

### **Third Prize: Can a utilitarian respect rights?**

by Chris Bailey

Utilitarianism is the view that the right moral action is that which produces, or tends to produce, the greatest happiness of the greatest number (GHGN). It was founded as a moral theory by Jeremy Bentham at the beginning of the 19<sup>th</sup> Century. A central charge made against it from the start was that it failed as a theory to take into consideration the question of human rights. In its original form, as it was propounded by Bentham, this certainly seemed to be true. Bentham denounced the idea of *natural* rights as “simple nonsense, rhetorical nonsense, — nonsense upon stilts”, whilst failing to provide an alternative utilitarian justification for rights. Without this, the GHGN appeared to allow the rights and interests of minorities to be sacrificed for the good of collective interests.

John Stuart Mill set out to overcome a number of problems with Bentham's utilitarianism, including this question concerning rights. He maintained that rights could be given a firm foundation on utilitarian grounds alone:

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being. (OL p19)

Before considering Mill's explicit utilitarian theory of rights, it is necessary first to consider another question. Where does Mill stand with regard to what today is seen to be a division within utilitarianism, between act based utilitarianism and rule based utilitarianism? A defence of rights surely requires a rule based utilitarianism that does not collapse into act based utilitarianism.

Mill supports the use of “secondary principles”, which he compares with “the use of landmarks and direction posts” for a traveller (U p35). He makes clear that the main purpose of these secondary principles is to be able to define rules that approximate to the correct course of action without having to “endeavour to test each individual action directly by the first principle” (U p34). However, he maintains that these secondary principles are only guides that should be set aside in favour of the utilitarian first principle (GHGN) where they lead to obviously inferior utilitarian consequences or conflict with each other.

At first sight then it would appear that Mill's secondary principles do not support a rules based utilitarianism capable of clearly defining rights. However, in Chapter V of *Utilitarianism*, where Mill defines his concept of justice, he tells us:

Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; (U p87)

Whilst refusing to acknowledge deontic claims for justice, he believes there is a hierarchy of secondary principles, some of which are more important to follow than others and that moral rules for justice come at the top of this hierarchy.

Mill's utilitarian theory of rights is introduced in Chapter V of *Utilitarianism* in the context of his penal sanction theory of duty. This latter theory identifies wrong actions as actions that it is useful for society to penalise.

We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; (U p71)

He concludes here that it is not only useful for society to punish wrong actions, but that individual members of society have a right to demand this:

Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as a matter of right. (U p73)

Thus individuals have a right to protection against the wrong actions of others:

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. (U p78)

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. (U 79)

Mill's whole theory of a utilitarianism based on penal sanctions, justified only by general utility, seems totally inadequate for defining justice and rights. It is clearly upside down. According to this theory, an act is not wrong in itself or even because of its own consequences, but because the action of punishing it contributes to general utility. Similarly, it is not because we have rights that society ought to protect them, but our rights are dependent on what society ought to enforce for the sake of this same general utility. Clearly for Mill himself this general utility is seen as that of a liberal democracy, but, without somewhere bringing in a deontic version of individual human rights, the utilitarian criteria of defining punishment and rights by their contribution to what is ultimately an ill defined and largely subjective concept of collective general utility could be, and indeed has been, used to justify even such despotic societies as that of present day North Korea. Indeed, Mill seems to accept this possibility when he argues that in a slave society:

institutions which leave to the slave scarcely any rights to enforce, are not deemed unjust, because they are not deemed inexpedient. (U p67)

Mill does, in fact, believe that he has a way of bringing in something pretty close to a deontic version of human rights. This is based on his hierarchy of secondary principles alluded to above, that places justice and rights at the top of the hierarchy.

He needs to justify this hierarchy and still maintain that the first principle of GHGN ultimately applies. The basis for this has been developed by him earlier in his definition of utility itself, which differs considerably from that of Bentham. This redefinition weights general utility heavily in the direction of supporting human rights and thus towards being that of a liberal democracy. The hierarchy of secondary principles is to be justified by a hierarchy of utility, with those secondary principles that promote the higher forms of happiness being most binding.

So what are these higher forms of happiness?

It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied. (U p14)

The distinction here appears to be that of reason, the highest happiness being associated with the exercise of human rationality. Mill argues this explicitly as the central theme of *On Liberty* and draws the conclusion that those secondary principles that promote mankind's rational capacities provide the most important ingredient in bringing about human happiness:

He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgement to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision ... 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? (OL p107)

Thus for Mill our happiness must reflect the sort of rational beings we are. Human beings have a special kind of superior happiness, because we are rational. General utility is to be heavily weighted in favour of this special kind of happiness.

But doesn't this mean that recognising human rationality is an *a priori* to defining utility, and that a definition of rights directly based on such a recognition therefore trumps one based on utility? Has nature only given humanity reason as a means to a special form of happiness?

Now in a being that has reason and a will, if the proper end of nature were its preservation, its welfare, in a word its happiness, then nature would have hit upon a very bad arrangement in selecting the reason of the creature to carry out this purpose. ... Nature would have taken upon itself the choice not only of ends but also of means and, with wise foresight, would have entrusted them both simply to instinct. (Kant p486)

Ultimately, Mill's attempt to develop a purely utilitarian position for respecting rights fails. The concept of GHGN only has any moral legitimacy in a society in which a deontic standard of rights prevails and non-utilitarian norms of behaviour are upheld.

## **Bibliography**

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