he ran and plunged himself into a creek, and stood there at the depth of his shoulders, refusing to come out. Mr. Gore told him he would give him three calls, and if he did not come out at the third call, he would shoot him. The first call was given. Denby made no response, but stood his ground. The second and third calls were given with the same result. Mr. Gore then, without consultation or deliberation with anyone, not even giving Denby an additional call, raised his musket to his face, taking deadly aim at his standing victim, and in an instant poor Denby was no more. His mangled body sunk out of sight, and blood and brains marked the water where he had stood.²⁰⁵

My point is not to "gross out" the reader. Gore's admittedly extreme behavior, sadly, was far from uncommon. Douglas' autobiography alone provides several other events that are equally shocking. Slavery as it was practiced in the antebellum South was monstrously evil, and it is hard to react to examples like Douglas' with anything but pure visceral disgust.

²⁰³ Douglas, Frederick 1982, Narrative of the life of Frederick Douglas, an American Slave, p. 65

²⁰⁴ Ibid., p. 66.

²⁰⁵ Ibid., pp. 66-67.

But Rawls suggests that the utilitarianism argument against slavery allows an insight into why the theory is defective. Rawls writes:

I am not, of course, suggesting the absurdity that the classical utilitarians approved of slavery. I am only rejecting a type of argument which their view allows them to use in support of their disapproval of it. The concept of justice as derivative from efficiency implies that judging the justice of a practice is always, in principle at least, a matter of weighing up advantages and disadvantages, each having an intrinsic value or disvalue as the satisfaction of interests, irrespective of whether or not these interests necessarily involve acquiescence in principles which could not mutually be acknowledged. Utilitarianism cannot account for the fact that slavery is always unjust, nor for the fact that it would be recognized as irrelevant in defeating the accusation of injustice for one person to say to another, engaged with him in a common practice and debating its merits, that nevertheless it allowed of the greatest satisfaction of desire.²⁰⁶ The charge of injustice cannot be rebutted this way.

Rawls is technically correct when he says it would be absurd to suggest that the classical utilitarians approved of slavery. But I think fairness would suggest a stronger formulation. In Chapter One I discussed Mill's views on slavery in some detail, and how extreme they were considered at the time. A gray utilitarian analysis would suggest that there were strong reasons for the English to support the South. Mill rejected them. Mill thought that losing one's freedom was perhaps the worst fate that could befall an individual. In an argument before Parliament in 1868 he

²⁰⁶ Rawls, John 1971. "Justice as Reciprocity," in Gorovitz 1971, p. 264. This essay is a revision of the better known "Justice as Fairness," and was written especially for Gorovitz's anthology.

argues that a permanent loss of freedom was worse than death. Speaking against a resolution to ban capital punishment Mill said:

I defend this penalty, when confined to atrocious cases, on the very ground on which it is commonly attacked--on that of humanity to the criminal; as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime. If, in our horror of inflicting death, we endeavour to devise some punishment for the living criminal which shall act on the human mind with a deterrent force at all comparable to that of death, we are driven to inflictions less severe indeed in appearance, and therefore less efficacious, but far more cruel in reality. Few, I think, would venture to propose, as a punishment for aggravated murder, less than imprisonment with hard labor for life; that is the fate to which a murderer would be consigned by the mercy which shrinks from putting him to death. But has it been sufficiently considered what sort of a mercy this is, and what kind of life it leaves to him? If, indeed, the punishment is not really inflicted--if it becomes the sham which a few years ago such punishments were rapidly becoming--then, indeed, its adoption would be almost tantamount to giving up the attempt to repress murder altogether. But if it really is what it professes to be, and if it is realized in all its rigour by the popular imagination, as it very probably would not be, but as it must be if it is to be efficacious, it will be so shocking that when the memory of the crime is no longer fresh, there will be almost insuperable difficulty in executing it. What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards--debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?²⁰⁷

²⁰⁷ "Speech in Favor of Capital Punishment," Paragraph 1. Given at Parliament on April 21, 1868.

One could debate Mill's overall point, but his reasoning is sound enough. "Give me liberty, or give me death" is more than an idle slogan. In recent years several death row inmates, most recently Timothy McVeigh, have stopped the appeals process in favor of a quick death. Some find life on death row, deprived of liberty, not worth living. Mill's extreme expression of this view--he is not offering the lifer an option--is fully consistent with the emphasis one finds on personal liberty throughout his work. For example, In Chapter V of On Liberty he argues against allowing persons to voluntarily sell themselves into slavery. Mill writes:

The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.²⁰⁸

Since Mill believes "voluntary" slavery to be unacceptable, it is hard to imagine the circumstances that under which he

²⁰⁸ Mill 1859, Chapter V, Paragraph 11.

would allow the ordinary practice of slavery. Given the extremely high importance Mill places on individual freedom, and the relatively low importance he places on luxurious consumption, one could hardly expect a different Millian response. Rawls continues:

But now, even if it is taken as established that, so far as the ordinary conception of justice goes, slavery is always unjust (that is, slavery by definition violates commonly recognized principles of justice), the classical utilitarian would surly reply that these principles, like other moral subordinate to that utility, are only generally correct. It is simply for the most part true that slavery is less efficient than other institutions; and while common sense may define the concept of justice in such a way that slavery is proved unjust, nevertheless, where slavery would lead to the greatest satisfaction of desire, it is not wrong. Indeed it is then right, and for the very same reason that justice, as ordinarily understood, is usually right.²⁰⁹

Of course, if this were the end of the story, then Mill would be off Rawls' hook. Since the huge amount of harm that the institution of slavery inflicts on the slaves--assuming we are still talking about slavery in the antebellum South--has no corresponding greater harm to be weighed against, there is not really anything for the Millian utilitarian to think about. Important secondary principles--those secondary principles important enough that Mill will classify them as right--are only overridden when they conflict with other important secondary principles. Slavery egregiously violates the rights of the slaves, and since there is no right to own other people, or have any slave-like contract enforced for

that matter, freeing the slaves does not violate the rights of slave owners. There is never any need in this type of case to appeal to the principle of utility. Mill's theory of justice appeals to the principle of utility only when secondary rules are in conflict with each other.

But this may not be, after all, Rawls' strongest objection. Rawls' point could be far more subtle than that, and let me develop how I think his argument might go. It is not important that one could not in practice create a real world example. Rawls' objection is that utilitarianism could in theory countenance slavery, if the benefits to others were sufficiently high to outweigh the suffering of the slaves. What is wrong with the utilitarian argument against slavery is that the utilitarian prohibition against slavery is merely accidental or contingent. Similarly, the Rawls of 1971 will reject the arguments made by the Rawls of 1955. It should be conceded that it is "highly unlikely" or "very doubtful" that under Mill's version of utilitarianism slavery or telishment would be practiced. However they could be allowed, if they did prevent greater harm to others. What Rawls or a Rawlsian will find intolerable is accepting a practice that would justify sacrificing one person to slavery, telishment, or even minishment to avoid harms to others. Justice forbids sacrificing the freedom of one

²⁰⁹ Rawls 1971a, p. 265.

person for another. Such a practice would not take the distinction between persons seriously.

However, this argument has a fatal flaw. Only a Pollyanna would think that one person's freedom or rights would never conflict with another's, and there is no reason to believe that one could always split the difference. As one would suspect, Rawls has a refinement:

In these remarks I have assumed that it is always those with the lesser liberty who must be compensated. We are always to appraise the situation from their point of view...Now it is this restriction that makes it practically certain that slavery or serfdom, in their familiar forms anyway, are tolerable only when they relieve worse injustices. There may be transition cases where enslavement is better than the current practice. For example, suppose that city-states that previously have not taken prisoners of war but always have put captives to death agree by treaty to hold captives as slaves instead. Although we cannot allow the institution of slavery on the grounds that the greater gains of some outweigh the losses to others, it may be under these conditions, since all run the risk of capture in war, this form of slavery is less unjust than present custom.²¹⁰

Two points are being made in this passage: One, in general when freedoms are in conflict one will look first to those with lesser liberty. Slavery or serfdom cannot be justified by appealing to gains for those with greater liberty. Two, when a practice is an improvement over existing conditions--even if technically it is unjust--it may be allowable. One is required in these cases to consider whether the best interests of those with lesser liberty are met. Rawls finds

²¹⁰ Rawls, John 1999, A Theory of Justice, Revised Edition, p. 218.

the most egregious feature of the usual practice of slavery is that the lesser liberty of the slaves is justified by purported benefits to the slave owners. But slavery could be justified if it was in the interests of the slaves, i.e., if it increased the liberty of the slaves. Rawls also notes, of course, that this reasoning is conditional; it is based on a practice of slavery that is not overly cruel. Otherwise, it would not be in the best interests of the prisoners to be kept alive. I take Mill to be making the same point in his speech on capital punishment. If my reading of Rawls is correct here, then Mill and Rawls may not be that far apart. I can see no Millian reason, or recall examples of Mill's actual views, that would suggest his unwillingness to adopt these two points as useful secondary rules.

But there remains, perhaps, one critical issue. I agree that in many cases additional freedom will ordinarily be more beneficial to those who have the lesser liberty; this is simply a stock illustration of the principle of diminished marginal utility. The less freedom one has, the more a slight increase in it proves beneficial. But what about the odd exception when it does not? Consider the following case: Let us assume that the principal of a deprived inner city high school has a fixed budget for the upcoming fiscal year. The principal has begged, cajoled, and screamed bloody murder, but the board of education refuses

to raise the school's allotment. This is a typical story played out in countless schools across the country. Given the school's meager budget, all of the students are being deprived of their fundamental right to an education. However, let us assume that the principal has sufficient funds to hire one more teacher, and that the students fall into roughly three categories of equal size; a college preparation track, a vocational education track, and a special education track. Assume further that the greatest injustice has been done to the special education kids, and that circumstances the principal has no control over have caused them to be the group with the lesser liberty. A superficial reading of Rawls might suggest that the Rawlsian principal must hire an additional special education teacher. If my reading of Mill is correct, the Millian principal will at least ask the chairs of the three departments how much harm they would be able to eradicate with an additional teacher, and give some consideration to the answers.

Of course, it is possible to up the ante. To successfully prosecute the Civil War, it was necessary for Abraham Lincoln to employ a military draft that many found unjust. Political reality gave him no other option. In New York City in 1863 hundreds of individuals, mainly black, were killed in the infamous draft riots. The draft was unpopular for many reasons; most notably, the ability for

the rich to buy their way out of service. One finds echoes of this in the more recent conflict in Vietnam where the sons of the wealthy were found ways to either avoid combat or service entirely. Even today many find any military draft to be an unjust form of involuntary servitude. So, should we applaud the end of slavery, but condemn Lincoln for not taking the distinction between persons seriously? Shortly after Lincoln's death Mill wrote:

What I now principally feel is that the death of Lincoln, like that of Socrates, is a worthy end to a noble life, and puts the seal of universal remembrance upon his worth. He now has a place among the great names in history, and one could have wished nothing better for him than to die almost or quite unconsciously, in perhaps the happiest moment of his life. How one rejoices that he lived to know of Lee's surrender.²¹¹

I take it that this example shows that Mill will find it morally praiseworthy to sacrifice the rights of some individuals when necessary to end a horror such as slavery. Mill does not take Lincoln's actions lightly. It would have been horrible to sacrifice so many lives without purpose. This is why Mill rejoices in the fact that Lincoln lived to see that the sacrifice was not futile. If Mill and Lincoln are guilty in this case of not taking the distinction between persons seriously, perhaps we need a procedure that tells us when to apply this distinction more carefully.

Interestingly, I think one can find this procedure in Rawls. As long as the war was a just war, i.e., the North was fighting the Civil War for the just purpose of ending slavery, and the draft was administered fairly, i.e., the lives of those with lesser liberty were not chosen to be disproportionately sacrificed or sacrificed to meet the ends of those with greater liberty, Rawls should have no objection.

It should be clear that Mill's liberal utilitarianism does not violate individual rights either as obviously or as egregiously as is often argued. Mill's utilitarianism will only justify violating individual rights to prevent greater rights violations to others. But it is not clear to me that violating rights in this instance does not take the distinction between persons very seriously, and, in any case, it does not seem to reject this distinction in a morally troubling fashion.

²¹¹ Packe 1954, p.426. This passage is from a letter to John Elliot Cairnes dated May 28, 1865.

CONCLUSION

Be convinced that to be happy means to be free and that to
be free means to be brave.

Thucydides, "Funeral Speech of Pericles"²¹²

I have argued in this dissertation against the standard reading of Mill as a maximizing utilitarian. Instead I suggest that Mill should be read as a moral minimalist with a firm commitment to individual freedom and the rights necessary to secure that freedom. The standard reading of Mill is anachronistic; it suggests that we should interpret an Enlightenment Greco-philiac as a twentieth century bureaucratic gray utilitarian. Mill's sense of happiness, and the importance of individual freedom for developing our own character and promoting human self-development are either lost under this interpretation, or made to seem inconsistent. As Thucydides informs us, it takes courage to advocate freedom; conservatives will always offer us the false security of paternalism. But if we are interested in a happiness grounded in our interests as progressive beings,

²¹² Thucydides 1979, Speeches of Pericles (the original source is The Peloponnesian War, Book Two, Paragraph 43). Translation by H.G. Edinger. I was unable to find a source for this alternate translation: "The secret of happiness is freedom, and the secret of freedom, courage."

we must find the courage to allow freedom to those individuals whose ideas and conceptions of the good we find personally intolerable. A utilitarianism that places the emphasis on maximizing crude pleasures or preference satisfactions cannot do this; after all, there is no reason to assume that freedom is either equivalent or co-extensive with bureaucratic or economic efficiency. But, on the reading of Mill I am offering, freedom is an integral component--perhaps the most essential component--of any human life that is worth living. Thus, any meaningful attempt to promote happiness must include a strong commitment to freedom.

The maximizing act-utilitarian reading of Mill has difficulties when one wishes to give a utilitarian ground to Mill's strong commitment to individual liberty. Mill wishes to place his focus on the institution (or suppression) of social practices that further individual self-development and character formation. Social policies that will lead to overall social progress or secure the rights needed for overall social progress can conflict with the principle of utility when the principle of utility is applied to specific individual cases. But Mill wishes to consider the principle of utility as the ground for the secondary rules that will be used to evaluate individual cases. This Mill may share

with some rule-utilitarians. But Mill parts company with the rule-utilitarian in two important ways. First, Mill is not an ethical extremist. Thus, our duties to others do not include producing the greatest happiness for the greatest number. Rather we should not impinge upon other individuals' private moral spheres or otherwise violate their rights. Mill wishes to improve the quality of human life; after all, he is a progressive and believes moral progress to be possible. But Mill is endorsing a conception of happiness that is much richer than the one offered by twentieth century gray utilitarians. This conception places human freedom at the center of a life worth living. Second, Mill is not a direct utilitarian. Mill believes that giving human beings the freedom to pursue their own version of the good will lead to moral improvement and ultimately an increase in happiness, but in many cases it is hard to measure this improvement directly. What one can hope to gauge with some level of certainty is whether the social practices and secondary rules that are instituted allow a tolerance for diversity that allows individuals to pursue their own version of the good. One cannot expect under normal circumstances to calculate the overall happiness of a complex industrial society, but one can implement principles of liberal justice, and we have strong historical precedent for the belief that societies that practice principles of liberal justice do increase the overall happiness of their

citizens. I take it that this view is a liberal commonplace,
but Mill's minimalist utilitarianism makes it explicit.

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