



# **Is there a (tenable) utilitarian foundation for justice and rights?**

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### Acknowledgement

The utilitarian, alias the slave moralist or the *persona non grata* of moral philosophy...But, in economics, there is a more welcoming perception of utilitarianism. This is partly because, as Rothschild finely puts, "... [T]he basic idea of utilitarianism in all its variations is relatively simple and plausible, and it is this basic idea which permeates economic thinking..." (1993, p.7). Prior to my training in philosophy, as an undergraduate in economics, I was aware of this clash of views between economic ethicists and moral philosophers, but only after my encounter with philosophy I know it also by experience.

My motivation to write this thesis was to systematically take up the issues concerning the utilitarian shortcomings in the areas of moral rights and justice, and consider the possibility of the utilitarian restoration of the issues regarding justice, freedom and rights. I am glad that **Dr. Bart Engelen** appreciated my motivation and accepted to become my promoter. I would like to express my special thanks, first and foremost, to him for his support, advice on thesis progress, reviewing, providing valuable discussions and comments that helped to improve the overall quality of my thesis.

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Dedicated to the memories of my grandmothers

**Fatma Özen** (1928 – 2009)

**Hamide Kanpak** (1915 – 2003)

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### **Introduction: situating the problem**

Utilitarianism is a normative theory of ethics. It asserts that the right course of action is the one that maximizes ‘utility’, classically formulated as maximizing pleasure or happiness and minimizing suffering. It should be noted that classical utilitarianism consists of a hedonistic construal of ‘utility’ (for a brief account on this, see Section 1.4). There has been a longstanding ambiguity over the meaning and the use of the term ‘utility’. Unfortunately, limitations of space prevent me from addressing this complex issue at length. Nevertheless let me add the following note on the terminological usage. Utility is an ethical term of diverse meanings. So, the apparent failure to propose a strict definition of utility need not make the term suspect or vulnerable to unwarranted usage. British philosophers like David Hume (1711- 1776), Jeremy Bentham (1748- 1832) and John Stuart Mill (1806- 1873) were instrumental in tailoring the notion of utility to embody a distinct moral dimension. In their works, the meaning of utility is not only specialized to a particular sort of usefulness (Broome, 1991, p.1), but also transforms into a principle of a reflective, normative attitude which is binding for all rational beings. The early utilitarians used the term utility to refer to the tendency of an object to produce pleasure or happiness<sup>1</sup> or to prevent the occurrence of pain or unhappiness (Bentham, 1970 [1789], pp. 11-12). According to the legal scholar and philosopher John Finnis, late utilitarians, dissatisfied with Bentham’s hedonic ethics, adopted a different strategy: “...postulate some good as the human good and then seek to identify the act which will maximize that good; that act is...the act of greatest utility and... the right act”. In this way, the term was narrowed down to a purely formal concept of that which ought to be maximized (1983, p. 81).<sup>2</sup>

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<sup>1</sup> According to Kelly (1990), Bentham used the word happiness as a synonym for pleasure, but also as “an achievement word signifying the attainment of pleasure within a given period of time.” (p.25).

<sup>2</sup>In an attempt to reduce the terminological and semantic complexities, Sen proposes what he labels as the vector view according to which utilitarian reductionisms into a single kind are abandoned by recognizing the utilities of diverse components ( like pleasure, desire and happiness) and the possibility of weighing them differently. More precisely, viewing utility as a vector enables us, for instance, to distinguish desire among other kinds or even to make further discriminations such as desiring as one thing and having a particular desire fulfilled as another. Thus we can have a vector view of utility within that particular interpretation of utility as desire fulfillment (1980, pp.193-194).

In this work, I will use the word utility in the following senses only. I will use utility to refer to that which represents the level of individual/social welfare or that which contributes positively to the common good.<sup>3</sup> Additionally the terms ‘general utility’, ‘social utility’ and ‘public utility’ will refer to the same thing. It now becomes worthwhile to stress that utilitarianism is a kind of ‘teleological’ (or consequentialist) theory. It judges actions based on their overall effects or consequences. In teleological theories, making the distinction between the good and the right is important in order to determine the moral worth of actions. In teleological theories, goodness is conceived as a property of states of affairs and rightness as a property of actions. And the good always has conceptual priority over the right. This implies that the teleological ethicist first of all considers the states of affairs in question, and then determines the value of a certain action from the value of the state of affairs it leads to (Broome, 1991, p.3). According to Joel Feinberg, “utilitarian moral philosophers are those who have insisted on paying rightness the authentic tribute that it necessarily does good, or has ‘utility’” (1967, p.368). This aspect of utilitarianism should be kept in mind for our later discussions about whether a utilitarian can appeal to something other than consequences, or is solely concerned with them. Utilitarianism as a form of teleological ethics is often contrasted to deontological ethics which emphasizes the notion of duty or moral obligation as the sole determining factor in assessing an act's worth. Modern theories of justice build on either utilitarianism or deontological ethics. Rawls, for instance, presents his ‘two principles of justice’ as a version of Kantian deontology which singles out not efficiency, maximum welfare or social utility, but justice as the ultimate criterion for the justification of the distributive aspects of the basic structure of society. He remarks: “...[L]aws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override” (Rawls, 1999, [1971], p.3 cited in Peter, 2009, p. 2).

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<sup>3</sup> By utility, utilitarians refer also to the utility principle: the greatest amount of goodness for the greatest number of people.

Now let me turn to the main business of this work. In what follows, I shall examine the so-called tension between utilitarianism, rights and justice, in particular ‘distributive justice’. Again, let me first add a note concerning the terminological usage. Throughout Chapter 1, when the term ‘rights’ is mentioned, I refer to basic human rights such as the right to life, the right to bodily integrity, the right to freedom of speech, etc. The reader will find an explication of different notions of rights and their functions in Section 2.1., I shall employ the term ‘distributive justice’ to refer to that which concerns the fairness of the distribution of benefits and burdens, i.e., socially just allocation where members of the society are guaranteed basic human rights and freedoms and have equal access to basic materials and social means (e.g., housing, education, health care, guarantee for minimum livelihood, etc.) in the extended sense in order to lead flourishing lives (Wright, 2010, p. 12). The reader should notice that one of the major functions of distributive justice is to express and maintain value for individual persons in addition to its ultimate concern about the promotion of wellbeing and happiness (Raphael, 1972, p. 99). Another point that is important to mention is that the notion of equality, as Mill claims, “...enters as a component part both into the conception of justice and into the practice of it, and, in the eyes of many, it constitutes the essence of justice” (1972, [1861], p. 42). Sen, in agreement with Mill, claims that since every theory of justice is committed to the equality of something, one of the crucial questions to ask, when discussing distributive justice, is the equality of what (1992, p. 21 cited in Su, 2005, p. 3). Rawls’s ‘two principles’, for instance, characterize equality in terms of primary social goods which consists of basic liberties, income and wealth, equal rights and opportunities to the powers and prerogatives related to positions of responsibility in the political and economic institutions of the basic structure and the social bases of self respect. We shall see that there are different ways a utilitarian can address the question of equality.

As to the crux of the problem, utilitarianism has been excoriated for its inadequate addressing of the issues of distributive justice. The reason can be expressed as follows. In their moral assessment of the state of affairs utilitarians add up the utilities of different people and then rank utility vectors on the basis of the total utilities obtained in them. Essentially, their utility calculus is unconnected to other matters.

Put differently, utilitarianism first and foremost concerns itself with the maximization of aggregate wellbeing, or social utility, and seems to operate independently of distributive principles. According to Rawls, as a consequence of this feature of utilitarianism, "...there is no reason in principle why the greater gains of some should not compensate for the lesser losses of the others; or more importantly, why the violation of the liberty of a few might not be made right by the greater good shared by many" (1999, [1971], p. 23 cited in Su, 2013, p. 113). Sen refers to this crucial limitation in the standard utilitarian perspective as distributional indifference (1999, p. 62). We will have more to say on this problem in Sections 1.6 and 1.7, but, nevertheless let me provide an introductory note setting out the issue. According to the criticism, there is always a tradeoff between justice and utility, i.e., the utilitarian axiom of maximization. But I argue that this is not necessarily so; because utilitarianism can be formulated as requiring that (1) one should maximize the good, but also (2) one should bring about the best state of affairs. Both requirements are forms of utility maximization, but they need not lead to the same thing. "(1)" entails that the utilitarian should maximize wellbeing and there is no space left for distributive justice. "(2)" on the other hand, does not entail that we should always maximize wellbeing, i.e., bring about the best state of affairs with the greatest amount of wellbeing for the greatest number of people. For utilitarians, wellbeing is certainly a valuable good to be maximized--However, the best states of affairs are not always the ones in which the sum total of wellbeing is maximized. The best states of affairs might be the ones in which the wellbeing is distributed justly. 'The axiom of maximization of utility' requires that the utilitarian should bring about the best state of affairs, but it suggests nothing specifically about the nature or the content of the best state of affairs. In other words, the utilitarian need not be solely committed to the maximization of the sum total of wellbeing, for utilitarianism requires only that one should bring about the best state of affairs. Thus, pace the widely expressed criticism, the concept of distributive justice does not necessarily conflict with the utility principle (Schroth, 2008, pp. 137-138).

Of course, the problem cannot be handled that easily. A mere utilitarian commitment to distributive justice is not enough. We also need a discussion on the principles that actually determine how goods have to be distributed. One might decide to distribute goods according to what is in the best interests of individual(s) (see Section 1.5); the difference principle; the average utility principle (see Section 1.6); the Pareto criterion (see Section 1.7); or some other distributive norm such as equality of opportunity (see Section 2.2.3). Each principle is dedicated to the achievement of a certain social goal. And these principles are sometimes in conflict and sometimes do coincide with one another. We shall see how utilitarians can address the issues over such distributive patterns.

To recap, the main goal of this work is to address the following criticisms (1) Individuals often come across situations where the principle of utility may favor acts which are questionable on the grounds of justice. (2) Utilitarian considerations fail to accommodate the existence of institutional (political-legal) and moral rights. (3) Utilitarianism as such is devoid of efficient means to address the demands of distributive justice. According to the critics, as I just mentioned above, utilitarianism in its standard forms relies on consequences, happiness, pleasure or aggregate welfare as sole criteria, and in deciding what is right gives no due attention to other at least equally significant objects of moral assessment, such as autonomy, individual rights, distributive justice, equality of opportunity, etc. As Raphael finely puts, “[m]ost of us find an immediate attraction in utilitarianism. [However] if we are later convinced that it does not account satisfactorily for the concept of justice, we are not quite sure which way to go” (1972, p. 87). The aim of this work is to expose the utilitarian foundation of rights and justice and to find a sound way to overcome the problems utilitarianism has when accounting for justice and rights. I argue that utilitarianism has to be constructed in a way that is consistent with its central concern, which is the promotion of human good or welfare, but at the same, it has to conjoin the principle of utility with a pluralist set of contributory principles and values of moral salience in order to effectively address the issues of rights and justice.

To achieve this, I employ the indirect utilitarian approach. ‘Indirect utilitarianism’ is a revisionary view of Mill's ethics and political philosophy of moral (human) rights and liberties formulated by British philosopher John Gray (1983).

The present work proceeds as follows. The first chapter is devoted to a systematic analysis of utilitarian systems and principles and their strengths and weaknesses with respect to the issues of rights and justice. The second chapter (Section 2.1) begins with a conceptual analysis of rights and their connection to justice and social utility or welfare. In Section 2.2.1, I introduce the indirect utilitarian view and attempt to give an indirect utilitarian justification of fundamental rights. Section 2.2.2 addresses further questions and highlights further issues concerning indirect utilitarianism. In Section 2.2.3, in order to concretize my argument I extend the indirect utilitarian reasoning to the issues of distributive justice. In the final chapter, I point out the similarities between Rawlsian (or rights-based) and indirect utilitarian accounts of justice. The paper then ends with a conclusion.

## 1 Analyzing utilitarian systems and principles in the face of criticisms

### 1.1 Act utilitarianism

Utilitarianism exhibits a variety of formulations to suit different purposes and to accommodate criticisms. However, in this work, I want to limit our discussion to most general formulations of utilitarian ethics. Let us begin with ‘act utilitarianism’ (AU). AU is the application of the principle of utility to actions. It posits that the rightness of a certain action depends on the production of goodness. Or to formulate alternatively as follows:

**AU.** An act is morally right if and only if the consequence of that action results in the greatest utility<sup>4</sup>, that is, the total amount of good minus the total amount of bad resulting from the act creates a net good (Sinnott-Armstrong, 2012).

Now, let us move on to the common criticism of this theory based on considerations concerning rights. Let me call it ‘the argument from the justification of acts that permit the subjugation of individual rights and liberties for the sake of utility maximization’. In her 1985 paper *The Trolley Problem*, the philosopher Judith Jarvis Thomson presents the argument with the help of a stylized example called ‘Transplant’. In brief, there is a very skillful surgeon who has five patients. Each suffers a certain organ failure. Two suffer from lung failure (each needs one lung), and one from heart failure and two from kidney failure (each needs one kidney). He must provide the parts patients need as soon as possible. Otherwise they will die very soon.

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<sup>4</sup> Some employ the term goodness, welfare or wellbeing in formulating. I have to admit that it is not that easy to overcome this widespread ambiguity in formulation with respect to utilitarian theories. Let me hereby add another note concerning the terminology. Although the term goodness certainly has a broader meaning; in this work, to avoid any semantic opacity the terms benefit, wellbeing and welfare shall come under the umbrella of goodness and will sometimes be employed synonymously.

At the critical moment, the surgeon becomes aware of a young healthy man who comes into the hospital for his yearly check-up. His blood and tissue type match the patients'. In other words, he is the right donor. Now, if the surgeon follows the act utilitarian's advice (i.e., if he complies with the act utilitarian principle: maximize the benefit or general interest) he may agree to cut the young man up and distribute his parts among the five who need them urgently - even without the young man's consent. After all, there is a greater aggregate benefit to commit such an act: five weigh more than one. According to the act utilitarian, the surgeon 'should' operate on the young man, obviously causing the young man's death in return for saving his five patients. But are there no other alternatives from which to choose? Or are we always confined to 'act or not act in any given situation'? According to Palmer and Lucey , "...oversimplifications are often couched in hypothetical contexts that pretend to show that they are the only alternative possibilities" (1992, p. 61). According to the authors such arguments signal the fallacies involved in the traditional criticisms of utilitarianism (Palmer & Lucey, 1992). But for the sake of the argument, let us assume that there are other alternatives --we do not need to specify them. And say none of them is as good an alternative as 'cutting the young man up and distributing his parts among the five patients' in terms of maximizing the aggregate wellbeing. Then the transplant case apparently plagues act utilitarianism on the ground that it is unable to account for rights. The reason why act utilitarianism is notoriously insensitive to rights like this is explained by Lyons as follows (2000):

"Act utilitarianism applies directly to particular acts as performed by particular individuals on particular occasions. It directly evaluates conduct, and only conduct, from a moral point of view. It does not directly evaluate other things that are also subjected to moral appraisal, such as laws, character traits, or moral attitudes, even though these are usually assumed to have utilities. Act utilitarianism takes account of those other utilities indirectly, by considering the effects of conduct on laws, traits, and attitudes and the effects of law, traits, and attitudes on conduct" (p. 106).

## 1.2 Rule utilitarianism

According to Lyons, rule utilitarianism (RU) was formulated as a reply to the criticisms of act utilitarianism. He explains this as follows: “The post-war period brought with it a new utilitarianism. This has been called *modified, restricted, indirect*, utilitarianism and, increasingly, *rule-utilitarianism*. The principal idea has been to apply the test of utility, not to the effects of an act itself, but rather to its tendency<sup>5</sup> or to a rule under which the act falls” (1965, p.11). Lyons conceives of rule utilitarianism as an attempt to set a compromise between utilitarian and ‘non-utilitarian’ elements of morality (2000, p.107). According to Frankena, rule utilitarianism points out people’s proneness, in most times, to appeal to rules in practical situations rather than to examine the range of alternative actions from which to choose (1973, *Chp. 3*). In fact, this point implies that rule utilitarianism offers a psychological insight into how most people make ethical decisions in addition to a criterion of what ought to be done (Raphael, 1972, p. 103). Some claim that rule utilitarianism is as old as act utilitarianism or an even older position. Let me provide the brief history. It has been argued that George Berkeley was the first philosopher with explicit rule-utilitarian tendencies. He wrote, “In framing the general laws of nature, it is granted we must be entirely guided by the public good of mankind, but not in the ordinary moral actions of our lives... The rule is framed with respect to the good of mankind; but our practice must be always shaped immediately by the rule.” (Berkeley 1712, section 31 cited in Hooker, 2011). Some even go so far as to call Plato a ‘utilitarian’ of this type. According to Robin Barrow (1975), Plato in his *Republic* seeks the right institutional arrangements and rules to guarantee a cooperative peaceful community, i.e., the greatest goodness of the city as a whole (cited in Creed, 1978, pp. 349-350).

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<sup>5</sup>By ‘tendency of an act’ Lyons (1965) refers to “the effects of everyone’s doing the same sort of thing” (p.3).

And regarding John Stuart Mill, not everyone agrees on a rule utilitarian interpretation of his ethics<sup>6</sup> (we shall briefly touch upon the interpretative issues with respect to Mill's ethics later in Section 2.2.1). Leaving those discussions behind let me now provide the reader with the standard formulation of rule utilitarianism (RU).

**RU.** "An act is morally right if and only if it conforms to a set of rules *general conformity* to which would maximize utility" (Lyons, 1965, p. 137).

It is clear that the rules that a rule utilitarian conforms to must satisfy the principle of utility. But what can be said about the utility-promoting effect of rules? This question points to the notion of 'test of efficacy' and to different subtypes of rule utilitarianism. Lyons (1965)<sup>7</sup> and Sumner (1987) mention three tests of efficacy of a system of rules which express an increasing degree of endorsement to rules.

(1) 'The condition of conformity'. In order to conform to a rule, one needs not to have an explicit opinion as to the legitimacy and the scope of the rule. This is the minimal condition of a rule's efficacy.

(2) 'The condition of compliance'. Compliance entails conformity but it requires more with respect to one's reasons for committing to a particular rule. Compliance requires one's awareness of the rule and implies only a weak reliance on the rule in the conduct of one's life. This is the more-than minimal condition of a rule's efficacy.

(3) 'The condition of acceptance'. Acceptance entails both compliance and conformity but it requires more with respect to one's reasons for committing to a particular rule. Acceptance requires one to endorse the rule, and this endorsement of the rule plays a strong motivational role in one's conduct. This is the maximal condition of a rule's efficacy (Sumner, 1987, pp. 62-65).

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<sup>6</sup>For a detailed discussion of the above issues, see Urmson 1953; Crisp 1997, 102–33 cited in Hooker's *Rule Consequentialism*, The Stanford Encyclopedia of Philosophy, 2011.

<sup>7</sup> See his 1965 *Forms and Limits of Utilitarianism*, Chapter Rule-Utilitarianism, pp. 136-140 in particular.

The third condition suggests a certain variant of rule utilitarian theory called ‘ideal-rule utilitarianism’ (IRU) which aims at drafting ideal rules/prescriptions for the members of the community to follow.

**IRU.** “An act is right if and only if it conforms to an ideal set of rules *general acceptance* of which would maximize utility” (Lyons, 1965, p.136).

RU is contrasted with ‘actual-rule-utilitarianism’ (ARU) which can be formulated as follows:

**ARU.** “An action is right if it conforms to the established rules or prevailing moral rules...acceptance...of which is conducive to the greatest general good [interest] or at least a necessary condition of it” (Frankena, 1973, Chp. 3).

Now I want to consider some of the common criticisms of this position. A stylized example can help here. Suppose that there is a rule *R* which legalizes the genocide of a minority group on the grounds that its acceptance would serve the interests of the majority. A rule utilitarian may endorse *R*, because if it were generally obeyed, then it could improve the welfare of the society as a whole. Critics who give priority to basic rights and freedoms rather than to the direct application of utility principle claim that utilitarianism of this type cannot overcome such blatant violations of rights. According to Palmer and Lucey (1992) again, “the fallacious assumption seems to be that there are only two alternative arrangements-[genocidal policy or the *status quo*]. This is, of course, mistaken.” (p. 60). The authors argue that ‘the site of the social’<sup>8</sup> is more complex than such simplistic backgrounds and certainly offers far more feasible alternatives from which to choose. However, the crucial problem is not really about having the right alternatives but about the rule utilitarian’s failure, in evaluating alternatives in terms of utility, to recognize the wrongness of ‘exterminating the minority’ as such. The rule utilitarian can only exclude such an alternative as long as there are morally better -- i.e., uncontroversial--alternatives. Basically, nothing limits the rule utilitarian from not counting ‘exterminating the minority’ as a possible alternative.

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<sup>8</sup>I borrow this notion from Theodore R. Schatzki (See his *A New Societist Social Ontology*, Philosophy of the Social Sciences, 2003, Vol. 33, No. 2, pp. 174-202).

J. J. C. Smart (1956) goes on to a more structural criticism of rule utilitarianism from the act utilitarian perspective:

“...Is it not monstrous to suppose that if we have worked out the consequences and if we have perfect faith in the impartiality of our calculation, and if we know that in [the] instance to break [normally a reliable and useful rule] will have better results than to keep it, we should nevertheless obey the rule? Is it not to erect [that rule in question] in to a sort of idol if we keep it when breaking it will prevent, say, some avoidable misery? Is not this a form of superstitious rule-worship?” (pp. 348-349).

Smart’s criticism reminds us that rules are not always perfect substitutes for moral inquiry. And he is right about that. But what if we narrow the terrain down to a short, manageable collection of rules (rules, in particular, that are concerned with conduct that should be wrong at all times)? Do we not need such rules binding for all human beings? Consider rules with respect to genocide and racial segregation for instance. Or, more relevant to our discussion, consider rules that prevent the transplant like cases. No doubt, rules cannot replace the moral inquiry entirely, but still have their place in morality.

At this point, I suggest returning to the transplant argument for a moment. Can RU avoid the problem represented by the transplant case? If the rule utilitarian, were somehow able to endorse the following dictum of Mill “Over himself, over his own body and mind, the individual is sovereign” for instance (1972, [1861], p. 73), then the problem might be avoided. But why should the rule utilitarian accept such a rule in first place? Like the act utilitarian, the rule utilitarian is concerned primarily with the sum total of individual utilities of all members of a society, i.e., the general interest. Whether Mill’s dictum is to be considered an acceptable normative guiding principle or not is to be decided ultimately by considering the consequences of adopting such a rule, i.e., by taking into account the aggregate interests of the community. And within the rule utilitarian framework there can be some instances, exceptional circumstances in which rules might better be broken, in the interest of the production of the greatest good. For instance, within the rule utilitarian framework, under certain circumstances, the appeal to the general interest might outweigh the rule of respect for bodily integrity concerning particular individuals. Then we can safely conclude that the transplant like cases cannot always be avoided within the rule utilitarian framework.

Before I conclude this section I would like to add a final remark. Rule utilitarianism, in all its formulations, places emphasis on the notion of rule in moral reasoning; however according to Frankena (1973, Chp. 3), in order to make its normative ethics complete the RU must provide us with some set of rules or rigid criteria that fulfill its stated requirements. Some critics think that such a framing is not conceptually possible (for more on this, see the next section).

### 1.3 The extensional equivalence thesis

Is rule utilitarianism a tenable theory? According to Lyons (1965), if we consider all the relevant factors in any given case, we will come to notice the extensional equivalence of act and rule utilitarian theories. In other words, it is inevitable that rule utilitarianism collapses into act utilitarianism. Lyons in his 1965 *Forms and Limits of Utilitarianism*, argues at length for the extensional equivalence of the two theories. Smart briefly exposes what Lyons conceives to be problematic about rule utilitarianism as follows:

“Suppose that *an exception to a rule R* produces the best possible consequences. Then this is evidence that the rule R should be modified so as to allow this exception. Thus we get *a new rule of the form ‘do R except in circumstances of the sort C’*. That is, whatever would lead the act utilitarian to break a rule would lead the...rule utilitarian to modify the rule. Thus...rule utilitarianism would be extensionally equivalent to act utilitarianism” (Smart, 1973, pp. 10-11).

But, as I mentioned above, what if we did successfully narrow the terrain down to a short, manageable collection of rules which would permit no exception whatsoever, would the equivalence thesis still hold? No, but in that case rule utilitarianism would stop appealing to ‘consequences’ and yield a commitment to acting on some moral imperative.

Some might claim that this is not a form of utilitarianism at all, but a sort of neo-Kantianism which prescribes: Act according to precepts which it would be good to universalize. (Allison, 1990, p. 12). Mill would interpret this as an anti-utilitarian prejudice, for he says in *Utilitarianism*:

“When Kant...propounds as the fundamental principle of morals, ‘So act, that thy rule of conduct might be adopted as a law by all rational beings’, he virtually acknowledges that the interest of mankind collectively...must be in the mind of the agent when...deciding on the morality of the act...[Thus] to give any meaning to Kant’s principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings must adopt *with benefit to their collective interest.*” (1972, [1861], p. 49; original emphasis).

The above passage can be viewed as Mill’s attempt either (1) to read utilitarianism into Kantianism (deontology), or (2) just to accentuate the common ground, rather than the discrepancies of the two traditionally rival theories. (In Chapter 3 we will draw on what utilitarianism and deontology have in common more systematically with the aim of addressing the challenge of formulating a tenable utilitarian theory).

#### 1.4 Hedonic utilitarianism

In this section, I shall very briefly consider a common criticism of hedonic utilitarianism based on considerations concerning rights. Above we have defined act-utilitarianism in non-hedonic terms as follows: an act is morally right if and only if the consequence of that action results in the greatest goodness. According to the hedonic utilitarian in judging the goodness and badness of the consequences of a particular act pleasure and pain are the sole criteria, i.e., the only good is pleasure and the only bad is pain. This is the form of utilitarianism Bentham defends. He says: “Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we *ought to do...*” (Bentham, 1789, *Chp. 1*). The controversy of this theory is due to its limited content of good: The only good is pleasure and the only bad is pain.

Let me provide the reader with Kraut's (2007) vivid account of the classic knockdown argument against hedonic utilitarianism on the basis of its subjugation of rights:

"...Consider someone whose sole sexual pleasure is rape, and who spends much of his time planning and carrying out sexual assaults. Is it good for him to succeed because when he does so he feels pleasure?"(p. 167).

Now let us further assume that,

"...the pleasures of the rapist are no less intense than any other kind of sexual pleasure. Then [the hedonic utilitarian] *ought* to say that, for one's own good, one should put rape on the menu of sexual encounters that one has. Such a rapist would have no hostility towards his victims: he would rape as a matter of principle...Of course a utilitarian hedonist would take into account the great harm done to those who are raped. But he would have to say that it would be to everyone's advantage to engage in rape to some degree- if one could get away with it" (*Ibid.* p. 168)

In other words, following the dictate of 'the master pleasure', the hedonic utilitarian must be at ease with rape as an option. This clearly poses a problem for hedonic utilitarianism on the ground that it cannot account for basic liberties.

### 1.5 The principle of equal consideration of interests

The principle of equal consideration of interests (henceforth the PEI) states that one's interests should deserve equal consideration as the identical interests of others. By an interest I refer to "something which one wants, or is likely in the future to want<sup>9</sup>, or which is (or is likely to be) a means necessary or sufficient for the attainment of something which one wants (or is likely to want)" (Hare cited in Locke, 1981, p. 531). It can be said that the principle has its roots in Bentham's utilitarian dictum: Each to count for one and none more than one. According to the preference utilitarian Peter Singer, ethics is about taking a universal point of view, and making judgments which go beyond particular perspectives (1999 [1979], pp. 11-12). And "in accepting that ethical judgments must be made from a universal point of view, [we are] accepting that [our] own interests cannot, simply because they are [our] interests, count more than the interests of anyone else" (*Ibid.*, p.12). So the PEI implies 'impartiality' as understood, for instance, in the Habermasian sense: "The impartiality of judgment is expressed in a principle that constraints all affected to adopt the perspectives of all others in the balancing of *interests*" (Habermas cited in Fritsch, 2006, p. 313; my italics). As I mentioned above, the PEI is closely related to utilitarian ethics. Consider the following remark by Mill for instance:

"...[I]mpartiality, is an obligation of justice...[it] rests upon a...deeper foundation...[it is] not a mere logical corollary from secondary or derivative doctrines. *It is involved in the very meaning of Utility, or the Greatest-Happiness Principle.* That principle is a mere form of words without rational signification, unless one person's happiness, supposed equal in degree... is *counted for exactly as much as another's.* Those conditions being supplied, Bentham's dictum, 'everybody to count for one, nobody for more than one,' might be written under the principle of utility as an explanatory commentary" (1972, [1861], pp. 57-58; my italics).

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<sup>9</sup> I treat the words want and desire as synonymous.

Then on the face of this remark, the allegation of justice being at odds with utility seems to drop, for "...if we ask how we are to be *just* between competing interests of different people, it seems hard to give any other answer than it is by *giving equal weight, impartially, to the equal interests of everybody*. And this is precisely what yields *the utility principle*" (Hare, 1991 [1982], p. 26; my italics). According to Singer, the PEI is strong enough to rule out extreme cases like genocide, racial segregation, slavery, or other forms of atrocities and violations (e.g., the transplant case). As a classic example, consider the Nazis. According to the PEI, the Nazis are wrong, for they were concerned only with the wellbeing of Nazi Germany, and the sufferings of Jews, Gypsies and Slavs were not of their concern. Again, along the same line of reasoning, slavery cannot be justified, for slavery prevents slaves from pursuing their interests such as to develop one's skills, to establish social relations, to have access to food and shelter, and so on. The basic element of the PEI is to take into account the person's interests irrespective of sex, race, religion, disability and socioeconomic circumstances (Singer, 1999 [1979], pp. 22-23). On the strength of these above points, Singer asserts that the PEI is a fundamental requirement of morality (DeGrazia, 1991, p. 74).

Now let me turn to some problematic aspects of the PEI. The first thing that comes to our attention is the ambiguity over the definition of interest in terms of desire. By the right action we understand that which is conducive to the maximization of actual or expected desire satisfaction (i.e., utility). But we also know that what the person desires is not always, necessarily in her real interest. Then the burden is on the interest-utilitarianism to specify what counts as a real, well thought out, or rational interest. Another problem about the construal of interest in terms of desire is, following the PEI, the requirement of giving equal weight to all interests regardless of their content. That is to say, under the PEI, one should not give less weight, for instance, to the desires of the sadist or the rapist than anyone else. But it is evident that desires as such cannot be evaluated morally (Locke, 1981, p. 557).

Expressed differently, the maximization of desire-satisfaction *simpliciter*, says nothing about the moral worth of the desires in question even if they be rational; for as Hausman and McPherson put it, “one’s [desires] can be as rational in the pursuit of evil as in the pursuit of good” (2008 [1984], p. 236). So this means that in an ethical evaluation of interests we cannot simply take refuge in the concept of ‘goodness as rationality’<sup>10</sup>. According to Rawls for instance, ‘the principles of right and justice’ are needed to impose restrictions on what are reasonable conceptions of one’s interests and good (1999 [1971], p. 27, p. 355).

Now as a final point, I want to briefly reflect on the PEI perspective on rights. Peter Singer is not reluctant to express his skepticism over human rights. He says in an interview:

“We have to ask the fundamental question, which is why we think that there are human rights in a sense of rights that all members of the species *homo sapiens* have but no members of any other species have? When you start thinking about that then it becomes rather peculiar. Because why should membership of a certain species give you rights? If there were beings from another planet who could suffer in exactly the same way that we can, would it be right to say that because they are from another species we do not need to care about their suffering, and can treat them as we treat animals today just because they are not members of our species? I think that the answer is clearly not, it would not be right. What gives a being rights and what makes it wrong to treat being in a certain way is not what species it belongs to but what capacities it has. And the most fundamental of those capacities is to suffer or to enjoy life”.<sup>11</sup>

In his discussion of rights, Singer (1979) relies on a ‘capacity-based approach to personhood’. To put it simply, in such view, a ‘person’ is considered as anyone having the capacity to conceive one’s self as a continuing self (and thus to be aware of one’s interests). Singer (1979) sees having the relevant capacity (i.e., self-consciousness) not only as constitutive to being a person, but also to enjoying a moral status; and being a person with a moral status, in return, qualifies one for a ‘right to life’.

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<sup>10</sup> Rawls applies the concept to the assessment of plans as follows: “A thing’s being a good X for the agent depends on its having the properties which it is rational for her to desire in an X in view of her interests” (1999 [1971], p. 351).

<sup>11</sup> Interview with Peter Singer – *On Global Poverty, Human Rights and Ethical Questions*, by Petr Pribyla, 28th September 2011. URL: <http://www.globalpolitics.cz/rozhovory/on-global-poverty-human-rights-and-ethical-questions-interview-with-peter-singer?en=1>.

Now, some animals, like apes or chimpanzees, are said to possess the capacity for self-consciousness. If those non-human persons are self-conscious, then it necessarily follows that they too, like human persons, qualify for the right to life. (Singer, 1999 [1979], pp. 110-119). In fact this is where the membership argument and thus the concept of human rights seem to lose their significance. The extent of Singer's adherence to the PEI, backed by his capacity-based approach to personhood, has been a source of discontent for many human rights proponents. This is because Singer's conception of personhood carries uneasy implications, such as, to deny the right to life to cognitively impaired persons who lack the capacity for self-consciousness (*Ibid.*, *Chps. 4-7*). While taking the utilitarian stance, Singer is eager to attach moral priority to interests (or needs) no matter whose interests they are; yet he is inclined to jettison the interests of disabled individuals. I think this inconsistency (resulting from Singer's conception of personhood) poses a threat to the credibility of his ethical theory in general. Let me not be misunderstood here. Firstly, I am not against endeavors to expand the utilitarian perspective so as to accommodate non-human beings' interests, provided that they do not lead to ethically controversial conclusions such as the lives of the disabled are worth less. And secondly, I endorse Singer's objection to the claim that people are bearers of rights simply because they are human beings. Nonetheless, I do think that utilitarianism can still support the cause of rights within the context of (1) minimizing suffering and maximizing welfare and (2) self-realization (I will expand on this more in Section 2.2.1). Perhaps, I should pause here; for our purposes, this degree of discussion of these complex issues of personhood suffices. In light of the above discussions, another point that is important to mention is the conceptual relation between interest and right. I accept that it would certainly be absurd to deny that interest has no role in defining rights. However, if we conceive of rights strictly in terms of interest, then we may neglect the most basic function of rights as a protector of interests and liberties. I will readdress this point shortly in Section 2.1.

In closing this section, I take side with Don Locke:

“...[T]he PE [is] indeed...an important moral principle. But...morality has other functions as well...the PEI [is] but *one principle among many*- not the supreme or fundamental principle of a rational morality [as Singer claims] but...one which might find a place in any valid and acceptable system of morals” (1981, p. 559; my italics).

## 1.6 The principles of total and average utility

Now, I want to add a few remarks on the distinction between ‘the principles of total and average utility’, and their common criticism based on considerations of rights and justice. According to ‘the total utility principle’ (this refers to the classical utilitarianism) an action or a policy is the best if it tends to maximize the total wellbeing of the people. ‘The average utility principle’, on the other hand, favors an action or a policy which brings about the greatest possible average wellbeing of the people. Now our crucial question is: how are these two principles related to the considerations of justice and institutional rights? To address this question, let me refer to an important figure who had his say on the issue. Rawls was among one of the most ardent critics of utilitarianism. He advocated a deontological theory of ‘justice as fairness’. However, according to Broome (2004), if Rawls were to be a utilitarian, he would be an average utilitarian (p. 193). The reason for this is actually based on a somewhat misleading intuition that the average principle offers a fairer method of distributing primary social goods in comparison to the total principle. N. F. Alican (1994) says:

“It is sometimes thought that the promotion of the total [wellbeing] is blind to the distribution of [wellbeing], whereas the promotion of average [wellbeing] is sensitive to the distribution of [wellbeing], and therefore, that the promotion of average [wellbeing] is a more humane goal than the promotion of total [wellbeing]. However, given that average [wellbeing] is total [wellbeing] divided by the number of persons, changes in a population’s [wellbeing] are reflected in total and average [wellbeing] in the same way *unless the changes include a change in the number of people in the population* ” (p. 187; my italics).

But what if we consider the possibility of adding new people to the population; can we still say that whatever affects total wellbeing also affects average wellbeing in the same way? The answer is yes if and only if the wellbeing of those included in the population is above the average wellbeing of the people in the population (Broome, 2004, pp. 192-193). Now as to Rawls’s discontent with utilitarian ethics with reference to the total and average utility principles, first, let us recall his two famous principles of justice which are lexically ordered:

1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value (equal basic liberties principle)

2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity (fair equality of opportunity principle); and (b), they are to be to the greatest benefit of the least advantaged members of society (difference principle) (Rawls, 1993, pp. 5–6).

Rawls is primarily concerned with protecting equal basic liberties and fair equality of opportunity from utilitarian justification of infringements upon individual rights whenever these infringements promise a greater benefit for a larger number of people. For Rawls, the utilitarian criterion of the greatest benefit of the society which gives way to sacrifices for the promotion of general interest is logically weaker than his conception of justice which benefits everyone (Lyons, 1972, p. 542). And because of a sort of logical coincidence of total and average principles that we have detected above, this criticism of Rawls also applies to the average principle. As to the distribution of other primary goods of wealth, income, social and economic positions, as Martin (1985, p. 103) finely puts it with literary flourish, for Rawls, the issue boils down to, 2b, or not 2b, that is the question. According to the difference principle (i.e., 2b), priority is given to maximizing the amount of social primary goods that go to the worst off. The reader should notice that in formulating two principles, Rawls, does not completely eschew the utilitarian reasoning. In particular, the difference principle has somewhat of a utilitarian dimension to it: instead of simply benefiting the general interest, it places significant weight on maximizing the gains of the worst off. However, it differs in principle from utilitarianism as 2b entails a maximin criterion defined not with regards to individual utilities but with regards to the index of primary social goods. And given the priority of the equal basic liberties principle, trade-offs are impermissible between basic liberties and other primary goods, i.e., economic and social gains (Sen, 1979, 213-214). Now as to the inadequacy of the utilitarian account of justice, this time Rawls argues against the utilitarian criteria of maximizing average and total social utility on the grounds that both principles omit a decent standard of living or ‘social minimum’.

But he claims that 2b does not have such a problem (*The Stanford Encyclopedia of Philosophy* defines ‘social minimum’ as “that bundle of resources which suffices in the circumstances of a given society to enable someone to lead a minimally decent life” (White, 2008)). The utilitarian might admit the problem here and reply that what the principles of total and average utility omit seems to be captured by a distribution-sensitive ‘principle of restricted utility’<sup>12</sup> according to which “... [a] society has a duty to provide a *social minimum* for all its citizens sufficient to meet their basic needs, and once basic needs are met, the economy is to be designed to distribute income and wealth so as to *maximize utility*...” (Freeman, 2006, p. 34; my italics). But how are we going to decide on what it is to lead a minimally good life, since the minimal conditions for a decent life do tend to vary with respect to different societies and cultures (Sen cited in Fagan, 2003). Unless there is the possibility of the society coming to terms with some interpersonally comparable evaluation standard (like Sen’s capabilities), it does not seem to be possible to have a meaningful discussion on social minimum. A rule utilitarian, for instance, might accept the enactment of a social minimum motivated by some version of the capabilities approach, for she considers a policy of social minimum as promoting maximization in the aggregate social welfare (White, 2008). In conclusion, we come to realize that neither the total nor the average utility principle is sufficient in addressing issues of justice and rights.<sup>13</sup>

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<sup>12</sup> To my knowledge, this phrase belongs to Smart (1956). He distinguishes between act and rule utilitarianism by referring to them as extreme and restricted utilitarianism, respectively. The principle of restricted utility relies on the intuition that “... the rightness of an action is not to be tested by evaluating its consequences but only by considering whether or not it falls under a certain rule. Whether the rule is to be considered an acceptable moral rule, is, however, to be decided by considering the consequences of adopting the rule” (Smart, 1956, pp. 344-345).

<sup>13</sup> The part of the discussion concerning Rawls’s criticism pays tribute to Rex Martin (1985, pp. 101-106).

### 1.7 The principle of Pareto efficiency (optimality)

Let me first provide the reader with the standard definitions of the terms ‘Pareto efficiency’ and ‘Pareto improvement’.

**Pareto efficiency.** A distribution of goods or the implementation of a social policy is Pareto efficient if and only if the only way to make one person or group better off is to make another worse off.

**Pareto improvement.** Any change or adjustment that makes someone better off without making anyone else worse off is said to be a Pareto improvement.

Critics have often claimed that utilitarianism as such is unconnected to justice and thus devoid of principles addressing distributive concerns. But on the other hand, one of the most dominant ethical criteria employed in mainstream welfare economics has been a weakened version of utilitarianism, namely, Pareto efficiency (Cowan & Rizzo, 1995, p. 6). It is a weakened version of utilitarianism in the sense that it shares the utilitarian concern for welfare (though not in the same way<sup>14</sup>), while avoiding the utilitarian ambition for interpersonal comparisons of utilities. To remind the reader once again, utilitarianism is defined in terms of welfare. Welfare can be understood as referring not only to happiness or preference-satisfaction but to economic welfare as well. This implies that utilitarianism should also be concerned with the efficiency of policy options or societal arrangements in order to bring about benefits for the greatest number of people. And for the evaluation of efficiency, the utilitarian may evoke the Pareto Principle.

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<sup>14</sup>Utilitarianism, in its standard versions, appears as a form of aggregative ethics. It concerns itself with maximizing overall welfare (i.e., aggregate utility). On the other hand, the Pareto principle is not primarily interested in measuring net social utility but in guaranteeing outcomes where no one’s welfare is worsened.

An apologist for the Pareto-utilitarianism may argue as follows. From the utilitarian point of view, a societal arrangement is just if it maximizes either (1) the total welfare of the society or (2) the average welfare of the society. And both accounts entail that the just society must fulfill the condition of Pareto optimality (Cudd, 1996, p.2). Now let me begin with mentioning some claimed advantages of the Pareto Principle.

(i) The principle can serve as a guide for rational individuals (i.e., policy makers) to consider a wide range of alternatives (Cudd, 1996, p. 3) and to specify their competitive weights in designing social policies.

**A reply to (i):** According to Putnam, Pareto optimality is “a terribly weak criterion for evaluating socioeconomic states of affairs” (2002, p. 56). He gives the following example to support his claim: “Defeating the Nazi Germany in 1945 could not be called Pareto optimal, for example, because at least one agent – Adolf Hitler – was moved to a lower utility surface” (*Ibid.*) **A reply to the reply:** But we can just as well say that on the same Paretian grounds, it is possible to argue against all forms of interventionism that are exploitative in nature. The problem for Putnam is that “[the] economist’s notion of a *Pareto optimum* is an attempt to have a notion of economic optimality which considers only efficiency of means, and involves no ‘value judgments’ concerning the goals of the various economic agents” (1998 [1981], p. 168).

(ii) The principle encourages progressive social policies (Cudd, 1996, p. 3).

(iii) Pareto optimality implies impartiality so that when there is an evaluation of a policy decision, agents do not give priority over self- or other-regarding personal interests (or preferences), but only the public interest (i.e., social utility)<sup>15</sup> (Mill, 1972 [1861], p. 42; Moehler, 2013, p. 27).

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<sup>15</sup>Pareto optimality, together with the Bayesian rationality postulates (the requirement of complete preordering, continuity axiom, probabilistic equivalence and independence axiom) is central to Harsanyi’s construal of utilitarian ethics (Cf. his *Bayesian Decision Theory and Utilitarian Ethics*, 1978, *American Economic Review*, 68, pp. 223-228).

(iv) The quest for ‘Pareto superior’ institutional arrangements is no doubt a rational effort to build up a prosperous community (Samuels, 1981).

On the strength of the above points, the Pareto principle may have a strong appeal to our moral intuitions. However, it is not free from complexities and criticisms. Now let us consider some of its problematic aspects in relation to the issues with which we are concerned in this work.

**Some criticism:**

(a) The Pareto principle as an ‘end-result principle’ (a Nozickian term) does not show any concern as to a particular allocation, adjustment, etc., is achieved on the grounds of justice, but is simply limited to the considerations of total welfare (Zhou, 2005, pp. 8-9). For instance, a situation in which everyone gets an equal share is Pareto optimal, but so is the situation in which one person has everything and everyone else has nothing.

**Conclusion:** Pareto optimality does not guarantee justice in distribution. **A reply:** But a Pareto non-optimal distribution invokes the notion of Pareto-improvement. So Pareto efficiency is not so unconnected to justice considerations (Cudd, 1996, p. 1).

(b) Given the complexity of social life, our diverse interests often clash with others’ and can even lead to others’ interests being completely ignored. It seems to be unlikely to achieve Pareto-superior arrangements (Calabresi, 1991 quoted in Zhou, 2005, p. 10). In such cases, the challenge, more precisely formulated, is how to choose “the best” among the enormous set of Pareto improvements.

(c) The Pareto principle neglects the considerations of basic liberties. According to Samuels (1981), the Pareto principle “neglects the distinction between freedom to [positive freedom] and freedom from [negative freedom] and thereby also neglects the factors and forces which operate to form the structure of opportunity sets within which freedom to and freedom from have meaning, that is, the alternatives between which one can choose and give one’s consent” (Samuels, 1981, p. 128 with reference to Gordon, 1980 and Rowley & Peacock, 1975).

The conflict between Pareto utilitarianism and freedom points to ‘Amartya Sen’s argument from the impossibility of the Paretian liberal’ (or ‘the Sen Paradox’ in short) as illustrated by him in the following example. Suppose that there are two persons *Prude* and *Lewd*, deciding who is going to read some literature with obscene content. It may seem obvious from the liberal’s point of view that *Lewd* should read the book alone. However assuming, it is the case that although *Prude* despises the book; he would suffer even more by it being read by *Lewd* who loves the book. As to *Lewd*, although the book is a worthy read for him, he would enjoy it even more if *Prude* did read it. From the Pareto utilitarian point of view, since for both persons *Prude*’s reading the book has a higher utility (i.e., it is Pareto optimal), thus against the Liberal principle, *Prude* is the one who should read the book. In sum, a direct utility calculus in the light of the Pareto principle conflicts with basic liberties (Sen, 2009, p. 310). (I do not intend to venture into an exhaustive critique of Paretian theories with respect to freedoms here. It is far beyond the province of this work to accommodate such complex issues<sup>16</sup>).

**(d)** The Pareto principle has no direct bearing on any particular Pareto optimal result beyond the fact that it is a Pareto optimal result. If there is such a thing as the recommendatory force of any Pareto optimal solution, such force is then derived from the acceptance of the Pareto rule and the *status quo* power structure (Samuels 1981, p. 126). It is this characteristic of the Pareto principle referred to as its neglect of basic human rights, which can be illustrated by a historically significant example: the institution of slavery in the United States. According to Hackett: “Slavery was widely seen in the North as being unethical from a deontological perspective, but a policy alternative of ending slavery would make slave owners worse off than under the status quo, and thus would have failed the Pareto efficiency criterion” (2011, p. 25). In short, it can be inferred that the Pareto optimal states of affairs are merely tantamount to the adjustments which occur only within a given opportunity set structure in harmony with the *status quo* power structure.

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<sup>16</sup> For some attempts to reconcile Pareto optimality and liberty considerations, see Peter Vallentyne’s *How to combine Pareto Optimality with Liberty Considerations*, 1989, *Theory and Decision*, Vol. 27, Issue 3, pp 217-240; and Jonathan Riley’s *Liberal Rights in a Pareto-optimal Code*, 2006, *Utilitas*, Vol. 18, Issue 01, pp. 61-79 for instance.

This obviously points to the absence of agreement to bring about a change, thereby to the conservative character of the Pareto Principle. Plus, such use of the principle also functions so as to divert attention from the social injustice consequent to the government policies (p. 129). **A note:** On the strength of (d) and (e), the impartiality of Pareto optimality seems to be weakened.

(e) Rothschild in his 1993 *Ethics and Economic Theory* points out what seems to be a theoretical weakness in the utilitarian considerations of justice based on the Pareto criterion (and in Rawls's criterion as well: Improve the welfare of the least advantaged persons) with the help of the following stylized example of alternative income distributions.

	A	B	C	T
(1)	100	60	40	200
(2)	120	80	41	241
(3)	90	60	42	192

A, B and C are three persons. Their income levels in three alternative situations are shown above. T stands for the total real income in each situation. Let us begin our comparison with situations (1) and (2). Both on the Pareto and the Rawlsian criterion, (2) is an improvement, because everyone is better off than (1), including the least advantaged person C. Note that (2) displays a higher income differentiation than (1), nevertheless this is accepted by Rawls on the ground that C benefits from it. If we include situation (3) in our comparison, we observe an income reduction in total. However, on the Rawlsian criterion, this lower and less differentiated income distribution is superior to (1) and (2) because C is better off. On the Pareto criterion, however, a shift either from (1) or (2) to (3) is 'Pareto non-comparable' (i.e., it can neither be recommended nor rejected); because in both cases there are losers and gainers (Rothschild, 1993, p131).

And in this case the Pareto principle is insensitive to--if not entirely ruling out--the possibility of the Rawlsian injunction to maximin the income levels in order to satisfy the urgent needs of the poor. By this illustration, Rothschild wants to show us that neither the utilitarian approach nor the Rawlsian rule is complete in terms of providing a distributional pattern. Their prime objective is to equate justice and equality of incomes, but they only end up having to pretend to fit into the framework of ethical theories that favor more income equality (*Ibid.*). We shall return to the problem of distributive justice and the utilitarian reasoning concerning inequalities and distributive norms in Section 2.2.3.

In closing the first chapter, we note that some principles (e.g., the PEI, the Pareto Principle, etc.) or axioms (e.g., the axiom of unrestricted utility maximization) traditionally associated with utilitarianism indeed play a key role in ethical evaluation. However, they also have self-defeating effects for utilitarianism. What strategy is needed then to establish the possibility of the utilitarian restoration of the issues regarding justice, freedom and rights? According to Brittan (1990), the utilitarian “should not be ashamed of using [some other criteria, principles] to supplement the principle of utility and [the utilitarian does] not need to attempt to govern [the ethical] behavior [or evaluation] by one principle whether utilitarian or otherwise. Utility can remain important in a pluralist set of values” (p.87). And this essential point brings us to the argument of the second chapter.

## 2 Addressing the criticisms: rethinking utility, justice and rights

### 2.1 Exploring the connection between utility, justice and rights

So far we have distinguished between the issues of justice and rights, and discussed why utilitarianism in its traditional forms fails to accommodate those issues. In this section, as the title suggests, I am going to show how utility, justice and rights are connected. Let us begin with the question: what is ‘right’? Or more precisely, what is it ‘to have a right’? According to Mill (1972, [1861]) “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” (p. 50). And as a justification for instituting the principle of individual rights, for Mill, there can be only one reason:

“To have a right... 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*.” (*Ibid.*; my italics).

It comes as no surprise at all that in justifying rights Mill evokes the concept of utility. He says:

“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” (1972 [1861], p. 74).

Now let us ponder the notion of ‘having a valid claim’ for a while. What is it that makes a claim valid? The legal philosopher Joseph Raz proposes a definition of right which unfolds within the utilitarian framework. And I think the answer to our question lies in that definition: “...*an aspect of X’s well-being (his interest)*<sup>17</sup> is a sufficient reason for holding some other person(s) to be under a duty” (1986, p. 166; my italics).

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<sup>17</sup> Here Raz speaks of interest and wellbeing interchangeably; however these are conceptually different terms. Having interest in something does not necessarily lead to an increase in wellbeing.

The reader should observe that by introducing the notion of interest to the discussions of rights, one draws attention to the welfare, wellbeing, needs, etc., of individuals, rather than to their ‘liberty’ (Williamson, 1990, p. 7). According to the interest-based theorists of rights like Raz (some others are Bentham, Lyons, and Singer) when drafting a particular right, the interests of the potential right-holder have to be taken into account; for the function of a right is, after all, to further the right-holder’s interests (Wenar, 2011).<sup>18</sup>

Next, let me say a few words on the difference between right and interest. A right and an interest do not necessarily coincide. A stylized example can be of help. It may be of great interest for *X* to do/have *A*; however, *X* may have no right to do/have *A*. Or *X*’s interest to do/have *A* may clash with *Y*’s right (I have the transplant case in mind). A rights-based ethical framework indicates that when faced with such a conflict between right and interest, *Y*’s right must trump *X*’s interest (here I allude to the legal philosopher Ronald Dworkin’s famous metaphor ‘rights as trumps’ (1984)). But what is about the utilitarian’s response? Is (can) utilitarianism (be made) compatible with rights must trump? Within the rule utilitarian framework, for instance, given the vast variety of individual interests, rights as trumps might be seen as providing a more secure basis for moral reasoning. So rule utilitarians could, to some extent, appreciate the practical benefits of rights by incorporating them into a system of rules governing the interaction between individuals. In Section 2.2.1, we shall see that another form of utilitarianism called ‘indirect utilitarianism’ seems to be able to answer the objections from rights and justice to a stronger degree.

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<sup>18</sup> Against interest theorists, will theorists, to put it simply, assert that “the function of a right is to give its holder control over another’s duty” (Wenar, 2011). Due to the limits of our analysis, I am not able to address the disagreement between will-based and interest-based theories of the function of rights at length here. The reason I give priority to the interest theory is because it aligns better with utilitarian theory. For a discussion on these issues, see, for instance, Leif Wenar’s *Rights* in *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2011/entries/rights/>>.

Now let us rotate our attention to the relation between right and liberty. Wesley Hohfeld (1879–1918), an American legal theorist, provides us with an analysis of rights. Within the Hohfeldian framework, we can talk about rights as three-term relations between two persons and a certain kind of act. Below, I will focus only on two Hohfeldian rights, namely, ‘claim-right’ (called by Hohfeld right *strict sensu* or right in the strict sense) and ‘liberty’ (called by Hohfeld privilege) (Finnis, 1980, p. 199). Let A and B signify persons and  $\phi$  a certain act, then the following logical relations will obtain:

- “(1) A has a *claim-right* that B should  $\phi$ , if and only if B has a *duty* to A to  $\phi$ .
- (2) B has a *liberty* (relative to A) to  $\phi$ , if and only if A has *no-claim-right* (‘a no-right’ that B should not  $\phi$ ).
- (2’) B has a *liberty* (relative to A) not to  $\phi$ , if and only if A has *no-claim-right* (‘a no right’) that B should  $\phi$ ” (*Ibid.*).

In light of the above logical exposition, we understand that someone’s claim-right is correlated to someone else’s duty. Someone’s liberty in return is correlated to the absence or negation of the claim-right that someone else would otherwise have (Finnis, 1980, p. 200). As Finnis points out, “a claim right is...either...a right to be given something...by someone else, or...a right not to be interfered with... in a certain way, by someone else.” (*Ibid.*). It is worthwhile to notice that by drawing attention to liberty in the discussions of rights, first of all, we come to think of rights not merely as ‘something beneficial’ [of interest] which the person is in possession of; but more than that, as something ‘which is just in a given situation’ (*Ibid.* p. 208). Moreover, we become aware of the connection between rights and justice, and of the meaning of Mill’s remark: “wherever there is a right, the case is one of justice” (1972 [1861], p. 47).

As to the connection between justice and utility, utilitarians argue that principles and laws regulating justice, as having the status of ‘secondary principles of morality’, are subordinate to and most importantly derivable from the principle of utility (Macleod, 1981, p. 75). Mill, in Chapter V of *Utilitarianism*, argues against those who conceive of justice as a standard *per se*, totally independent of utility (1972 [1861], p. 51). On the contrary, he conceives of justice as a branch of general utility (*Ibid.*, p.39). He states that “...justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility...” (*Ibid.*, p. 59). Hume, an important influence on utilitarian thinkers, both in *A Treatise of Human Nature* (1739) and *An Enquiry Concerning the Principles of Morals* (1751), explicitly discusses the view that the merit of justice is solely due to its utility. He establishes the proposition as certain that it is only from selfishness and the limited generosity of mankind along with the relative scarcity of goods that justice derives its origin (Hume, 1896 [1739], p. 495). And building upon that proposition, Hume argues that “[a]fter men have found by experience, that their selfishness and confined generosity...totally incapacitate them for society; and at the same time have observed, that society is necessary to the satisfaction of those passions, they are naturally induced to lay themselves under [the obligations of justice]” (*Ibid.*, pp. 498- 499). In other words, for Hume, justice serves our interests and maintains an orderly society; thus it has to be tied to utility:

“That Justice is useful to society, and consequently that part of its merit, at least, must arise from that consideration, it would be a superfluous undertaking to prove. That *public utility* is the sole origin of justice...” (Hume, 2006 [1751], p. 13; my italics).

Mill, in agreement with Hume, further adds that “justice implies something which it is not only right to do, and wrong not to do [the content of justice], but which some individual person can claim from us as his *moral right*” (1972 [1861], pp. 46-47; my italics).

Then, what is a ‘moral right’ or in the words of Lyons (1980) ‘right with moral force’?<sup>19</sup> A ‘moral right’ can be defined as the right which exists independently of social recognition and legal enforcement (Lyons, 1994, p. 149). This is what Lyons refers to as the independence thesis of moral right. There are two major theories of moral (or human) rights that conform to the independence thesis, namely, ‘rights as valid claims’ and ‘natural rights’.<sup>20</sup> I have introduced the former above. Let me now turn briefly to the natural rights theory. To put it very simply, the natural rights theory holds that natural rights follow from the nature of man. Bentham is an important critic of this view. He famously dismisses the concept of natural rights as ‘nonsense on stilts’. He dismisses not only the idea that natural rights follow from the nature of man but also the very idea of moral rights. He conceives of rights in terms of beneficial obligations, restrictions on behavior, as merely legal rights (Lyons, 1980, p. 23). At this point a caveat suggests itself. It is important to notice that the conceptualization of moral rights does not require the adoption of a firm stance on their philosophical foundation. As Lyons puts it, “...the doctrine of human rights is the claim that all humans possess, unconditionally, a set of moral rights. Natural rights theory adds to this doctrine a claim about their foundation...Those who embrace human rights need not endorse natural rights theory. One can accept the idea that we all have certain rights without being committed to a theory about their foundation.” (2013, p. 48). Mill, for instance, pace Bentham, is able to recognize *rights as valid claims* and their *moral force* to face up to social contingencies regardless of the question concerning their philosophical foundation. He remarks: “...a law is thought to be unjust...namely, by infringing somebody’s right; which, as it cannot in this case be a legal right, receives a different appellation, and is called a *moral right*” (1972 [1861], p. 41; my italics).

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<sup>19</sup>The following discussion on moral rights and moral justification pays tribute to Sumner. It draws upon the crucial points of Sumner’s argument in Section 5.1 “The Concept of a Moral Right” (pp. 132-151) of his *The Moral Foundation of Rights* (1987).

<sup>20</sup>Rex Martin, against the independence thesis, argues for ‘the social recognition thesis’ according to which a moral right is defined as a fully functioning human right. But I shall not consider that view here. I can refer the interested reader to his *Human Rights and the Social Recognition Thesis*, *Journal of Social Philosophy*, Vol. 44, No. 1, 2013, pp. 1-21.

In closing, this section has been devoted to exploring the connection between utility, justice and rights. In Section 2.2.1 I shall try to give my conclusive argument on whether rights can be successfully accommodated within an alternative utilitarian framework; for this is still the main point at issue for us.



## 2.2 The utilitarian's response: the indirect approach

### 2.2.1 Direct *versus* indirect utilitarianism

In an article in *The Stanford Encyclopedia of Philosophy* the following distinction is made.

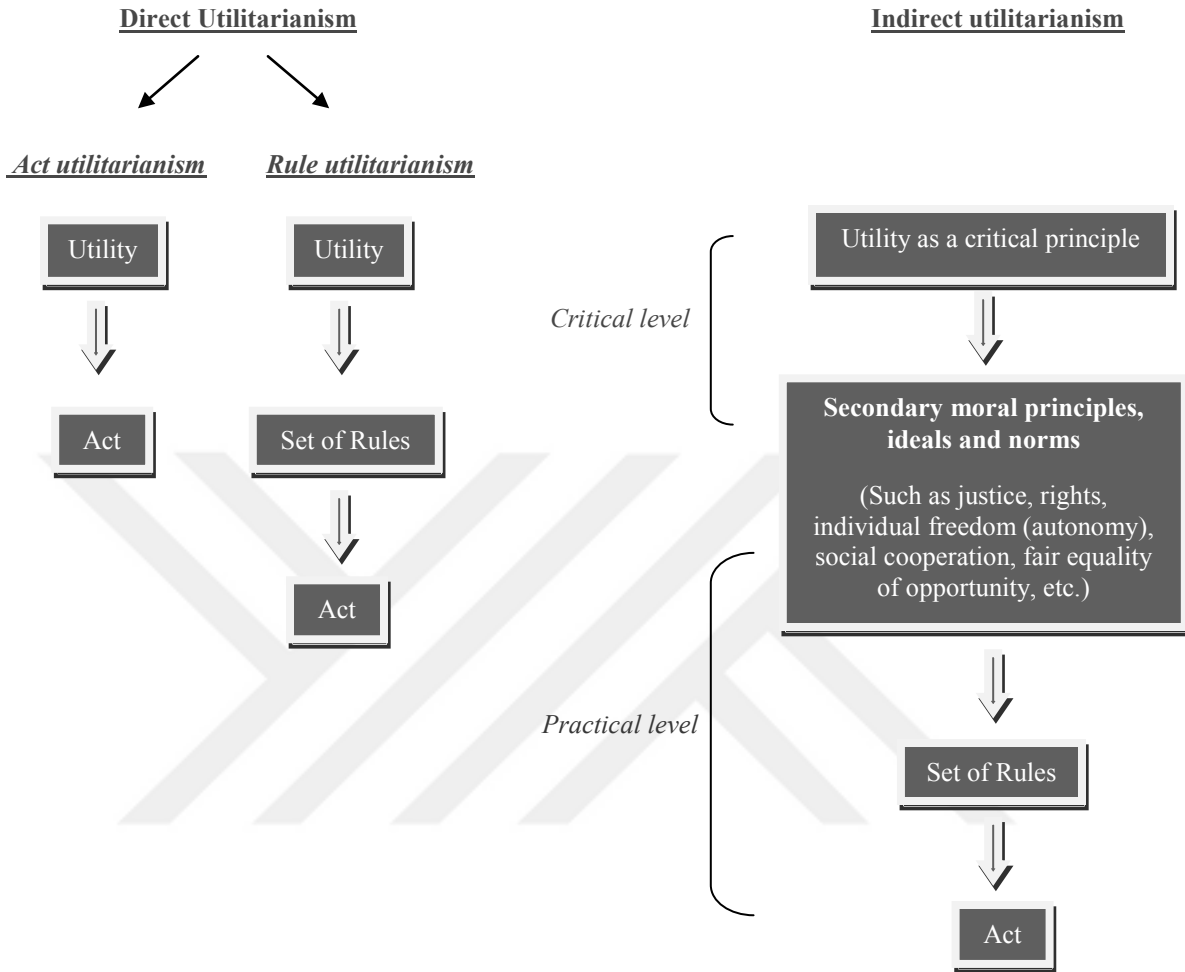
**“Direct utilitarianism.** Any object of moral assessment (e.g. action, motive, policy, or institution) should be assessed by and in proportion to the value of its consequences for the general [welfare].

**Indirect utilitarianism.** Any object of moral assessment should be assessed, not by the value of its consequences for the general [welfare], but by its conformity to something else (e.g. norms and ideals) that has (have) good or optimal acceptance value” (Brink, 2008).

And following from the above distinction; act utilitarianism is regarded as a form of direct utilitarianism applied to action, and rule utilitarianism as a form of indirect utilitarianism. I think the relation between act utilitarianism and direct utilitarianism is obvious. Thus it is better to move on to work out the distinction between rule-utilitarianism and indirect utilitarianism; because as Rex Martin (2008) correctly diagnoses, “the distinction between them is often hazy” (p. 227). The below graph<sup>21</sup> can serve as a general orientation for our analysis.

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<sup>21</sup>Based on Figure 1 in John R. Gibbins's *Utilitarianism, Conservatism and Social Policy* in (edited by Lincoln Allison) “The Utilitarian Response”, 1990, p. 124.



To reiterate, rule utilitarianism is the view that “an act is right if and only if it conforms to a set of rules *general acceptance* of which would maximize utility” (Lyons, 1965, p. 136; my italics). (As we have distinguished the three tests of efficacy for rules in Section 1.2; the reader knows what general acceptance in the above formulation implies). John N. Gray, in his *Mill on Liberty: A Defence* (1983) defines ‘indirect utilitarianism’ as the view “wherein the Principle of Utility cannot have direct application either to individual acts or to social rules because such application is in general, and in many cases necessarily, self-defeating” (p.12). Martin (2008), pace the distinction made by Brink (2008) in *The Stanford Encyclopedia of Philosophy*, claims that indirect utilitarianism differs from both ideal and actual variants of rule utilitarianism.

This is so, firstly, because rule utilitarianism allows for the direct application of the principle of utility to the rules. Within the indirect utilitarian framework however, the application of the principle of utility is restricted to the secondary principles only. Also, the reader should observe with the help of the above graph that indirect utilitarian reasoning encompasses, yet it is certainly not exhausted by rule utilitarian arguments; because indirect utilitarianism, in addition to appealing to the value of utility, explicitly offers room for secondary principles and criteria in the process of determining the content of rules to be applied in specific cases. Martin (2008) finely explains the difference of the indirect utilitarianism from different variants of utilitarian theory as follows:

“The indirect utilitarian is interested in existing social rules insofar as justifiable (and revisable) on utilitarian grounds. Such rules will always be relatively simple and designed to be followable, and they will be (in part for this very reason) highly teachable rules...The moral project of indirect utilitarianism is focused on *the short list of values*...that inhere in a justifiable set of existing social rules. In contrast, the utilitarian advocate of a code of ideal rules is *interested in achieving with that code the nearest practical or feasible approximation to the requirements of the greatest [well-being] principle, consistent with retaining the distinction of rule from act utilitarianism and staying true to the requirements of acceptance utility*” (pp. 237-238; my italics).

Let me now sum up some important characteristics of indirect utilitarianism:

**(1)** The theory makes space for a pluralist set of secondary moral principles, norms and ideals concerning justice and rights. It seeks to supply ‘utility barring (i.e., the function of setting a constraint on unrestricted/direct utility calculation) secondary principles’, maxims, practical precepts, rules and rights for the guidance of conduct and policies, the general compliance of which will maximize utility indirectly (Gray, 1983, pp. 13, 16). **(2)** It is a hierarchical theory of reasoning about conduct (as shown in the above graph) (*Ibid.*, p. 42). **(3)** The indirect utilitarian system depends on the separation of practical and critical levels of moral thought; and the Principle of Utility is called upon only at the latter level (*Ibid.*, p. 41). Utility regarded as a critical principle of evaluation for systems of rules, rights and secondary moral principles, (*Ibid.*, p. 38) “[does not] by itself impose obligations or yield judgments about right action” (*Ibid.*, p. 22). Rather, it determines the value of ideals, norms and rules which regulate the right action or rule.

In light of the above points, let me mention first that we should regard the indirect utilitarian as a utilitarian who is told to "...be wary of all monisms: all philosophical doctrines that deny the [plurality] of the world...of values [and good] and seek it to fit seemingly disparate items into one mold" (Kraut, 2007, p. 21). This statement naturally obliges me to clarify, at least in a few succinct words, the indirect utilitarian perspective on the content of good. Let us then begin with what is meant by 'the plurality of values and goodness' or simply 'value pluralism'. To put it simply, value pluralism is the view that there are many different ethical values, beliefs and conceptions of good which are susceptible to incommensurabilities and discontinuities in comparisons, and cannot be reduced to one 'super-value' (e.g. utility). This definition of value pluralism (employed by both John Gray and Isaiah Berlin) is built upon the following two central notions: (1) 'Incompatibility': this refers to the uncombinability of some moral values. An example (given by Gray): the moral life of a nun is incompatible with that of a lover (Boot, 2008, p. 3 with reference to Gray & Berlin) (2) 'Incommensurability': this refers to the impossibility to measure some moral values by a common scale of units or by appealing to a super value. The notion of incommensurability implies the impossibility of rational solution when values do conflict. An example: Money and friendship are incommensurable, i.e. they cannot be compared in value, for they lack a common unit of value. Now, utilitarianism- in our case, indirect utilitarianism- can be regarded as conforming to 'a kind of weak value pluralism', for some utilitarians (like Mill) recognize both diversity as the essential fabric of human well-being and the possibility of the incompatible moral values (i.e. the confliction of contributory values). However, utilitarians (including Mill) do not accept the existence of the incommensurable values; for they argue that when values do conflict, comparison and rational choice is still possible by appealing to the principle of utility (Boot, 2008, pp. 2-4 with reference to Gray & Berlin). In other words, the ultimate ethical standard of comparison, utility, makes it possible for utilitarians to compare different values and to choose one rather than the other (Boot, 2007, p. 107).

With the help of the above brief exposition, it becomes more explicit that for a sophisticated utilitarian (who endorses value pluralism), good should by no means be exhausted by a single kind (Here I allude to Thomson's discussion on the utilitarian understanding of goodness (1993, pp. 145-159) ). Otherwise, it causes problems to utilitarian ethics. Consider again Benthamite hedonic utilitarianism for instance. We have argued in Section 1.4 that as hedonic utilitarianism regards pleasure and pain as the sole criteria for goodness and badness, it fails to accommodate rights; thus it becomes an untenable position to hold. Fortunately, Mill, a kind of value pluralist utilitarian, was aware of the naivety of equating good with pleasure. For that reason he tried to extend the scope of the utilitarian good to include individual freedoms and rights, and strongly emphasized the community's role in nurturing those ideals--in particular, the value of freedom.

As to the value of freedom, Carter (2003) highlights an obvious but crucial point, of which Mill was well aware of: "...[O]ne might value other things more than freedom. But one first needs to know whether or not one is free to pursue those other values" (p. 162). This first and foremost suggests that freedom is the precondition for one's moral agency (*Ibid.*). In addition to that, we quite often appeal to the value of freedom to justify certain rights in relation to the realization of human potentials. Therefore, we can safely conclude that freedom provides the basis for any comprehensive moral system (*Ibid.* 177). This, in my opinion, seems to stand as a sufficient explanation for why the value of freedom plays a constructive function in undergirding Mill's utilitarianism and why utilitarians, in general, have been so eager to accentuate that it is in the interest of the just society to promote the value of freedom in general. To put in other words, Mill's utilitarianism was able to recognize the plurality of good (i.e., the diversity of values) and thereby the compatibility of basic freedoms and rights with the utilitarian foundation. Mill did not for instance, like Bentham, simply obey the hedonistic imperative and settle for pleasure as the sole moral standard; and thus did not fail to respect basic freedoms and rights.

In Mill's utilitarianism, rights function as valid claims that the individual can enforce upon society. Rights are conceived of as 'preeminent goods', higher in importance than other goods (e.g., the pleasant), because they are instrumental for underwriting the conditions necessary for promoting freedom for the realization of human potentials (i.e., self-realization) to which Mill assigns greater intrinsic value. For Mill, the individual's welfare or happiness (or broadly good) consists in self-realization (Brink, 2007, p. 1670; 2008). And, in the absence of rights, neither the realization of one's potential nor social prosperity can be guaranteed. In fact, this point, receives great support from historical experience. In summing up, we notice that for Mill, rights, individual development (or self-realization), happiness and welfare (or broadly good) are closely related concepts. Bernard Williams says that, "utilitarianism...should be willing to agree that its general aim of maximizing happiness does not imply that what everyone is doing is just pursuing happiness. On the contrary, people have to be pursuing other things. What those other things may be, utilitarianism, sticking to its professed empirical stance, should be prepared just to find out" (1973, p. 113). In other words, if utilitarian ethics, like any comprehensive moral system, is to remain a plausible theory, then the utilitarian good should effectively capture those other dimensions of moral discernment such as justice, rights, moral virtues, liberty, equality of opportunity, etc., and acknowledge the diversity of moral values and principles worth pursuing in life. Let all this be the reasoning in a nutshell, that the indirect utilitarian employs on the content of good.

As we have witnessed previously, the direct application of the Principle of Utility to actions, under particular circumstances, raises problems with respect to rights. More precisely, we have noticed that, taking into account the considerations of rights, actions with maximally valuable consequences cannot always be morally acceptable (Vallentyne, 2006, p. 21). This was the main reason for our shift from act to rule utilitarianism. But the same problem persisted with the direct application of the utility principle to the design and implementation of social rules. Thus, another shift followed from our inspection of the problems confronting rule utilitarian framework.

Now we need to examine how indirect utilitarianism is going to address the objections from rights and justice. Rights, according to Lyons (1980), pose a serious problem for act utilitarianism. He thinks that if we want to establish and sustain rights with moral force (i.e., moral rights), then act utilitarianism seems to be the least eligible theory to ask for any guidance (Lyons, 1980, p.22). “If utilitarianism has anything useful to say about rights...it must be capable of explaining *how rights function like moral factors with a life of their own*. In order to do this, it must presumably employ *indirect utilitarian arguments* and at the same time severely limit the scope of direct utilitarian reasoning” (Lyons, 1980, p.22; my italics). As we have seen above, it is not only act utilitarianism, but rule, average, total and Pareto versions are also unable to successfully account for, in Lyon’s words, “how rights function like moral factors with a life of their own” (1980, p. 22). Lyon’s criticism, I think, makes an essential point which is not only able to point out what is wrong with the logic of direct utilitarian reasoning, but also hints at a different strategy. The burden is on the shoulders of the utilitarian. However fortunately, that burden seems to be eased slightly by the introduction of indirect utilitarianism.

According to Sumner, “a substantive theory of rights must add to [the] conceptual analysis an account of how...rights are to be justified. Consequentialism can supply such an account: a...right is justified just in case the policy of recognizing it in the appropriate rule system will better promote some favored consequentialist goal than will any alternative social policy”(1987, p. 174). Even though Sumner does not use the word utilitarianism, since utilitarianism is defined as a kind of consequentialist theory, I see no reason why his remark should not be relevant for our analysis. Above we have defined right as a valid claim, or justified claim. The justification of a claim depends on some standard accepted by the just society. When a claim becomes a right codified in a legal code, such a right is called legal right. A moral right, on the other hand, is also justified by some critical moral standard; however, it is not necessarily codified in the legal system. And, from the utilitarian point of view, the ultimate ethical standard of good and bad must be found in the long-term effects produced by the introduction of the right in question.

Utilitarians, in general, value institutional arrangements, practices and policies that are capable of facilitating effective cooperation and superior forms of social coordination among individuals. Rights are an essential part of such a social cooperation and efficiently coordinated behavior, which are indispensable for enhancing human flourishing and bringing forth social utility (Egger, 1996). This relates to Rawls as well, for he says:

“What have come to be called *human rights* [such as *the right to life, freedom from involuntary servitude, the right to hold and use at least some personal property, etc.* as minimal reasonable terms (Freeman, 2006, p. 37 with reference to Rawls)] are recognized as necessary conditions of any system of *social cooperation*. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind”. (Rawls, 1999, p. 68 cited in Freeman, 2006, p. 36).

Rights deserve the utilitarian’s respect not because they are natural or conform to some idea of human nature transcending all the empirical realities of existing social and legal systems (Shestack, 1998, p. 209), but ‘for some favored consequentialist goal’, for what they are able to do, for their ability to provide the basis for the physical, intellectual and moral development of individuals, and simply for the kind of actions and the kind of society that results from them (Egger, 1996). Now it must be observed that it is a highly misguided assumption that utilitarianism is unable to have a place for basic human rights and justice in its framework. Utilitarianism is certainly not blind to the history of human suffering in the absence of socially just institutions and basic human rights. For the utilitarian, freedom, justice and rights are constitutive of the greatest good and the least harm for society (Palmer & Lucey, 1992, pp. 64-66). And from the above considerations we eventually reach the following conclusion:

“*Utility is a necessary condition for the justifiability of [rights]* because the concept of utility is built into the very notion of an individual’s having good reasons for committing himself to [human rights]. It is necessarily the case that any person has good reasons for committing himself to a [right] that would bring about an increase in his power to accomplish the goals he sets for himself and an increase in his freedom from interference by others. *The greater the utility of [rights], the better his reasons (weightier) for accepting them.*” (Taylor, 1972, p. 347; my italics).

In light of the above discussion, let us now look at our early transplant case, only this time, from the indirect utilitarian perspective. Consider the concept of bodily integrity. Bodily integrity is a very basic component of human well being and important to human happiness. So, the right to bodily integrity can be easily defended by appeal to social utility; for it guarantees individuals the right to live their lives without being physically harmed by others, including organ transplantation without consent. Within the indirect utilitarian framework, since the right to bodily integrity is expected to function as a secondary norm, ‘any direct utilitarian argument for departing from them’ (e.g., cutting the young man up and distributing his parts among the five patients) becomes automatically irrelevant. Here I allude to Lyons’s criticism on the grounds that utilitarian theory ‘cannot’ account for rights; for Lyons thinks that no utilitarian system no matter how sophisticated, can turn a deaf ear to direct utilitarian arguments for departing from rights in particular cases when a more effective promotion of human welfare is at stake (Lyons, 1980, p. 25). He says: “I do not see how a utilitarian...can regard as irrelevant a direct utilitarian argument for departing from [rights], whatever their utilitarian justification” (*Ibid.* pp. 25-26). Yet in light of the above discussion, his criticism seems to fall to the ground: The indirect utilitarian does not conceive of rights as being subject to the common good, for the unconditionality of basic human rights and fundamental freedoms is seen to the utilitarian as the basis of social wellbeing. Therefore, for the indirect utilitarian, in a transplant like case, the correct thing to prescribe is that “the surgeon should not operate on the young man”.

At this point let me add a twofold caveat. (1) Indirect utilitarianism takes rights more seriously than any other utilitarian theory. However, as Sen (2009) argues, (within the indirect utilitarian framework) taking rights seriously should not imply that a right must always trump whatever argument is out there regarding the promotion of the common good. Such ‘all-conquering pretensions to rights’ dismisses the point that taking rights seriously has no implication beyond that rights are among the powerful determinants of the common good, thus should not be ignored or easily swept away (pp. 360-361, fn. 2).

(2) It is important that indirect utilitarianism should not be confused with the position Nozick (1974, p.28) calls disparagingly as ‘utilitarianism of rights’, which treats rights as mere goals to be promoted. The utilitarian of rights takes the non-violability of rights as a goal whose pursuit may, under special circumstances, require the violation of certain individuals’ rights. For example, the utilitarian of rights can argue for suppressing someone’s free speech in order to produce the greatest freedom of speech for the greatest number of people (Neuman, 1982, p. 132). On the basis of Nozick’s criticism, Bentham’s theory of utility, for instance, may seem to dictate a kind of utilitarianism of rights. But this might not be so. According to Kelly, for Bentham, rules and norms are essential in order to maximize social utility and the central question of Bentham’s political theory is not what action maximizes social utility, but what distribution of rights (1990, pp. 212-213). In other words, in Bentham’s view, the principle of utility can function not only as a direct reason for action, but also as a basis for obligations and norms in constructing the common good (which somewhat points to the indirect utilitarian tendencies in Bentham’s political view). Kelly argues that Bentham’s political theory requires the extension of the sphere of personal inviolability as the necessary condition of interest formation and self-realization. Thus if we are to maximize social utility by distributing the conditions of social interaction in order to facilitate the greatest amount of interest satisfaction for the greatest number of people, then this clearly entails an extensive distribution of liberty. So, according to Kelly, Bentham too, like Mill, seems to show a significant commitment to liberty and the idea of certain unconditional liberties and rights (*Ibid.*).

As to Mill’s ethics, taking into account certain traits of his practical reasoning over rights, it is sometimes rather ambivalent whether he is to be considered as an indirect utilitarian or a somewhat utilitarian of rights. This is because, on the one hand, Mill, for instance, insists on unconditional freedom of speech as the fundamental right in a democratic society (for its good consequences such as exchanging error for truth, intellectual and social development of individuals and groups, etc.). He famously says: “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, then he, if he had the power, would be justified in silencing mankind” (1972 [1861], p. 79).

On the other hand, he, for instance, argues for the abandonment of rights of inheritance and private ownership in Ireland, and for redistributing the land of absentee landlords among the resident peasants in order to facilitate autonomy and self-sufficiency in peasants (Gibbins, 1990, p. 122). Nevertheless, all things considered, an indirect utilitarian interpretation of Mill's social and ethical philosophy is far from being controversial.

Once again, within the indirect utilitarian framework, rights are treated as utility barring secondary norms; thus the utilitarian would not depart from them even if doing so maximized utility in particular circumstances. In other words, for the indirect utilitarian, "the protection of [rights] should not be subject to a case-by-case consequentialist calculation..." (Brink, 2007, p. 1704). In this regard, the indirect utilitarian construal of rights seems to be in line with the Nozickean 'rights as side-constraints' argument. According to Nozick, rights must function as side constraints upon the actions to be performed, and how we treat each other. Such constraints can be well incorporated into a teleological (or goal-directed) theory--in our case, indirect utilitarianism--so that "among those acts available to you that don't violate constraints *C*, act so as to maximize goal *G*" (1974, p. 29). As to the source of his inspiration, Nozick refers to Kant:

"Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means, they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable." (*Ibid.* pp. 30-31).

### 2.2.2 Further questions and issues concerning indirect utilitarianism

In this section, I shall briefly consider further questions and issues concerning indirect utilitarianism (including its problematic aspects). In this connection, the following three questions are in order. Firstly, how can indirect utilitarianism set out its utility barring principles, acceptance of which would most effectively promote the common good of the society? What plausible process can accomplish the specification of secondary principles, rules, maxims, etc., within the indirect utilitarian framework? This is an important question indeed and an intricate one. However, I shall not address it here; for it is a task beyond the scope of our analysis. Moreover, I think it has no direct bearing on our present argument.

Secondly, within indirect utilitarianism, can a lexical order be developed in order to avoid the conflicting of contributory values and principles? Indirect utilitarianism provides a method for weighing the plurality of secondary values; and, unlike, for instance, the Rawlsian theory, it has no ambition to construct a full set of principles which are to be ranked in lexical order. This might call for a brief explanation. The notion of lexical ethical priority is certainly not alien to indirect utilitarianism. On the contrary, indirect utilitarianism favors a strong lexical priority of individual rights. As we mentioned in the previous section, within indirect utilitarianism, rights as preeminent goods must take precedence over other goods. If it was otherwise, then, having no way of thinking of the inviolability of individuals, indirect utilitarianism would simply collapse into direct utilitarianism (This brings to mind “the extensional equivalence argument” discussed in Section 1.3). Here, what needs to be pointed out is that, within indirect utilitarianism, principles are not sorted into a firm lexical order, like in Rawls’s theory (However, later in Chapter 3, we shall see that Mill can be read as being committed to a lexical ordering as well).

Thirdly and finally, I want to address the difficulty of insulating the practical level of moral thinking from the critical level of utilitarian evaluation (Gray, 1983, pp. 137-138) and the issues of conflicting claims. Let me repeat once more that within the indirect utilitarian framework “there is never a direct and determining appeal to [the principle of utility] as to what to do, what act to perform or what rule to follow [on particular occasions of conflict]” (Martin, 2008, p. 241). Instead, utility as a critical principle is at our service only to decide what rules, values, and norms are of great benefit to us, all things considered, in the long term; or to guide us in making a policy, drafting a rule (right), and setting a norm, again all things considered, for conduct when particular rules (rights) do conflict (Martin, 2008, pp. 240-241). One might object to this line of reasoning on the grounds that policy making is a practical discipline which involves the evaluation and review of the relevant data and statistics; and since the indirect utilitarian is confined to contemplate at the critical level, she, unlike the act utilitarian, seems not to have much to say on the practical issues of policy decision. The indirect utilitarian might reply to this objection by trying to deflect its insistence on the practicality of policy making. Of course, policy making is extensively a practical matter. But one should also acknowledge the presence of the critical mode of moral thinking in the matters of policy making. Which moral principle(s) will guide the legislator in the decision making process? This question certainly deserves the critic’s attention. We cannot make sense of policy making as a practical discipline unless we set some objectives or priorities which are ultimately shaped by some moral standard or principle(s). And in the case of indirect utilitarianism, that moral standard is the utility principle. However, in closing, let me add a crucial caveat. Although indirect utilitarianism may entail providing the utilitarian moral basis for policy making, i.e., for methods and programmatic strategies to produce greater wellbeing for the greater number, it should be borne in mind that its prime aim is to maintain or establish a short list of principles both for the use of the moral instruction of the society as a whole (Gray, 1983, p. 3) and to govern the adjustment of conflicting claims and values from a long term perspective.

### 2.2.3 Secondary principles and ideals: distributive norms from the indirect utilitarian point of view

So far we have tried to show that it is a mistake to suppose that the utility principle cannot apply across varying moral dimensions; and thus the common criticisms against utilitarianism concerning justice and rights can never be rebutted. On the contrary, the utility principle provides us with good reason for holding not only that the idea of justice and moral rights can be derived from the utility principle, but also that the demands of justice and rights can be sufficiently incorporated into a more sophisticated utilitarian framework. At the end of Section 1.7 we touched upon the issues of distributive justice and economic inequality, and noticed the inadequacy of Pareto utilitarianism in comparing different income allocations. Now it seems that we need some elaboration on the same issue, from the indirect utilitarian perspective. My goal in this section is to appeal to the indirect utilitarian line of reasoning concerning inequalities, distributive norms or political ideals. By doing so, we shall once more realize how the plausibility and simplicity of utilitarian ethics allows us to effectively render non-utilitarian moral arguments, “without much difficulty or distortion” as appeals to the long run ‘greatest welfare for the greatest number of people’<sup>22</sup> (Schweickart, 1977, p.2).

Mill long ago, one and half centuries ago, drew attention to the difficulties revolving around the considerations of distributive justice. He thought that even if we all agree on the idea of income leveling, we will hardly be free from questions of justice. He says:

“[Some may] consider it unjust that [if an allocation decision relies on a] principle other than that of exact equality; others think it just that those should receive most whose needs are greatest; while others hold that those who work harder, or who produce more, or whose services are more valuable to the community, may justly claim a larger quota in the [allocation]. And the sense of...justice may be plausibly appealed to in behalf of every one of these opinions” (1972 [1861], p. 43).

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<sup>22</sup> This refers to the principle of utility.

Though Mill might not argue against income equality as a higher social good to be achieved as a long-term goal, the greater equality of income distribution was not at the center of his social and political philosophy. He wrote extensively on economic justice and inequalities and, at various points in his writings, he strongly suggested that the stipulation of equal ‘access to advantage’<sup>23</sup> or the equal right to income, not the equality of share or income, is what would result in a direction to a socially just society. His emphasis on the political ideal of the fair equality of opportunity is explicit, for instance, in the following passages:

“Some are born rich without work, others are born to a position in which they can become rich by work, the great majority are born to hard work and poverty throughout life, numbers to indigence. Next to birth the chief cause of success in life is accident and *opportunity*” (Mill, 1879, p. 265; my italics).

“A just and wise legislation would abstain from holding out motives for dissipating rather than saving the earnings of honest exertion. Its impartiality between competitors would consist in endeavoring that they should all start fair .... Many, indeed, fail with greater efforts than those with which others succeed, not from difference of merits, but *difference of opportunities*; but if all were done which it would be in the power of a good government to do, by instruction and by legislation, to diminish this *inequality of opportunities*, the differences of fortune arising from people's own earnings could not justly give umbrage” (Mill, 1848, V.ii.3 cited in Brink, 2008; my italics).

In light of the above remarks, we can posit the following. First of all, for Mill inequalities as such are tolerable as long as the chance of getting what one wants to have is available. Now, in a discussion of economic inequalities, it is important to make the following distinction between ‘constructive and destructive inequality’ in order to argue clearly as to “which inequalities have ‘normative significance’, or whether some inequalities are more significant than others” (Temkin, 2001, p. 335; my italics). By ‘constructive inequality’ I refer to that which reflects differences in an individual’s responses to equal opportunity provided that all individuals enjoy the same opportunities (Birdsall, 2001, p. 9).

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<sup>23</sup> Cohen’s (1989) phrase cited in Roemer (1998, p. 24).

To put alternatively, some may define constructive inequality "...in terms of providing 'ambition-sensitive justifications of departure from equality' [assuming] that equality is the baseline and that departures from it need justification, while equality itself does not" (Ryan, 2002, p. 225 with reference to Dworkin). By 'destructive inequality' on the other hand, I refer to that which reflects privileges for the rich (generally at the expense of others) and interferes with an individual's capacity to be productive (Birdsall, 2001, p. 9). It is clear in the above passage that Mill's concern is with destructive inequalities derived from inequality of opportunity and those inequalities that make inequality of opportunity persistent in the long run (Brink, 2008). Secondly, and more importantly, we have noted in the previous sections that for the indirect utilitarians, together with basic liberties, each individual's wellbeing consists in the realization of the individual's potentials (i.e., self-realization). This then implies that a socially just society, which aims for the maximization of the common good, should concern itself with the fair equality of opportunity for self-realization and welfare (Brink, 2008) and compensate individuals for differences in opportunity but not for those differences occurred due to autonomous decisions (Blanco & Villar, 2009). This is so because "when persons enjoy *equal opportunity for welfare in the extended sense*, any actual inequality of welfare in the positions they reach is due to factors that lie within each individual's control. Thus, any such inequality will be nonproblematic from the standpoint of distributive equality"(Arneson, 1989, p. 86; my italics).

In closing, Mill's struggle to seek out a delicate balance between the principle of utility, norms of distributive justice and basic human rights -- in particular, his strong adherence to the cultivation of individuality backed with the ideal of fair equality of opportunity-- finely coincide with the indirect utilitarian framework which allows the adoption of utility-barring secondary principles guided by the overarching principle of utility in order to better integrate the conceptions of liberty and justice.

### 3. Exploring the similarities and differences between Rawls's two principles of justice and the indirect utilitarian account of justice

In this final chapter, as the title suggests, I want to initiate a discussion on the similarities and differences between Rawls's two principles of justice and the indirect utilitarian account of justice. Let us begin our analysis by recalling the conceptual framework of Rawls's theory of justice. At the onset of developing his account of justice, Rawls makes use of a distinct conceptual apparatus called 'original position'. He says that this 'original position' is not conceived of as an actual historical state of affairs, but "as a purely hypothetical situation characterized so as to lead to a certain conception of justice" (Rawls, 1999 [1971], p.11). According to Rawls, we need to take this hypothetical standpoint if we are to envisage a socially just system for all involved. One key feature necessary to mention is that, in the original position, individuals are behind a 'veil of ignorance' in which no one knows her class position, social status, her intelligence, talents and the like (*Ibid.*). According to Rawls, behind the veil of ignorance, every individual would prefer to secure, first of all, greater liberties and rights; and then, individuals would aim to arrange social and economic inequalities so as to benefit the least advantaged members of society. To put it alternatively, according to Rawls, in the original position, behind the veil of ignorance, rational people would all come to endorse his principles of justice (for Rawls's two principles, I do not want to refer the reader back to Section 1.6. Rather, for the reader's convenience, I put them in the footnote<sup>24</sup>).

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<sup>24</sup> Once again, Rawls's two principles:

1. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value (*equal basic liberties principle*)

2. Social and economic inequalities are to satisfy two conditions: (a) They are to be attached to positions and offices open to all under conditions of fair equality of opportunity (*fair equality of opportunity principle*); and (b), they are to be to the greatest benefit of the least advantaged members of society (*difference principle*) (Rawls, 1993, pp. 5–6).

Concerning Rawls's reasoning, there are two points that are worthwhile to consider. (1) In the original position, the individual does not know who she will be in society. There is a chance of her being a member of the worst off group. So the individual rationally tends to be risk averse, and learns to empathize with those who are least advantaged. (2) If the individual does not know who she will be in society, then she cannot advance her own interests. So, this situation forces the individual to take an impartial standpoint when thinking about what to do. However, impartiality implied by the veil of ignorance differs from the utilitarian conception. As we discussed in Section 1.5, in order to be impartial (or to achieve a universal perspective), the utilitarian has to give equal weight to the equal interests of all within the existing social circumstances and institutions; however, Rawlsians incorporate a commitment to move away from desires, particular interests and to transcend conventional moralities and the status quo (Freeman, 2012).

Now let me turn to the similarities and differences between the Rawlsian and the indirect utilitarian ways of reasoning that should catch our notice.<sup>25</sup> Let us begin with Rawls's hypothetical choice situation. What would it be like to be behind the veil of ignorance? What would go on in one's mind in the original position? Needless to say, the person in the original position would want the best for herself. In the original position, the individual --having no identity, no interests, no class and no privileges-- would find herself on an equal footing with the others. She would then adopt the impersonal perspective of impartial, rational men and women. Under such circumstances, what one would wish for oneself would be wished for the others too. And if we put this in the utilitarian jargon, in the original position, rational individuals would eventually wish nothing but the greatest goodness for the greatest number of people.<sup>26</sup>

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<sup>25</sup>For a similar but less comprehensive comparative analysis, see T.D. Rogers's *Rawls's Theory of Justice from a Utilitarian Perspective*, 2004, *Macalester Journal of Philosophy*: Vol. 13: Issue. 1, Article 5.  
URL=<http://digitalcommons.macalester.edu/philo/vol13/iss1/5>

<sup>26</sup> See Rogers (2004), for a similar argument.

Now, let us consider Rawls's two principles in comparison to the indirect utilitarian point of view. The first principle expresses a demand for greater equal basic liberties for all. Utilitarianism in its classical forms is committed only to serving the general interest. And as we argued above in Chapters 1 and 2, this leads not only to self-defeating effects, but also to neglect and breach of basic rights or liberties. However, indirect utilitarianism-- as we introduced in Section 2.2.1 -- has no difficulty in addressing the considerations of rights and liberties. In particular, with all that was revealed about some features of Mill's and Bentham's utilitarianism with the help of the revisionary literature in Sections 2.2.1 and 2.2.3, it was intended to show that individual liberties and the norms of justice can be secured within the teleological framework of utilitarianism. Thus, in light of the above discussions, I see no reason why the indirect utilitarian perspective should conflict with Rawls's first principle. As to the second principle, 2a (the fair equality of opportunity), it stresses commitment to the ideal of equal opportunity, but so does the indirect utilitarian approach-- we already discussed this above in Section 2.2.3. However, it might be necessary to point out the difference in the conception of equality of opportunity in the two theories. According to Roemer, there are two main conceptions of equality of opportunity. The first states that society ought to strive to level the playing field among individuals during their periods of formation so that, as a result, those from disadvantaged social and economic backgrounds will be included in the pool of candidates for positions and offices in society (Roemer, 1998, p. 1). The second conception, which Roemer alternatively refers to as 'the nondiscrimination principle', states that in the competition for positions and offices in society, the eligibility of an individual's candidacy is to be determined solely with respect to those attributes required for the performance of the duties of the job in question; and race, gender etc., should not count for or against an individual's eligibility for the job (*Ibid.*). Obviously, both Mill and Rawls endorse the two conceptions of equality of opportunity with no trouble; however, in my opinion, they nevertheless differ in their commitment to equality of opportunity. In the case of Rawls, I think, taking into account his affinity with the least advantaged people, he is more committed to the first conception.

As for Mill, despite his promotion of various redistributive measures for those on lower incomes, first and foremost, he emphasized the social necessity of the ideal of equal access to advantage which is anchored to the value of nondiscrimination in particular. This is most explicit, for instance, in his famous 1869 essay titled *The Subjection of Women*. There Mill ardently argues against the inequality of rights between men and women, and for the full emancipation of the latter. He promotes various legal arrangements in favor of women such as women's economic right to their own property (Mill, 2000 [1869], p. 59). Also, in the essay, Mill stresses that if given the opportunity, women could at least prosper in society as men could. Thus, I would claim that Mill is more committed to the second conception of the equality of opportunity. Last but not least, as to 2b (the difference principle), once again I also think this principle does not necessarily stand in conflict with the indirect utilitarian approach on the basis of the thesis of diminishing marginal utility. 2b favors allotments of material wealth to the least advantaged members of society. This can be supported by the assumption that the marginal utility of wealth tends to decline.<sup>27</sup> For example, one thousand dollars is worth more to a poor family than to Donald Trump. So, distribution decisions based on the Rawlsian criterion (improve the welfare of the least advantaged persons) would make sense from the indirect utilitarian perspective. Indeed, by adopting the difference principle, one could boost the average wellbeing of society (This also sheds more light on Broome's remark as to why, if Rawls were to be a utilitarian, he would be an average utilitarian).

Now, in light of the above analysis the following two points are worth highlighting. Firstly, both Mill's aggregative conception of justice under the fair equality of opportunity constraint and Rawls's difference principle express a conception of distributive justice which is intended to serve as a guideline for corrective mechanisms and socio-economic arrangements. Secondly, for both Mill and Rawls inequalities are permissible in a just society except those in basic rights, liberties and opportunities, and etc.

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<sup>27</sup> See Rogers (2004), for a similar argument.

Before concluding this section, I would like to invite a further reflection on a Rawlsian reading of Mill's theory of justice in order to shed more light on the similarities between the two conceptions of justice. Su in her 2013 *Economic Justice and Liberty: The Social Philosophy in John Stuart Mill's Utilitarianism* provides the reader with an analytic framework to compare Mill's and Rawls's social and political philosophies. According to Su, one can find propositions in Mill's work which correspond to Rawls's two principles of justice. The following two principles can be brought forward as the highest standard of Mill's conception of distributive justice:

- “1 - [S]ociety should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely (Mill, *CW*, X: 257).
- 2 - The equal claim of everybody to happiness in the estimation of the Moralists and of the legislator, involves an equal claim to all the means of happiness (Mill, *CW*, X: 257-258).”

(Su, 2013, pp. 122-123)

Su refers to these first principles of distributive justice as ‘Mill's principle of equal happiness’. These are abstract (or formal) principles of justice. Their contents can be obtained only by taking into account the empirically determinable facts and the circumstances of the society in question (*Ibid.* p. 123).

Secondly, let us consider the difference principle which provides distributive institutions with a solid frame of reference for policy purposes:

- “ a - After the primary necessities of food and raiment, freedom is the first and strongest want of human nature (Mill, *CW*, XXI: 336).
- b - If all were done which it would be in the power of a good government to do, by instruction and by legislation, to diminish this inequality of opportunities, the differences of fortune arising from people's own earnings could not justly give umbrage (Mill, *CW*, III: 811).”

(*Ibid.*)

Statements (a) and (b) together-- Su refers to them as 'Mill's difference principle'-- suggest that economic inequalities are permitted if and only if the society guarantees minimum livelihood for every person and differences in social positions are to be reduced to a minimum level. As we indicated above in Section 1.6, a very important aspect of Rawls's principles of justice is their lexical priority, which suggests that the first principle trumps the second one in case they conflict in practice. Su claims that similar to Rawls's case, one can find a lexical order between Mill's first and second principles too. The priority of the principle of equal happiness over the difference principle suggests that the unequal treatment of happiness cannot be justified on the basis of the promotion of greater prosperity for the greater number of people (*Ibid.*). One can easily observe that such an interpretation of Mill's theory of justice perfectly fits into the frame of the indirect utilitarian ethics. However, showing that Mill's theory can be made to fit into Rawls's theory (or vice versa) does not necessarily imply that justice fits into utilitarianism. It is precisely due to the revisionary account of Mill we have been giving (i.e., the indirect utilitarian reading) that utilitarianism can accommodate the issues of justice.

Finally, I would like to add a quick note concerning the attribution of lexical ordering to Mill's theory of distributive justice. In Section 2.2.2, on page 50, I implied that indirect utilitarianism is essentially indifferent to the lexical ordering of principles of justice and rights. I still hold to that view. However, it is possible to suggest that the opposite is also true, as for instance Su does.

## **Conclusion**

Even its most ardent opponents admit that utilitarianism is a serious theory of ethics which deserves attention. And, in return, many of its proponents concede that some of its central features are --as we discussed above--morally defective. We have good reasons to depart from the traditional forms of utilitarianism. To recap briefly, we have seen that neither the act utilitarian principle nor the mere maximization of 'pleasure over pain' (or desire-satisfaction) as the guiding doctrine is proved to be the best method of promoting the common good. Many versions of utilitarianism have been developed in order to accommodate objections to utilitarianism, concerning, in particular, its inadequacy to address the demands of rights and justice. Rule utilitarianism, for instance, seemed to be the most promising variant in addressing the shortcomings of utilitarianism and providing a firm basis for legal and other institutional rights. However, I have tried to show that ultimately it too is subject to the same criticisms levied on act and hedonic variants, for rule utilitarianism fails to adequately recognize the general notion of moral right and wrong. Under the pressure of its harsh critics, the goal of utilitarians, in Lyons words, has been to find out the most faithful, but at the same time, the least controversial expression of the utilitarian cause (2000, p. 110). There have been many attempts to achieve this. I argued, as a sympathetic critic of utilitarianism, that indirect utilitarianism is the most defensible form of utilitarianism that can not only overcome the criticisms facing standard forms of utilitarianism, reconcile utility, rights and justice, and integrate diverse non-utilitarian moral ideas; but also ease the tension and resume a dialogue with its rivals, in particular with rights (or duty) based ethics.

Polish philosopher Tadeusz Kotarbiński (1886 – 1981), in an interesting paper called *Utilitarianism and the Ethics of Pity*<sup>28</sup> expresses a similar hope:

“[Rights-based theories] lead to a wilderness of obligation...utilitarianism [on the other hand] takes us to a place where there is a road but no sign pointing the way. The former [view] appears to be true, but in a fully developed life it lacks room for action... [it is] unable to find the road that would be obligatory. [But] [t]he latter [view] might find it...” (2000 [1914], p. 84).

While expanding on the indirect utilitarian theory, we have drawn on the socio-political systems of Bentham and Mill. And we have come to notice that a revisionist approach to these classical utilitarian views in fact proves that a reasonably charitable reading of classical utilitarians (in particular Mill) can successfully undermine what Gray (1984, p. 73) refers to as the conventional view that the enterprise of attempting a utilitarian derivation of fundamental rights is a highly hopeless project. By going beyond the traditional dichotomies between utilitarianism and deontology and focusing more on what binds these two theories together, we have come to see that rights and principles of justice as ethical precepts can, borrowing Lyon’s expression, ‘lead a life of their own’ within indirect utilitarianism. Also we have noticed the additional advantage of the indirect utilitarian approach over deontological approaches in the way it allows one not only to weigh off different principles and values, but also to clarify when and what kinds of violations of these principles and values are justified.

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<sup>28</sup> The translation was made by Wlodek Rabinowicz, the professor of practical philosophy at Lund University, Sweden. Concerning the article, he says: “I have thought it worthwhile to translate it into English because of its surprisingly ‘modern’ approach to its subject” (2000, p. 80).

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**Abstract**

It has been argued by some philosophers (John Rawls and David Lyons for instance) that the principle of utility is not a sufficient criterion for the justification of actions and institutional rules, thus has to be rejected or its application has to be restricted at best. Their reasoning amounts to the following. (1) Individuals often come across situations where the principle of utility may favor acts which are questionable on the grounds of justice. (2) Utilitarian considerations fail to accommodate the existence of institutional (political-legal) and moral rights. (3) Utilitarianism as such is devoid of efficient means to address the demands of distributive justice. It is the burden of this work to argue otherwise by examining the following views. (1) Rights and liberties have to be taken seriously for they are constitutive elements of social utility, or welfare (A famous defender of this view is John Stuart Mill). (2) Utility as an aggregative principle and justice as a distributive principle do not necessarily conflict with each other. The first chapter provides a general discussion on utilitarian systems and principles, and their strengths and weaknesses. In the second chapter, my aim is to address the above criticisms by adopting indirect utilitarian reasoning with respect to institutional arrangements, issues of justice and rights. In the final chapter, I point out the similarities and differences between Rawlsian and indirect utilitarian accounts of justice.

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