Utilitarian Strategies in Bentham and John Stuart Mill*

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The argument of this paper is part of a general defence of the claim that Bentham's moral theory embodies a utilitarian theory of distributive justice, which is developed in his Civil Law writings.1 Whereas it is a commonplace of recent revisionist scholarship2 to argue that J. S. Mill had a developed utilitarian theory of justice, few scholars regard Bentham as having a theory of justice, let alone one that rivals in sophistication that of Mill.3 Indeed, Gerald J. Postema in his book Bentham and the Common Law Tradition, argues that Bentham had no substantial concern with the concept of justice, and that what analysis of the concept there is in Bentham's thought is unlike the utilitarian theory of justice to be found in chapter five of J. S. Mill's Utilitarianism.4 Although Postema's interpretation is not the only one that will be addressed in this paper, it serves as an important starting point for any rival interpretation of Bentham's ethical theory for two reasons. Firstly, it is the most comprehensive and most penetrating discussion of Bentham's utilitarian theory, drawing as it does on a wide variety of published and unpublished materials written throughout Bentham's career. Secondly, it is interesting in this particular context because the contrast that Postema draws between Bentham's and Mill's theories of justice depends upon a particular reading of Mill's theory of justice and utility which is derived from recent scholarship and which is by no

* A version of this paper was first presented at the International Bentham Society Conference, King's College, Cambridge, 13–15 July 1989. I am grateful to Professor Gerald Postema and Professor David Lyons for their comments on a subsequent draft.
3 For a standard criticism of Bentham's utilitarian theory as being hostile to the concept of justice see H. A. Bedau, 'Justice and Classical Utilitarianism', Nomos, vi (1963), 284–305.
means uncontroversial. As part of the defence of the claim that Bentham had a sophisticated theory of distributive justice, it will be argued in this paper that the contrast drawn between Bentham and Mill does not stand up to careful scrutiny, for insofar as Mill’s theory of justice can be consistently defended it is not significantly different from the utilitarian strategy that Bentham employed for incorporating considerations of distributive justice within his theory. This is not to claim that there are not significant differences between the theories of justice of Bentham and J.S. Mill, but it is to claim that whatever technical differences exist between their theories, both writers saw the need to incorporate the concept of justice within utilitarianism. Therefore, rather than showing that Mill is an interesting thinker to the extent that he abandons his early Benthamism, by demonstrating how close Mill’s theory of utility and justice is to that of Bentham, it will be possible to argue that Bentham employed a sophisticated and subtle utilitarian theory that was responsive to the sort of problems which occupied Mill a generation later.

A discussion of the theories of Bentham and Mill will form the second section of this article. The first section will begin by addressing some of the preliminary issues that have surrounded attempts to explain and defend Mill’s theory of justice, in particular whether he has an indirect theory of obligation, and whether such an interpretation remains consistent with an act-utilitarian account of his moral philosophy. The discussion will then be used to shed light on Bentham’s utilitarian theory, to assess Postema’s account and explore the suggestion of H.L.A. Hart that Bentham also offers an indirect account of moral obligation which is similar in certain crucial respects to that attributed to J.S. Mill in recent revisionist scholarship.

The second section of the paper will argue that while Mill incorporates important elements of Bentham’s utilitarian theory within his theory of justice, there remain certain dissimilarities which are derived from a different perspective on the substantive goal of justice. This section will also contain a brief consideration of what the theories of justice in Bentham and Mill contribute to an understanding of their respective places within liberal theory.

While with respect to Mill the conclusion of this paper will be relatively uncontroversial, in the case of Bentham I hope to show two things which are important and original; firstly, that Bentham does have a utilitarian theory of distributive justice, and secondly that it is from this theory of justice that Mill borrowed elements which he incorporated into his own theory of justice. This will further confirm

2 For recent revisionist Mill scholarship see n. 2 above.
the contentions of Hollander and Rosen\footnote{S. Hollander, \textit{The Economics of John Stuart Mill}, 2 vols., Oxford, 1985, ii. 645–56, and F. Rosen, 'Bentham and Mill on Liberty and Justice', in G. Feaver and F. Rosen eds., \textit{Lives, Liberties and the Public Good}, London, 1987, pp. 121–36.} that Mill's theory of justice is indebted to Bentham's utilitarian theory. However, it will be argued that Mill did not use the elements he borrowed in the same way as Bentham, and this was ultimately because of their divergent conceptions of the utilitarian good. It will be clear from this discussion that the difference between Bentham and Mill on the score of justice is not that referred to in the contrast that Postema drew.

I

The history of utilitarianism can be fairly characterized as a series of attempts at restating the basic claim that utility, happiness or the general welfare, is the sole criterion for judging actions and determining what to do, in response to a series of criticisms which assert that it is unable to accommodate basic moral distinctions, and that it yields unacceptable conclusions. As much contemporary ethical theory has consisted of attempts to construct non-utilitarian theories of justice, and attempts by utilitarians to defend their positions against such criticisms, the discussion and development of various utilitarian strategies has been one of the enduring themes of recent debates.\footnote{The literature on utilitarianism is vast, but a good guide to recent debates is to be found in J. Griffin, 'Modern Utilitarianism', \textit{Revue Internationale de Philosophie}, xxxvi (1982), 318–30.}

One of the standard criticisms of act-utilitarianism is that the making of direct global utility calculations on each occasion of action is either too demanding, self-defeating or irreconcilable with moral and social practices which constitute conventional morality such as promise-keeping or truth-telling. Few, if any, utilitarian thinkers have been quite as uncompromising in their rejection of rules as an essential condition of social interaction and moral life\footnote{Only William Godwin appears to have accepted the 'anarchical' implications of such an unrestricted act-utilitarianism. See W. Godwin, \textit{Enquiry Concerning Political Justice}, ed. F. E. L. Priestley, Toronto, 1846.} as is implied in this criticism. Nevertheless, even when utilitarians do incorporate rules within their theories they generally only serve as rules of thumb, revisable in the light of subsequent utility calculations, because they are generalizations based on those actions which have in the past maximized utility. It is further argued that because utilitarians are unable to provide an adequate account of institutions and practices which are constituted by rules, they have also been unable to give an account of the role and function of justice within moral life. However, some important utilitarians have attempted to make room for the...
concept of justice within utilitarian theory, and consequently have argued that justice and utility are not necessarily antithetical concepts. In the case of Mill this perception has given rise to a series of attempts by Mill scholars to explain and justify the connection and reconciliation of justice with utility. The most sophisticated and controversial of these interpretations which have been advanced in recent years is that Mill’s utilitarian theory is not a simple maximizing theory, but rather an indirect variant of utilitarianism which rejects the principle of utility as a direct source of obligations. This indirect utilitarian theory is most closely associated with the work of David Lyons and John Gray.10

The indirect versions of utilitarianism attributed to Mill differ in certain respects between commentators, but they share a number of central premisses. They distinguish between judgements of expediency and judgements of morality, and argue that moral obligations are not determined merely by reference to the principle of utility and which actions tend to maximize utility. This view is captured by Lyon’s claim that:

On Mill’s view . . . nothing is shown to be right by showing that it maximizes utility: nothing wrong simply because it fails to maximize utility. For Mill distinguishes between evaluations of expediency and moral judgements: the former concern utility, the latter obligation. To show that something is not morally wrong, we must show that it does not breach a moral obligation, and this is not a matter of maximizing utility. Mill also holds that justice is the most important segment of morality, involving the weightiest obligations, which correlate with personal rights. To show that something is not unjust, we must show that it does not violate rights. This too is not a matter of utility.11

In order to maintain this interpretation Lyons focuses on chapter five of Mill’s Utilitarianism,12 and in particular on the ‘punishability’ criterion of right and wrong. In the course of this chapter Mill considers the origin of the sentiment of justice, and whether this can be reconciled with the principle of utility. His argument proceeds by way of an analysis of the concept in order to identify those beliefs which are essential to justice. After a review of the etymology of the term, Mill identifies the ideas of law and consequently of punishment as being crucial in the various uses and meanings of the term.13 However, having identified the role of punishment at the root of the concept of

10 See note 2 above. I shall concentrate largely on Lyons’s account for it is this which Postema uses in drawing his contrast between Bentham and Mill. See Postema, p. 149.
13 Mill writes: ‘Thus the idea of legal constraint is still the generating idea of the notion of justice, though undergoing several transformations before that notion, as it exists in an advanced state of society, becomes complete’ (Essays on Ethics, Religion and Society, CW, x. 246).
justice, Mill goes on to argue that the presence of the idea of penal sanction does not distinguish the obligations of justice from those of moral obligation more generally. He then proceeds to give the ‘punishability’ standard of right and wrong in the following passage:

... the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it: if not by law, by the opinion of his fellow creatures; if not by option, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. It is a part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfil it.\(^\text{14}\)

The important point that Lyons derives from this passage is that obligations, moral or legal, are derived from the imposition of sanctions, either public such as those of law and conventional morality, or else internal sanctions such as that of conscience. The principle of utility is not itself a direct source of moral obligations, as these depend on sanctions, which in turn are related to moral rules.\(^\text{15}\) Sanctions are employed in order to enforce the observance of rules, and this is most clear in the case of legal rules, where the law specifies and imposes punishments for non-compliance. But as Mill has just argued in the passage quoted above this idea of ‘punishability’ attaches to all obligations, and this presupposes the existence and importance of moral rules. However, in order to maintain this interpretation Lyons also argues that the principle of utility is not a direct source of obligations, but rather the standard in terms of which one judges those things which are of ultimate value or are desirable as ends. The principle of utility is thus concerned with the doctrine of ends and not with the determination of what one ought to do.\(^\text{16}\)

Lyons’s argument is presented as an indirect utilitarian theory in that the connection between sanctions and obligations is derived analytically from the meaning of obligation and not from a direct appeal to the principle of utility.\(^\text{17}\) Thus, just because an act does not maximize utility it does not entail that it is morally wrong. The principle of utility provides a criterion for judging actions, but it

\(^{14}\) Ibid.

\(^{15}\) Lyons writes: ‘These considerations suggest that Mill had a view like this. To call an act wrong is to imply that guilt feelings, and perhaps other sanctions, would be warranted against it. But sanctions assume coercive rules. To show an act wrong, therefore, is to show that a coercive rule against it would be justified’ (‘Mill’s Theory of Morality’, p. 91).


\(^{17}\) To be fair to Lyons, his argument is intended as a rational reconstruction of Mill’s theory; it is not his intention to assert that all passages throughout Mill’s writings can be rendered logically consistent in one general theory.
prescribes no moral duties or duties of any kind as these are analytically connected to liability to punishment. On Lyons’s argument the ‘proportionality’ criterion which Mill employed earlier in Utilitarianism,\(^\text{18}\) is best interpreted as making a claim about ends and what is desirable and not about the criteria for determining moral obligation. However, while Lyons argues that Mill’s utilitarianism is not of a direct maximizing kind,\(^\text{19}\) and that moral obligations are analytically connected to the liability of sanctions, he does not claim that Mill is not a utilitarian or that Mill argues that any existing set of conventional moral rules and their respective sanctions give rise to morally justified obligations. After all a conventional morality may well include all sorts of moral strictures which a utilitarian could not justify, particularly one as devoted to liberty, individuality and self-culture as J. S. Mill. Instead Lyons argues that ‘... wrong acts are those against which coercive rules would be justified.’\(^\text{20}\) Thus he connects moral obligation on Mill’s view with a set of ideal rules which would have a utilitarian justification if they came into being. These rules are determined by their consequences, so that the principle of utility functions within Mill’s moral theory as a means of identifying those features of the moral world which would give rise to justifiable coercive rules, and therefore create obligations. On this interpretation Mill’s theory of justice and freedom can be seen as a way of identifying what those rules are and why they are justifiable. Nevertheless, it remains true that moral obligations are only indirectly justifiable, they are not determined by individual utility calculations. Lyons’s theory is also an indirect theory in a second but related sense, in that an individual’s actions tend towards the greatest happiness by conforming to those patterns of behaviour prescribed by the system of morally justifiable rules, and not because they are based on direct utility calculations. Social welfare is maximized when pursued indirectly by means of rule-governed social interaction.

It is on such an indirect utilitarian interpretation of Mill’s theory of morality and justice that Postema’s contrast between Bentham and Mill relies. Postema argues that Bentham is a consistent act-utilitarian judging each action in terms of the proportions of pleasure and pain that arise from it. He maintains that in Bentham’s writings the principle of utility is not only the ultimate evaluative principle in terms of which one judges actions, but also it is the sole sovereign

\(^{18}\) Here 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’ (Essays on Ethics, Religion and Society, CW, x. 210).


decision principle. Consequently, Bentham is unable to give an account of justice in terms similar to Mill, for justice and all other aspects of moral life must be reducible to individual utility calculations or rules which are generalizations based on past utility calculations. Postema’s interpretation of Bentham as a direct act-utilitarian is brought out in his account of Bentham on justice, where he writes:

No moral concept suffers more at Bentham's hand than the concept of justice. There is no sustained, mature analysis of this notion to match that of Mill’s discussion in *Utilitarianism*. Seldom willing to take the notion seriously, he was most inclined to respond to talk of justice in an entirely polemical fashion, discussing it summarily as, at best, innocently vague and potentially obscurantist, but more often a mask for social antipathy and malevolence.

The concept of justice, insofar as it features in Bentham’s jurisprudential theory, is connected with a particular species of utility, namely that derived from expectation, and the popular contrast between justice and utility refers to the utility of adhering to fixed general rules which give rise to those expectations. Where these rules which give rise to expectations are sufficiently important they will produce a set of expectation utilities which can conceivably outweigh any other set of considerations in a direct utility calculation. It is because of the utilities derived from expectation that people attach value to justice in contrast to judgements of expediency. But as Postema makes clear, Bentham is referring to a species of utilities derived from adherence to a set of rules or norms. When and only when these rules give rise to significant utilities can they override any other utilitarian considerations. They do not entail any principled restriction of the agents’ attention, and they do not provide authoritative reasons for action unless adherence to them will be the maximally beneficial course of action. On Postema’s account of Bentham, the principle of utility alone determines what one ought to do, there is no question of justice giving rise to any distinct body of authoritative reasons for action that are not reducible to direct utility calculations.

However, having argued that expectation utilities are only one...
species of utilities which the Benthamite legislator ought to include in his calculations, Postema goes on to give an account of why utilities derived from expectation are considered important enough to be distinguished from other species of utilities, and more importantly why Bentham attaches such weight to them in his theory of legislation. In making his case, Postema refers to a number of passages from Bentham’s ‘Principles of the Civil Code’, which account for the priority attached to security of expectation. Bentham writes:

This disposition to look forward, which has so marked an influence upon the condition of man, may be called expectation—expectation of the future. It is by means of this we are enabled to form a general plan of conduct; it is by means of this, that the successive moments which compose the duration of life are not like insulated and independent points, but become parts of a continuous whole. Expectation is a chain which unites our present and our future existence, and passes beyond ourselves to the generations which follow us. The sensibility of the individual is prolonged through all the links of this chain.

and later he continues:

In order to form a clear idea of the whole extent which ought to be given to the principle of security, it is necessary to consider, that man is not like the brutes, limited to the present time, either in enjoyment of suffering, but that he is susceptible of pleasure and pain by anticipation, and that it is not enough to guard him against an actual loss, but also to guarantee to him as much as possible, his possessions against future losses. The idea of his security must be prolonged to him throughout the whole vista that his imagination can measure.

In both these passages Bentham identifies expectation as a major, if not the major source of utility, because it provides the necessary conditions of personal continuity and coherence. It is expectation which enables an agent to project himself into the future. It is therefore expectation which is the condition of all individual conceptions of welfare or interest that are not confined to the most immediate desire satisfaction. What is particularly interesting about these two passages, both of which are referred to by Postema, is that they suggest the possibility that expectation utilities are far more weighty utilitarian considerations than Postema seems prepared to admit. In the second passage Bentham argues for the necessity of securing an individual’s possessions against future loss. This indicates that while property rights are not conclusive against all possible considerations, there is

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25 Ibid, i. 308.
26 Ibid.
27 Postema, pp. 160–1. Postema is right to argue that these passages present only the barest sketch of an argument. However, the weight and importance attached to them is justified by Bentham’s consistent reliance on expectation as a major, if not the major, utilitarian consideration.
nevertheless, a presumption in favour of them based on the important class of expectations to which they give rise. These utilities are not mere desire satisfactions, but are a function of the conditions of personal continuity and coherence. In this passage where Bentham refers to the importance of possession and property,\textsuperscript{28} he comes close to identifying property rights as a condition of personal identity over time, and consequently, rights as having a significant utilitarian justification. This is very different from Postema’s argument that Bentham was prepared to subordinate rights to direct utility calculations.\textsuperscript{29} On one level Postema’s argument is quite correct, the act-utilitarian justification of these rules and practices which give rise to expectations, can be outweighed by other act-utilitarian considerations in certain circumstances, but given the value that Bentham attaches to expectation utilities and the role they have in providing the conditions of individual well-being, it seems clear that such an allowance will require that the understanding of rights needs to be significantly modified. Similarly, the act-utilitarian justification of expectation creating rights and rules need not be subject to the criticism of Lyons to which Postema was responding, namely that a utilitarian theory of legal rights cannot account for the normative force of rights, which is intended to preclude consequentialist reasoning.\textsuperscript{30} However, there is nothing to stop an act-utilitarian theory adopting preremptory or near stringent rights as part of a strategy for maximizing general welfare.\textsuperscript{31} What would make a consideration weighty enough to limit the direct pursuit of utility on an act-utilitarian theory would be the fact that given human nature as it is, imperfect information and an individual’s inability to construct co-ordinated patterns of action, the general adherence to rule-governed strategies is the best way of maximizing utility. The weight that Bentham attaches to expectation utilities, and the function of rules and norms in providing the conditions of personal continuity and coherence justifies the employment

\textsuperscript{28}In the 1829 ‘Article on Utilitarianism’, in Deontology Together with A Table of the Springs of Action and Article on Utilitarianism, ed. Amnon Goldworth, Oxford, 1983 (The Collected Works of Jeremy Bentham), pp. 289–318, Bentham refers to property as including rights to protection of the person, possessions, condition in life and reputation.

\textsuperscript{29}Postema, pp. 321–4.


\textsuperscript{31}As Rolf Sartorius points out in Individual Conduct and Social Norms, Belmont, Ca., 1975:

The act-utilitarian is therefore in fact able to give an account of social norms which bar direct appeals to utility as more than mere rules of thumb in a two-fold sense. Firstly, they perform the central function of directing human behaviour into channels that it would not otherwise take by restructuring the sets of considerations of consequences of which utilitarian moral agents must take account. Secondly, they provide reasons for action in that their conventional acceptance is tantamount to the existence of systems of warranted expectations, the disappointment of which is a disutility according to standard normal cases of their violation (pp. 70–1).
of such a strategy. However, the point is not simply that security of expectation is an essential condition of each individual’s pursuit of their own conception of welfare. This would provide a good reason for adopting an indirect strategy for achieving the maximum general welfare. Rather the point is that given the interconnectedness of expectations within the social realm it is not easy to conceive of how one can override certain expectations without creating significant disutilities based upon the upset caused to the general pattern of social interaction. The interconnectedness of expectations based on complex patterns of social interaction, suggests that the utilitarian legislator’s strategic position is insufficient to enable him to trace the effects of overriding expectations in some particular cases on the general pattern of behaviour. The argument here is similar to some classical liberal arguments against government activism in the economy. However, this argument does not necessarily undermine Postema’s interpretation, for it does not entail that the legislator or judge is unable to override expectations in particular cases, but it does support a significant presumption in favour of maintaining the stability of expectations by not subjecting the proposed adherence to general rules in each case to direct utility calculations, unless the disutility of acting on them is manifest, as in cases of national crisis. The creation and maintenance of a stable pattern of expectations requires a level of consistency from the legislator and judges, that would preclude their acting on the results of direct utility calculations, if such a direct strategy was shown to have destabilizing consequences. An obligation to do that in each circumstance which maximizes social well-being would always leave open the possibility of the legislator having to override fixed patterns of expectations, and this would undermine the regularity of the legislator’s behaviour, on which the stability of expectation depends. While it is correct to argue that all authoritative reasons for action must be reducible to act-utilitarian ones, this does not imply that either the individual or legislator is under a direct obligation to pursue the maximum social well-being in all circumstances.

Nevertheless, even given the value of expectation utilities and the arguments that can be used to justify their priority in practical decision-making, Postema’s argument that Bentham does not have an

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32 Bentham did not accept the conservative position of Hume, that the maintenance of a stable and secure pattern of social rules was all that was required by justice. However, though Bentham introduced the disappointment-preventing principle in his later writings as a means of reconciling security of expectation with the requirements of reform, the principle was intended as a means of minimizing the disutility that necessarily arose from certain required interferences with a given pattern of expectations.

33 It is perhaps not surprising that Bentham’s own concerns with Poor Law administration and various economic projects are concentrated in the decade of the 1790s, at the height of the war with France.
indirect utilitarian theory of morality and justice similar to that attributed to J.S. Mill by Lyons and others, still stands. Whatever indirect or rule-based strategies that Bentham employs in his science of legislation, it nevertheless remains true that these strategies are adopted as a means of achieving the act-utilitarian goal of utility maximization. The point is not that in particular instances a utility calculation will warrant the overriding of some rule or norm, but the rather more fundamental point, that whatever strategies Bentham adopts are nevertheless strategies employed as a means to maximize the general welfare. Whereas on the account of Mill’s moral theory, it is denied that the principle of utility requires the maximization of utility at all, because one’s actions are determined by reference to moral duties and obligations which are in turn determined by sanctions.

One way of reconciling Bentham’s position with that of J. S. Mill is to argue, following John Dinwiddy,\(^4\) that the principle of utility does not for Bentham give rise to a general obligation to maximize overall welfare. Instead it is only addressed to legislators and others in a position of public trust. Dinwiddy argues that it is only reasonable to expect individuals to act in accordance with their own interests, and that morality only becomes an efficient cause of action when individual interests and duties can be reconciled by means of the imposition of legislative sanctions. However, Dinwiddy’s claim that the principle is not addressed to all individual agents does not affect the character of the principle as a maximizing principle, nor does it overcome the problems of reconciling the maintenance of secured patterns of expectation with the requirements to maximize general welfare. The legislator may adopt for strategic reasons the policy of determining his actions by reference to general rules rather than particular utility calculations, but these strategies are still premised on the act-utilitarian requirement to maximize utility. Also, although Dinwiddy is right to emphasize that the principle of utility (as it features within Bentham’s science of legislation) is directed at those who are strategically well placed to bring about the co-ordination of duty and interest, it is not clear that Bentham thought that the maximizing requirement did not also apply to individual agents. Indeed, part of the reason that Bentham placed such great emphasis on the science of legislation was not that individuals had no reason to pursue the utilitarian moral good, but that the direct pursuit of that good by individual agents would be largely self-defeating in the absence of a public means of co-ordinating individual action into a coherent conception of the general welfare.

Another way of reconciling this fundamental contrast between the theories of Bentham and Mill, is to show that J.S. Mill did not

unequivocally reject the direct application of the principle of utility as a
guide to practical decision-making. This strategy does not entail the
denial of Lyons’s thesis concerning the ‘punishability’ criterion of
obligation in chapter five of Utilitarianism, but it does suggest that this
was not the only standard by which to determine right and wrong, that
one could also refer to the ‘proportionality’ criterion also found in
Utilitarianism. The combination of the ‘proportionality’ criterion of
moral judgement and the ‘punishability’ criterion of obligation within a
revised interpretation of Mill’s theory of utility suggests that the
principle of utility can serve as a direct standard of moral conduct, and
not simply as a principle for determining among ultimate ends. There
are numerous passages in Mill’s later writings where he suggests that
the ‘proportionality’ criteria ought to guide our moral decision-

making without denying the claims made for the ‘punishability’ criterion
of obligation. Mill employs both the ‘punishability’ and proportionality
criteria in two later works: An Examination of Sir William Hamilton’s Philosophy (1865) and ‘Thornton on Labour and Its
Claims’ (1869), and this certainly suggests that Mill did not abandon
the ‘proportionality’, criteria of moral judgement: namely that acts
are right in proportion as they maximize happiness, wrong in propor-
tion as they minimize it, even after he introduced the ‘punishability’
criterion in chapter five of Utilitarianism. Mill’s continued use of both
criteria of moral judgement throughout his later works suggests the
impossibility of identifying any one criterion as his final definitive
position and this undermines Lyons’s single criterion interpretation.
However, that these two criteria appear to conflict need not matter if
they can both be combined within a more general interpretation of
Mill’s enterprise. Such an interpretation would be fundamentally ac-

35 The following reconciliationist account is indebted to Berger’s Happiness, Justice
and Freedom.

36 For a brief summary of some of the passages where Mill acknowledges the
‘proportionality’ criterion, and direct appeals to the principle of utility as an appropriate
means of moral decision-making, see Berger, pp. 155–6. In the following passage Mill
appears to suggest that while justice and obligation-creating moral rules are perhaps the
most important parts of morality, they do not exhaust its content, thus leaving the
possibility for the principle of utility to function as a moral principle.

While I dispute the pretensions of any theory which sets up an imaginary standard of
justice not grounded on utility, I account the justice which is grounded on utility to be
the chief part, and incomparably the most sacred and binding part, of all morality.
Justice is a name for certain 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 (Essays on Ethics, Religion and Society, CW, xz. 255.)

37 J. S. Mill, An Examination of Sir William Hamilton’s Philosophy, ed. John M.
v–vi), v. 651 and 659.
utilitarian, thus abandoning the claim that the principle of utility does not feature in moral decision-making. Nevertheless, it requires the employment of indirect strategies which do involve the rejection of appeals to the principle of utility, on the grounds often suggested by Mill, that utility is best served when aimed at indirectly by means of secondary policies. These policies include elaborate social strategies which confer obligations by means of the imposition of sanctions, which aim to provide authoritative reasons for action based on those sanctions, independently of the strategic act-utilitarian justification of the policy. Such an interpretation allows much of Lyons’s account of Mill’s theory of justice and morality, but it modifies it by allowing that in certain circumstances direct appeals to the principle of utility can be morally justified. This rival interpretation makes better sense of the complexity of Mill’s moral theory and the role of the principle within it. It would also be easier to reconcile with Mill’s insistence on the openness of the future and the possibility of individual and social moral progress changing the terms of social interaction and the requirements of moral theory.\footnote{J. S. Mill, ‘Bentham’, in Essays on Ethics, Religion and Society, CW, x. 110–11.}

The contrast between Bentham and Mill can be further weakened by showing that Bentham adopted a similar analysis of obligation based on his sanction theory of duties. H. L. A. Hart has recently argued that Bentham had an indirect utilitarian theory of obligation:

\ldots Bentham’s statement that this principle is the standard of right and wrong in the field of morality in general and of government in particular must be taken to mean that it is a standard of morality not for the guidance of individual conduct but only for the critical evaluation of it, determining what may be properly demanded by way of action from individuals and when moral sanctions may be used to obtain it. This is consistent with remarks made by Bentham such as his statements that ‘men in general embrace this principle \ldots not for the ordering of their own actions, yet for the trying of their own actions as well as those of other men \ldots’.\footnote{J. M. Robson, The Improvement of Mankind, Toronto, 1968, p. 140.}

In a discussion of Bentham and J. S. Mill on the subject of natural rights, Hart argues that Bentham ‘roughly sketched \ldots an indirect variant of utilitarian theory’.\footnote{H. L. A. Hart, ‘Introduction’, to An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart, London, 1982, p. xlviii.} His argument is that Bentham cannot have had a direct utilitarian theory of moral obligation because he had a sanction theory of duties. Thus he writes:

Though Bentham calls the principle of utility ‘the measure of right and wrong’ and regards it as constituting the standard by which both the law and the conventional morality of any society should be judged, he plainly does not think that obligations or duties (which he treated, as Mill also did, as

\footnote{Hart, ‘Natural Rights: Bentham and John Stuart Mill’, p. 86.}
equivalent) are generated by the principle of utility. For him, a necessary condition of a man having an obligation to act in a certain way is the likelihood of suffering in the event of failure so to act.\footnote{Hart, 'Natural Rights: Bentham and John Stuart Mill', pp. 86–7.}

The principle of utility does not give rise to obligations because these are dependent upon the imposition of sanctions. Therefore, it is these sanctions which are the direct reasons for action, and utility is only indirectly a source of obligations when these can be given a utilitarian justification. Although Lyons is correct to point out that Bentham’s sanction theory of duties does not of itself give rise to an account of moral obligations, he is wrong in the contrast he attempts to draw between Bentham’s and Mill’s theory of obligation.\footnote{Lyons, ‘Mill’s Theory of Morality’, p. 111.} Both writers argue that to be under an obligation one must be liable to suffer punishment for the non-compliance with one’s duty. But just as Mill introduces the notion of justifiable constraints to give an account of moral obligation so it can be argued that Bentham would only accept an obligation as moral when it is justifiable in terms of the principle of utility. Thus for Bentham, one is under an obligation when one is liable to a sanction of punishment in case of the performance or non-performance of the specified action. An obligation becomes a moral when the reason for imposing the sanction has a particular utilitarian justification, such as when the obligation or right protects one of the basic conditions of interest formation, such as personal security. The identification of these particularly weighty utilitarian reasons will be dealt with in the next section, but it is sufficient to mention here that as in the case of Mill’s theory, these peculiarly weighty utilitarian reasons focus around the concepts of security and expectation. Bentham’s discussion of the moral sanction as a source of obligations can give a misleading impression. He did not mean to imply that there could be moral obligations independently of a sanctioning authority, he merely intended to identify a possible source of obligations, namely those derived from the conventional moral beliefs of the public at large. However, any system of conventional rules will give rise to expectation utilities, and therefore will have a presumptive justification, even though some other conceivable configuration of obligations and morally justifiable rules might give rise to a higher overall sum of utility. Indeed the function of the ‘Security-providing principle’\footnote{UC lxi. 47 and BL Add. MSS 33550. fo. 55.} within Bentham’s writings on Civil and Distributive Law was to identify a distribution of rights and principles which would be distributed or presupposed by a utilitarian code of law.

This indirect utilitarian interpretation of Bentham’s moral theory is closer in spirit to Bentham’s motto of the good citizen from A Fragment
on Government, 'To obey punctually: to censure freely.'\(^{46}\) This suggests that while the individual citizen is free to judge the system of laws according to the principle of utility, he ought nevertheless, to conform his actions to the requirements laid down by law. Also it does not require one to argue that the principle of utility is not a moral principle in Bentham's theory. In fact it is consistent with the general act-utilitarian theory attributed to Bentham by Postema, while acknowledging the essential role for strategies which rely on rule-governed social interaction. Bentham's employment of a sanction-based theory of obligation within an act-utilitarian framework shows two things. Firstly, that it is not necessary to construct an indirect utilitarian theory such as Lyons's version of Mill's theory of justice in order to make room for the concept of justice and moral rules. Given the correct input, namely the role of expectation in providing the conditions of personal continuity and coherence, it is possible for an act-utilitarian theory to yield stringent utilitarian strategies which can incorporate justice and rights. Therefore, it is unnecessary to argue that either writer abandoned the act-utilitarian requirement to maximize utility, which has been taken as a defining characteristic of classical utilitarianism, for the act-utilitarian theories of both writers are sufficiently flexible to incorporate indirect or rule-based strategies. Secondly, on this interpretation of Bentham's moral theory, it is clear that his act-utilitarianism can make sense of the concept of justice as can J. S. Mill's similar theory. There is no fundamental contrast between Mill's moral theory and account of justice, and that which can be derived from Bentham's Civil and Distributive Law writings. It remains to outline Bentham's theory of distributive justice, and how this compares to the better known theory of J. S. Mill.

II

Despite posing a fundamental contrast between Mill and Bentham on justice, it is interesting that Postema also identifies a number of passages where Bentham clearly ties justice to justified rules in the same way as Mill's rule or sanction-based theory.\(^{47}\) In his commonplace book, Bentham wrote: 'Justice is beneficence: in cases in which the non-performance of it is considered as punished or punishable by the force of one or other of the several sanctions: principally the political, including the legal, and moral or popular.'\(^{48}\) Here Bentham explicitly connects justice with those aspects of benevolence which can be


\(^{47}\) Postema, pp. 156–8.

\(^{48}\) Bowring, x. 511.
required as duties and for which sanctions can be imposed for non-compliance. In further passages from *Deontology* Bentham comes even closer to the Millian version, when he analyses the term justice in the following way:

In and by the employment given to the word justice two assumptions are implicitly contained: ... that by competent authority the general rule of action has been laid down; ... that whatever be meant by rectitude and propriety this rule is itself: ... a right and proper one.\(^a\)

And later he continues:

If then so it be that the rule thus exhibited in the character of maxim or dictate of justice is the same which on this occasion would be found to be a dictate or say precept from the greatest happiness principle, then ... the dictate or say precept ... may be said to be a dictate of justice.\(^b\)

Despite having located these passages in the course of his argument, Postema nevertheless claims that they do not affect his overall direct utilitarian interpretation of Bentham’s science of legislation, because such an analysis played no role in his theory, and therefore it was not an argument to which he attached much weight. In one sense Postema is quite right in his claim, in that there is no extended treatment of justice similar to Mill’s chapter five of *Utilitarianism*. Nevertheless, he is wrong in his assertion that no such analysis was employed by Bentham in his writings. Bentham did address the problem of distributive justice in terms of such an analysis, particularly in those writings on Civil or Distributive Law, where he was concerned with what configuration of rights a utilitarian legislator would want to distribute in the interests of maximizing social welfare. The two passages quoted earlier in which Bentham emphasized the value of expectation and expectation utilities are from his Civil Law writings, and show the sort of considerations the legislator or codifier would want to take into account in his deliberations, and why he should be interested in focusing attention on rules in the first instance. When any scholarly attention has been given to Bentham’s Civil Law writings, this has tended to concentrate on the analysis of Civil Law found in *Of Laws in General*. However, what is of greater interest from the perspective of defending the claim that Bentham had a theory of distributive justice are those principles of Civil Law which would underlie the distribution of rights and titles and which are presupposed in the specification of a utilitarian account of harms and offences. The character of these principles is discussed in a series of manuscripts written on the subject of Civil Law several times throughout Bentham’s career.\(^c\) None of the

\(^a\) *Deontology (CW)*, p. 308.
\(^b\) Ibid.
\(^c\) See UC c. 96-196; UC Ixi. 9-10, 19-21, 26-66, 83-97; and BL Add. MS 33550. fos. 48-144.
In his distribution of rights and obligations, the legislator, we already said, should have for his object the happiness of the body politic. In inquiring more particularly in what this consists, we find four subordinate objects—

Subsistence.
Abundance.
Equality.
Security.

... The more perfect the enjoyment of all these particulars, the greater the sum of social happiness, and especially of that happiness which depends upon the law. 52

Security and subsistence are the main conditions of individual welfare with which the legislator or codifier is concerned: security, because secured expectations are a condition of personal continuity and coherence; and subsistence, because this is the primary material condition of individual welfare. Subsistence is ordinarily obtained by maintaining security of expectations derived from property, thus providing a motive for the individual to engage in productive labour as a means of providing for his subsistence, and securing to him the proceeds of his labour. However, in certain extreme circumstances it might prove necessary for the legislator to provide the positive provision of the means of subsistence, and this fact has to be incorporated into his determination of rights and the scope of particular titles. Abundance and equality are social modifications of those components of welfare included under security and subsistence. Thus the legislator does most in the way of securing material abundance by securing property and removing impediments to productive and commercial activity. The above passage simply identifies the considerations that a utilitarian legislator ought to aim at in maximizing social welfare. As yet it is unclear that they are objects at the heart of Bentham’s theory of distributive justice and not simply general conditions which have a tendency to maximize utility. What is needed is to show that Bentham intended that these ends be achieved by means of a distribution of rights and titles, and that this distribution distinguishes between a general Humean requirement to maintain the existence of a stable social order, and the identification of a set of maximally beneficial social rules. That Bentham did not adopt the Humean strategy is clear.
from his express commitment to act-utilitarianism, even if that implies, as I argued in the previous section, the adoption of indirect strategies. There is, however, more substantial evidence that Bentham did not adopt such a conservative strategy. In his Civil Law writings Bentham identified two principles; the security-providing and the disappointment-preventing. The security-providing principle is described as a principle of justice which identifies the configuration of rights and titles and the consequent realm of security which the utilitarian legislator is concerned to distribute. Bentham emphasizes the connection between justice and security: 'To security alone has justice any direct application: to the security-providing principle.' In the case of the disappointment-preventing principle, Bentham describes it as 'A modification of the security-providing principle, applying to security in respect of all modifications of the matter of property', and later he writes: 'Disappointment preventing principle. This is a modification of the security-providing principle. The use of it is to convey intimation of the reason for whatever arrangements come to be made for affording security in respect of property and the other modifications of the matter of prosperity, considered with a view to the individual possessors.' Of these two principles, the latter has been most discussed in Bentham scholarship. However, without the former principle it is not possible to appreciate fully Bentham’s theory of distributive justice. The former principle identifies a realm of personal inviolability which gives rise to those fixed expectations on which individual conceptions of welfare are premised. Any interference with these basic conditions of welfare gives rise to one of the four classes of harm which are at the source of Bentham’s division of offences. The avoidance of these harms or offences serves as the premiss for the distribution of rights prescribed by the security-providing principle, and it is these rights which give rise to the most important class of fixed expectations, which in turn provides the utilitarian justification of those rights. This realm of personal inviolability determined by the security-providing principle is constituted by rights to protection against interference with person, possessions, beneficial condition in life and reputation. The

54 UC lxi. 47.
55 Bowring, ii. 213.
56 BL Add. MS 33,550. fo. 57, and 143.
security-providing principle can thus be interpreted as a harm principle, identifying that realm of activity which is important enough to warrant the protection afforded by rights and their consequent sanctions. However, while the utilitarian legislator may have good act-utilitarian reasons for the distribution of these rights in the construction of a utilitarian code of law, it is equally clear that in practice many of these sources of individual welfare will either not obtain or do so only imperfectly. Thus rights in a given legal system might fail to protect beneficial condition in life, or imperfectly protect reputation. Similarly, though the distribution of secured property rights is a key component of a justifiable system of social rules, in practice the given distribution of property might give rise to a lesser sum of utility than a particular patterned redistribution of property and wealth. This raises the important question of how Bentham proposed to reconcile his ideal or justified system of rules with those already obtaining. Bentham acknowledged that any particular system of expectations will give rise to real expectation utilities and that these have a presumptive justification against any merely hypothetical configurations of rights and titles. Any interference with the given system of social rules will give rise to real disutilities derived from disappointed expectations, and this gives rise to an apparent tension between the explanatory and critical aspects of the principle of utility. As an explanatory principle, the principle of utility provides a presumptive justification for many social rules and practices which as a critical principle it suggests ought to be reformed. Bentham was fully aware of this tension between the explanatory and critical implications of his utilitarian theory, and aimed to reconcile them by means of the other component of his theory of justice, the disappointment-preventing principle. This principle prescribes strategies by which the distribution of rules and rights identified by the security-providing principle can be realized, but which, nevertheless, minimize the overall disruption of the existing pattern of expectations. In the context of institutional reform and the abolition of sinecures and other superfluous offices this involves the use of compensation. Thus Bentham wrote: 'The loss by the abolition of places for life can no otherwise be compensated than by the grant of pensions of at least equal value. But what is more neither can places said to be held during pleasure be compensated on terms any thing if at all inferior.' In this way the office can be abolished while those whose expectations are derived from pecuniary gain can be maintained. In this way the reform does not appear as an attack on property or an example of levelling, and thus, the destabilizing consequences of such reforms on expectations arising from interference with property rights is minimized. However, Bentham does not confine the application of

\textsuperscript{59} UC c. 186.
such strategies to the field of constitutional reform. The distribution of property and wealth in society can be equalized by modifications of the law of inheritance, for example enabling women to enjoy equality of rights with respect to bequests. Bentham thought that reforming the law of inheritance was one way of breaking up large inherited property holdings over time, and would lead to the gradual equalization of wealth.\(^{60}\)

It has only been possible to give the briefest of outlines of Bentham's theory of justice in this section, and much more needs to be said to defend it adequately. Nevertheless, enough has been said to provide a useful comparison with the better known theory of J. S. Mill. There are a number of obvious features which are shared by the theories of both Bentham and Mill. The most obvious is the identification of security, which Mill describes in Benthamite fashion, as the most vital of all interests:

... security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment; ... Now this indispensable of all necessaries, after physical nutriment, cannot be had, unless the machinery for providing it is kept uninterruptedly in active play. Our notion, therefore, of the claim we have on our fellow-creatures to join in making safe for us the very groundwork of our existence, gathers feelings round it so much more intense than those concerned in any of the more common cases of utility.\(^{61}\)

This passage clearly mirrors Bentham's concern with security as the most important component of individual and social welfare. However, both theories share a number of formal features. They both employ a sanction-based account of the obligations of justice and, therefore acknowledge the importance of rule-governed social interaction. There is even scope for arguing that both theories employ a conception of moral rights. Mill does so unequivocally in chapter five of Utilitarianism, but even though Bentham remained hostile to the language of moral or natural rights,\(^{62}\) much of the substantive position is captured in his notion of securities derived from the principle of utility.\(^{63}\)

Despite these important similarities there is one equally important formal dissimilarity, and this derives from Mill's concern

\(^{60}\) UC clx. 169–70.

\(^{61}\) Essays on Ethics, Religion and Society, CW, x. 251.

\(^{62}\) For an interesting discussion of Mill and Bentham on moral rights see L. W. Sumner, The Moral Foundation of Rights, Oxford, 1987, p. 140. Sumner argues that Bentham's resolute hostility to using the language of rights for those ideal legal and conventional rights which could be given a utilitarian justification can be traced to Bentham's hostility to the French Revolution, and the shadow that those events cast over his generation. The spectre of the French Revolution and the Terror had considerably receded by the time that Mill wrote Utilitarianism, two generations later.

\(^{63}\) Bentham's employment of the concept of a security enables him to avoid some of the problems that Hart raises for an account of moral rights within the utilitarian theories of Bentham and Mill. See Hart, ‘Natural Rights: Bentham and John Stuart Mill’, pp. 79–104. Firstly, by abandoning the language of moral rights, Bentham is able to avoid the
with one aspect of the theory of justice. The dissimilarity arises from a consideration of how the ideal set of justifiable social rules and rights ought to be introduced in practice. Mill appears to acknowledge the importance of expectations as the key to explaining the value attached to moral obligation and justice in the following passage:

The moral rules which forbid mankind to hurt one another (in which we must never forget to include wrongful interference with each other’s freedom) are more vital to human well-being than any maximum, however, important, which only point out the best mode of managing some department of human affairs. They have also the peculiarity, that they are the main element in determining the whole of the social feelings of mankind. It is their observance which alone presupposes peace among human beings: if obedience to them were not the rule, and disobedience the exception, every one would see in every one else a probable enemy.44

However, Mill’s discussion of justice does not appear to take account of the disutility arising from attempts to institute any hypothetical set of justifiable ideal rules. There is nothing in Mill’s discussion which resembles Bentham’s account of distributive justice in terms of the security-providing and the disappointment-preventing principles. Bentham’s theory of justice may be incomplete and inadequately defended; nevertheless, it does provide an account not only of what justice is but also why it remains an important feature of an adequate utilitarian theory.

One possible reason for this omission in Mill’s theory is that he devotes more of his attention to explaining and defending one particular aspect of the utilitarian good which comes under the theory of justice, that is the doctrine of liberty. It is not implausible to see the argument of On Liberty as an extended discussion of one particular aspect of the theory of justice. Although Mill identifies a harm principle which demarcates a sphere of personal inviolability, much of difficulties that arise from Mill’s analysis of moral rights as a reason for the creation of a conventional moral or legal right. The problem with such a position is that it precludes the claim that someone has a moral right to x from serving as a ground for a legal right, for this would mean that if the having of a moral right already means that there is a reason for there being a conventional legal or moral right, then the claim that x has a moral right is not itself serving as a reason for there being such a conventional right. This sort of problem can be avoided by adopting a realist methodology where all rights are features of conventional rule systems, and employing the concept of a security to refer to those particularly weighty considerations which may not feature within a given conventional configuration of rights, but which on the grounds of utility ought to be included. Secondly, Bentham’s use of the concept of a security enables him to identify a particular set of considerations that ought to be incorporated within the configuration of rights and titles. In the Civil Law writings Bentham uses securities to demarcate a basic realm of personal inviolability which in turn provides the conditions of interest formation and the conditions of personal continuity and coherence. In this way the sort of considerations incorporated in a utilitarian theory of justified legal or conventional rights are able to provide peremptory near stringent constraints on direct appeals to the principle of utility, and they are precisely the sort of considerations which, according to Hart, must be at the root of an adequate notion of moral rights.

44 Essays on Ethics, Religion and Society, CW, x. 255.
the discussion is centred on the value of liberty in terms of personal
development and self-culture. Mill does not simply identify liberty as a
condition of maximizing individual welfare. Although liberty is firmly
connected with general well-being, the connection is made through the
means of personal moral development. Further, because personal
development and self-culture are such essential components of Mills’
doctrine of liberty, Mill acknowledges that the extension of the
conditions of liberty are only appropriate when a society has suffi-
ciently established individual moral development and self-culture as
conditions of further social progress. While none of this denies the
importance of the formal and legal conditions of liberty in Mill’s
theory of justice it does mean that Mill does not address the political
question of how these formal legal conditions of liberty can be
distributed in a way that is sensitive to expectations that are derived
from any existing system of rights and titles. Mill’s emphasis on the
doctrine of liberty within his theory of justice is in keeping with the
importance that he attached to the advocacy of self-culture and
encouragement of personal moral development within an adequate
utilitarian moral theory. It is in this area of Mill’s thought that it is
easiest to identify Mill’s non-Benthamic influences, and it is on this
that most of the familiar discussions of the fundamental differences
between Bentham and J. S. Mill focus. Given all of this, it is not
surprising that Mill should combine the formal defence of a utilitarian
theory of justice with a perfectionist doctrine of the good. Bentham on
the other hand was contemptuous of advocates of a morality of
personal development and self-culture which made appeal to a substan-
tive conception of human flourishing, which he saw as a pernicious
disguise for the furtherance of sinister interests. Bentham was more
concerned with freeing individuals from the dead hand of traditional
conventional moralities, and liberating the diversity of human poten-
tial by concentrating his attention on the distribution of the formal
and legal conditions of individual and social welfare which are neutral
between the various substantive conceptions of individual interest.
Therefore, Bentham’s theory of justice falls within that branch of the
liberal tradition that is neutral between individual conceptions of the
good. Mill on the other hand, because of his commitment to a eudaimon-
istic conception of personal moral progress, fits more neatly into the
perfectionist branch of the liberal tradition. This yields the uncontro-
versial conclusion that it is this difference of perspective with regard
to personal moral development which explains any fundamental dif-
fences between the theories of Bentham and Mill, and not any formal
differences concerning the role of rule-governed social interaction
within an adequate utilitarian theory or the account of obligation at
the root of their theories of justice.