

A Millian Analysis of Rights

Martin Gunderson
Department of Philosophy
Macalester College
St. Paul, MN 55105 U.S.A

Resumen

Los derechos han sido caracterizados de maneras diversas: como pretensiones, títulos, títulos más restricciones normativas o como límites a las justificaciones utilitarias. Sin embargo, son dos las teorías que han dominado la discusión reciente: la teoría del beneficio, que caracteriza los derechos en términos de los beneficios garantizados al poseedor del derecho por los deberes de otros; y la teoría de la elección, que analiza los derechos en términos del control ejercido por el poseedor sobre la libertad o los deberes de los otros. Sostengo que las dos grandes obras éticas de Mill contienen un análisis que acoge las ventajas de ambas teorías evitando sus inconvenientes.

Abstract

Rights have been variously characterized: as claims, entitlements, entitlements plus normative constraints or as limits to utilitarian justifications. Two theories of rights, however, have dominated recent discussion: the benefit theory, which characterizes rights in terms of benefits secured for the right-holder by others' duties; and the choice theory, which analyzes rights in terms of the control exercised by the right-holder over the liberty or duties of others. I argue that Mill's two major ethical works embody an analysis that captures the advantages of both the benefit and choice theories while avoiding the problems of each.

1. INTRODUCCION

Rights have been characterized by different writers as claims, entitlements, entitlements plus normative constraints and as limits to utilitarian justifications.¹ Two theories of rights, however, have dominated the discussion in the last twenty years. The oldest analysis is the benefit theory according to which rights are characterized in terms of benefits secured for the right-holder by others' duties.² The second is the choice theory according to which rights are characterized in terms of control exercised by the right-holder over the liberty or duties of others.³

I argue that Mill's two major ethical works embody an analysis that captures the advantages of both the benefit and choice theories while avoiding the problems of each. In particular the Millian analysis of rights is not a theory of rights

¹ Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry*, vol. 4 (Winter 1970), pp. 243-257 (rights as claims); Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," *The Journal of Philosophy*, vol. 61 (October 29, 1964), pp. 628-641 (rights as entitlements); James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley, Los Angeles and London: University of California Press, 1987), pp. 30-33 (rights as entitlements plus normative constraints); Ronald Dworkin, "Taking Rights Seriously," in Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 184-205 (rights as limits to utilitarian justifications).

that reduces all types of rights to one function of rights. Rather, the Millian analysis concentrates on different functions of rights and how they limit one another. In this respect the Millian analysis is closer to the analysis suggested by James Nickel in *Making Sense of Human Rights*, though the Millian analysis provides more in the way of explaining how the various functions limit one another.⁴ If I am right, Mill has an important contribution to make to the current discussion on rights.

I speak of a Millian analysis rather than Mill's analysis because Mill does not explicitly formulate the Millian analysis of rights which I offer as an interpretation of his work. In this sense the theory is a constructive interpretation of Mill's major works, rather than an attempt to formulate an analysis that Mill himself actually believed. Nonetheless, all of the elements of the analysis are asserted by Mill and are consistent with what Mill explicitly says.

BENEFIT AND CHOICE THEORIES OF RIGHTS

Benefit Theory: On the most simple version of the benefit theory, to have a right is to be the person who will benefit from the performance of another's duty. As David Lyons notes, this analysis is inadequate because it is open to fairly obvious counter-examples. Suppose, to use Lyons example, that A promises to pay B \$10 and that, unknown to A, B decides he will give the money to C. B is the right-holder, but C is the beneficiary of A's duty to pay B.⁵ Lyons suggests that the

² The classical statement of the benefit theory is given by Jeremy Bentham. See *An Introduction to the Principles of Morals and Legislation and Of Laws in General* in the *Collected Works of Jeremy Bentham* (London: Athlone Press, 1970). For a recent defense of the benefit theory see David Lyons, «Rights, Claimants, and Beneficiaries,» *American Philosophical Quarterly*, vol. 6 (July 1969), pp. 173-185. See also Joseph Raz, «The Nature of Rights,» *Mind*, vol. 93 (April, 1984), pp. 194-214 and *The Morality of Freedom* (Oxford, The Clarendon Press, 1986), Chapter 7. According to Raz, «'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.» *The Morality of Freedom*, p. 166. The benefit theory is also called the «beneficiary theory» and the «interest theory of rights.»

³ Recent defenders of the choice theory include H.L.A. Hart, L. W. Sumner, and Carl Wellman. Hart, «Are There Any Natural Rights?», *The Philosophical Review*, vol. 64 (April 1955), pp. 175-191; Hart, «Bentham on Legal Rights,» in A.W. B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2nd Series (Oxford: The Clarendon Press, 1973), pp. 171-201; L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1989), pp. 46-53 and 96-100; and Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions and Morals* (Totowa, NJ: Rowman & Allenheld, 1985), Chapters 3 and 4.

⁴ James Nickel, *op. cit.*, pp. 15-26. According to Nickel, «we do not need to choose between the will [choice] and interest [benefit] accounts of rights, because rights can have more than one distinctive function.» Nickel, *op. cit.*, p. 22.

⁵ Lyons, «Rights, Claimants, and Beneficiaries,» *op. cit.*, pp. 175-176.

analysis be qualified so that to have a right is to be the intended beneficiary of another's duty "in the sense that some other person or persons are required to act or forbear in ways designed or intended to serve, secure, promote, or protect [the right-holder's] interests...."⁶ On the qualified version, the right-holder is the person who benefits because a duty is owed to him or her in particular. It is not sufficient for the right-holder to benefit merely from the performance of some duty or other.

There are obvious advantages of the benefit theory. The benefit theory captures the fact that rights typically do secure benefits for the right-holder. The benefit theory also accounts for the commonly held view that the mentally incompetent and children have rights even though they cannot make the sort of choices required by competing analyses of rights.

Choice Theory: The most prominent competing analysis of rights is the choice theory. There are two versions of the choice theory. On the version provided by H. L. A. Hart in his essay, "Are There Any Natural Rights?", to have a right is to be in a position to justifiably restrict another's liberty.⁷ On this version, the right-holder can choose whether to restrict another's liberty. I shall refer to this as the liberty version of the choice theory. On the second version, defended by L.W. Sumner, to have a right is to have control over another's duty.⁸ One has control over the duty of another just in case one has the power to eliminate the duty or to keep it in force. I shall refer to this as the duty version of the choice theory. On the duty version, the right-holder is not necessarily justified in restricting the liberty of those who would violate his or her rights.

The primary advantage of the choice theory is that it accounts for the fact that rights can be exercised. On the duty version, people exercise rights by keeping the duties of others in force or by eliminating those duties. On the liberty version, people exercise their rights by attempting to restrict the liberty of others. Also, as Sumner notes, the choice theory has the theoretical advantage of providing a clear distinction between moral reasoning based on principles of individual autonomy or liberty and moral reasoning based on considerations of welfare.⁹ On

⁶ Lyons, «Rights, Claimants, and Beneficiaries,» *op. cit.*, p. 176.

⁷ Hart, «Are There Any Natural Rights?» *op. cit.*, p. 179. In his later essay, «Bentham on Legal Rights,» Hart adopts a more sophisticated version of the choice theory. Hart, «Bentham on Legal Rights,» *op. cit.*, p. 192.

⁸ Sumner, *op. cit.*, pp. 45-53; H. L. A. Hart, in his essay, «Bentham on Legal Rights,» also defends this version of the choice theory for those rights which correspond to duties. For Hart in the Bentham essay, the choice theory encompasses not only the choice of whether to extinguish a duty or keep it in force, but also whether to take action for enforcement after a breach of the duty and whether to accept or waive appropriate compensation. Hart, «Bentham on Legal Rights,» *op. cit.*, p. 192.

⁹ Sumner, *op. cit.*, pp. 93-100.

the choice theory, rights can be used to clearly demarcate areas in which considerations of welfare are limited by considerations of liberty or individual autonomy, since rights create areas of individual autonomy or liberty.

THE MILLIAN ANALYSIS

Mill and the Benefit Theory: The benefit theory is especially attractive for utilitarian analyses, since the theory makes the central purpose of rights the securing of benefits rather than some quasi-Kantian notion of autonomy. While Mill does not say a great deal about the nature of rights, what he does say fits well with the benefit theory.¹⁰ In *Utilitarianism* Mill says that “to have a right...is...to have something which society ought to defend me in the possession of.”¹¹ The most natural interpretation of this passage is that those things which I possess that society ought to defend me in the possession of are benefits. As will become clear later, Mill’s statement that rights correlate with benefits should not be interpreted as providing necessary and sufficient conditions for the concept of a right. Rather Mill is noting an important feature of rights. In this respect what Mill says fits well with analyses that hold that the benefits theory merely picks out one function of rights.

Mill’s basic statement concerning rights and benefits needs to be qualified in several ways. At the outset, it should be noted that there are duties which create benefits, but which do not create rights. Mill notes, for instance, that the duty to give to charity does not correspond with a right of the charity recipient.¹² Mill calls these imperfect duties.¹³ For Mill, rights are correlative with duties directed to specific persons. Benefits derived from duties not directed to specific persons, however, do not correlate with rights. This enables Mill to avoid counter-examples to the benefit theory based on beneficiaries of duties

¹⁰ David Lyons is correct to note that sometimes Mill makes claims that fit well with the benefit theory, though Lyons is also right to note that what Mill says fits with the theory that rights are claims and with the choice theory. David Lyons, «Mill’s Theory of Justice,» in *Rights, Welfare, and Mill’s Moral Theory* (New York and Oxford: Oxford University Press, 1994), p. 81.

¹¹ John Stuart Mill, *Utilitarianism*, in J. M. Robson (ed.), *Collected Works of John Stuart Mill*, vol. 10 (Toronto: University of Toronto Press; London: Routledge and Kegan Paul, 1969), p. 250.

¹² *Ibid.* p. 247.

¹³ *Ibid.*, p. 247. Mill claims that the difference between perfect and imperfect duties is that perfect duties, unlike imperfect duties, correspond to rights. Note that this differs from the way in which Kant distinguishes perfect and imperfect duties. For discussions of Mill’s distinction between perfect and imperfect duties as they relate to rights, see David Lyons, «Human Rights and the General Welfare,» *Philosophy and Public Affairs* vol. 6 (Winter, 1977), pp. 126-127 and Fred Berger, *Happiness, Justice and Freedom* (Berkeley: U. Cal. Press, 1984), pp. 214-225.

who do not have rights correlating with those duties.¹⁴ In addition Mill claims that violations of rights involve injuries or harms to specific persons and that the injuries are of such a magnitude as to warrant sanctions on the injurious behavior.¹⁵ In extreme cases these sanctions may take the form of criminal law and state punishment. In less severe cases, the sanctions may be in the form of social disapprobation. The sanctions may also be internal in the form of feelings of guilt.¹⁶

It should be noted that rights need not correlate with duties which actually benefit the person to whom the duty is owed. Of course, performance of the duty will typically produce benefits for the person to whom the duty is owed, even though it may not produce benefits in a particular case. Taking all of this into account, Mill's view is that rights correlate with duties which typically produce benefits for the person to whom the duty is owed.

So far in developing the Millian analysis I have concentrated on the way in which what Mill says about rights accounts for the way in which they produce benefits and thereby captures the advantage of the benefits theory. There are two ways, however, in which the Millian analysis is far more sophisticated and more plausible than current accounts of the benefit theory: (1) Mill emphasizes both the way in which rights are claims and (2) Mill limits the duties correlative with rights by use of the harm principle developed in *On Liberty*. Together these enable the Millian analysis to capture all of the advantages of the choice theory because they provide ways in which the right-holder can exercise his or right by making various choices. I consider each of these in the next two sections.

Mill and the Liberty Version of the Choice Theory: First, Mill combines his statements about how rights constitute benefits with the view that rights are claims to societal protection. He states in *Utilitarianism* that "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."¹⁷ In short, rights are claims. As Joel Feinberg points out, to have a claim is to have reasons which put one in a position to make claims.¹⁸ If we interpret what Mill says about claims in light of what Feinberg says about claims, then we have an analysis of rights which can account for the

¹⁴ Here Mill's account of rights relies on the sophisticated benefits theory which David Lyons calls «the qualified beneficiary theory.» Lyons, «Rights, Claimants, and Beneficiaries,» *op. cit.*, p. 176.

¹⁵ Mill, *op. cit.*, pp. 247-248.

¹⁶ Mill, *op. cit.*, pp. 228-229.

¹⁷ Mill, *op. cit.*, p. 250.

¹⁸ Feinberg, *op. cit.*, p. 257.

exercise of rights. On Mill's view, one of the ways in which people exercise their rights is by making claims for the protection of society.

Mill's statement that rights are claims is not incompatible with his analysis of rights in terms of protected benefits. To say that rights are claims, as Feinberg notes, is not to give a formal definition of "rights," for such a definition would be circular.¹⁹ Rather, noting that rights are claims tends to call attention to an important feature of rights. Nor is Mill claiming that every right is a claim right. The central purpose of a right, on Mill's account might be, for example, to secure a liberty (e.g., the right to worship as one pleases), to secure a power (e.g., the right to accept an offer which has been made), or to provide a claim (e.g., the right to welfare benefits if one qualifies). On the interpretation of Mill offered here, whatever the central purpose or core of a particular right, every right has as one of its additional normative elements a claim for the protection of society.

It is important that for Mill the claim is made to society for protection because this combines Mill's benefit analysis with the basic insight behind the liberty version of the choice theory. When the right-holder makes a claim for societal protection, the right-holder asks society (often the state) to restrict if necessary the liberty of those who are infringing on the right-holder's rights. If the claim is valid, society has a reason in virtue of the claim to limit the liberty of another if it is necessary to protect the right. Interestingly, on Mill's account, the right-holder can claim the protection of society in the form of education and remonstrance even before the right-holder's right is threatened. In this way Mill provides for stronger protection of rights than most theories which analyze rights in terms of claims.

There are two limits on when it is justifiable to restrict liberty, for Mill. First, the reason society has for restricting the liberty of the rights violator after the claim is made by the right-holder is not by itself a sufficient reason for restricting the liberty of the rights violator. It is not sufficient, for example, in cases in which innocent persons may be harmed. Also, it may not be sufficient if the harm involved in restricting the liberty of the offender will be greater than the harm that would be caused if the offender's liberty were not restricted. Second, the reason may not justify completely thwarting the liberty of the rights violator. Rather, in some cases it is a reason for making it more difficult for the rights violator to exercise liberty in a way that violate rights. For example, if I renege on a promise to meet a friend for lunch, no one is justified in bodily dragging me off to lunch against my will. There is, however, justification for milder sanctions such as expressions of disapprobation which make it more difficult for me to exercise my liberty by breaking promises.

¹⁹ Feinberg, *op. cit.*, p. 250.

Mill and the Duty Version of the Choice Theory: There is a second way in which Mill's statements about rights can be interpreted in a way that is far more powerful than standard benefit accounts. What Mill says about rights should be read in light of the central thesis of *On Liberty*. Doing this goes beyond Mill's specific statements about rights and results in a Millian analysis of rights. In this respect the interpretation offered here differs from interpretations offered by Sumner and Lyons according to which Mill's conceptual analysis of rights is wholly independent of his substantive moral theory.²⁰ On Mill's analysis, rights correlate with duties to provide benefits. But, for Mill, one of the most important duties is the duty not to interfere with another's liberty. Mill makes this clear in his essay, *On Liberty*, when he states that the only justification for coercing a member of a civilized community is prevention harm to others. His or her own good, either physical or moral, is not sufficient justification.²¹ Mill then makes exceptions in the cases of children and persons who are incapable of being improved by free and equal discussion.²² This principle is generally referred to as Mill's liberty principle or harm principle.

For Mill, rights correlate with duties which can be interpreted as *prima facie* duties that can be overridden in the case of competent adults by the stronger duty not to restrict another's liberty except as necessary to prevent harm to others. For example, if I promise Smith that I will paint his friend's house I incur a *prima facie* duty. If, however, Smith's friend does not want me to paint her house and objects, my *prima facie* duty is overridden by the stronger duty not to interfere with the home owner's liberty. In effect the liberty principle gives the right-holder a veto over whether another acts on his or her duty to provide benefits. This enables us to combine Mill's beneficiary theory with the basic mechanics of the duty version of the choice theory. The right-holder has the power to determine whether a *prima facie* duty becomes an actual duty. This provides another way in which the Millian analysis accounts for the exercise of rights. In this respect the Millian analysis of rights is similar to the analysis offered by Joseph Raz who holds that the duties that correlate with rights are conditional duties that become unconditional duties at the discretion of the right-holder.²³

²⁰ Lyons, «Human Rights and the General Welfare,» *op. cit.*, p. 124; Sumner, *op. cit.*, p. 137.

²¹ Mill, *On Liberty*, in J. M. Robson (ed.), *Collected Works of John Stuart Mill*, vol. 18 (Toronto: University of Toronto Press; London: Routledge and Kegan Paul, 1977), p. 223.

²² *Ibid.*, p. 224.

²³ Joseph Raz, *The Morality of Freedom*, *op. cit.*, pp. 167-168. Unlike the Millian analysis, Raz offers an analysis of rights in terms of necessary and sufficient conditions. See footnote 2.

In those cases in which the agent is incompetent (e.g., children and the mentally incompetent) and therefore unable to exercise this liberty the *prima facie* duty to provide the benefit cannot be overridden by the choice of the right-holder and therefore becomes a duty all things considered. If receipt of the benefit requires that choices must be made (e.g., selecting the precise sort of education a child will receive) then the choice must be made by an appropriate proxy. The right-holder's proxy must make the choice in such a way as to secure the benefit for the right-holder, however. The proxy cannot simply forgo the benefit on behalf of the incompetent right-holder.

All in all, Mill's work can be interpreted as providing an analysis of rights that embodies the functions of rights exemplified in the benefit theory, the liberty version of the choice theory, and the duty version of the choice theory. Mill begins by noticing that performance of the duties correlative to rights provide benefits for the right-holder. He captures the underlying advantages of the liberty version of the choice theory by noting that rights entail claims. In addition we can use the liberty principle from *On Liberty* to capture the basic mechanics of the duty version of the choice theory. Even if the liberty principle is not made a part of the analysis of rights, as it is on the constructive interpretation offered here, what he explicitly says about rights should be seen as operating within the context of what he says about claims and his defense of the liberty principle. This Millian analysis has several advantages over both the benefit theory and the choice theory. These advantages emerge most clearly by exploring problems faced by the benefit theory and by the different versions of the choice theory.

PROBLEMS FOR THE CHOICE THEORY

Inalienable Rights: Adherents of the benefit theory claim that the choice theory cannot account for inalienable rights.²⁴ Inalienable rights are rights which the right-holder cannot eliminate. Thus, the right-holder does not have a choice over whether he or she has the right. While it is debatable whether there are any inalienable rights, an adequate analysis of rights should not prejudge the issue.

This objection clearly does not apply to the liberty version of the choice theory. A right-holder can choose not to restrict the liberty of someone who is violating his or her rights without eliminating the right. The duty version, however, is more complex. Suppose, for instance, that I have a right to life and that the right to life is inalienable. On the duty version, I can eliminate a person's duty

²⁴ Niel MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), Chapter 8, cited in Sumner, *op. cit.*, p. 51. Sumner gives a brief summary of arguments for the choice theory and for the benefits theory. See pages 50-51.

not to kill me. I may, for instance, be suffering from a painful terminal disease and want the doctor to give me a fatal injection of morphine after a certain stage of the illness is reached. The choice theorist can claim that although this eliminates the doctor's duty not to kill me, it does not eliminate my right to life. My right to life correlates with the duty not to kill me without my permission, not with the duty to refrain from killing me regardless of what I want or choose. In this way the choice theorist can claim that the right to life is inalienable even though the right-holder has control over the corresponding duties of others.

This tact works less well with the right to liberty, however. Part of the problem is that it is difficult to give a person permission to interfere with my liberty. If I give a person permission, it is not really an interference with my liberty. The seeming paradox vanishes, however, when we deal with restrictions of future liberty. I can, at the present time, give a person permission to restrict my liberty in the future because in the future I may no longer agree with the restriction which I authorized in the past. Thus, my liberty in the future can genuinely be restricted. If, however, my right to liberty is inalienable, then it seems that I should not be able to eliminate my future liberty in this manner, for what I am doing is using my present right to liberty to divest myself of the future liberty and hence of the right to liberty, on the liberty version of the choice theory of rights. In addition, if the right to liberty is inalienable then a right-holder cannot sell himself or herself into slavery. So the right not to be enslaved corresponds to a duty which cannot be eliminated. In short the benefit theory and the liberty version of the choice theory can account for inalienable rights, but the duty version of the choice theory can account for only some inalienable rights.

The Millian analysis of rights also provides a way of explaining how rights can be inalienable. On Mill's view, those rights are inalienable which could not be divested by the right-holder without defeating the very purpose of the right. Mill explicitly notes, for example, that people cannot sell themselves into slavery (i.e., divest themselves of the right to liberty) because to do so would defeat the very purpose of the liberty in the first place.²⁵

Mill's view that rights are claims to the protection of society provides for a degree of autonomy without entailing that all rights are alienable. As we have seen, for Mill, rights involve claims. Claims can be inalienable whether or not the claimant actually makes a claim. To have an inalienable right to liberty, for instance, is to have a claim to liberty which cannot be eliminated whether or not the right-holder chooses to exercise his or her claim. In this case, Mill's analysis of rights captures the advantages of the liberty version of the choice theory and the benefit theory.

²⁵ Mill, *On Liberty*, *op. cit.*, pp. 299-300.

Uncontrollable Duties: Closely related to inalienable rights are rights which correspond to duties which cannot be controlled. Consider, for instance, property rights. Property rights in real estate correspond to a duty not to trespass. The duty not to trespass is a duty not to enter another's property without permission. The problem for the duty version of the choice theory is that this duty cannot be eliminated. The landowner might exercise his or her right by allowing another to enter the property. But, even with this permission the duty not to trespass remains. The person who enters with permission is not trespassing at all. The property owner who grants permission does not then eliminate the duty not to trespass. Rather the owner makes entry onto his or her land a non-trespass.

Consider also the right to defend oneself. Presumably this right corresponds with a duty not to attack others in certain ways. The person who exercises his or her right to self-defense does not, however, merely keep in force or eliminate the duty not to attack. Those who exercise their right to self-defense attempt to restrict the liberty of the attacker or at least claim the protection of the state.

Both the liberty version of the choice theory and Mill's version of the benefit theory can take account of such rights. The landowner confronted with an actual trespass has the choice on the liberty version of the choice theory to restrict the liberty of the trespasser or not as the land owner chooses. Similarly in the case of self-defense the person attacked can choose whether to resist or not. On the Millian analysis of rights, the landowner has the choice of whether to claim societal protection of his or her property rights. A similar analysis can be given for the right of self-defense.

Mandatory Rights: Sometimes we speak of having rights where the right-holder has a duty to do whatever it is that he or she has a right to. Thus, adolescents have both a right and a duty to go to school.²⁶ Such rights are sometimes called mandatory rights. Various philosophers have noted that the choice theory of rights has difficulty accounting for mandatory rights.²⁷ It is impossible for the duty version of the choice theory to account for mandatory rights because it is not possible for the right-holder to control the duty. The liberty version, on the other hand, could claim that the right to education gives the student justification for restricting the liberty of those who would prevent his or her education. This is compatible with adolescents having a duty to obtain an education.

²⁶ Raz, «The Nature of Rights,» *op. cit.*, p. 199 and *The Morality of Freedom, op. cit.*, p. 170.

²⁷ Joel Feinberg, «Voluntary Euthanasia and the Inalienable Right to Life,» *Philosophy and Public Affairs*, vol. 7 (1978), p. 109; Lyons, «Rights, Claimants, and Beneficiaries,» *op. cit.*, p. 180, nt. 16; Raz, «The Nature of Rights,» *op. cit.*, p. 199.

Mandatory rights are also compatible with the Millian analysis of rights. Those persons (e.g., children and the mentally incompetent) who constitute exceptions to the liberty principle can have rights which are mandatory because the rights correlate with duties which cannot be overridden by Mill's harm principle. Required schooling for children is a primary example of this. Also, like the liberty version of the choice theory, on the Millian analysis, a student can claim the protection of society in protection of his or her right to an education in the event that anyone should attempt to deny that right. For instance, the famous United States Supreme Court case of Brown v. Board of Education which held in 1954 that segregated school systems are unconstitutional can be viewed as a case in which African Americans claimed their right to an equal education under the 14th Amendment of the Constitution.²⁸

Of course, as Sumner points out, those who feel uncomfortable with mandatory rights may regard the duty version of the choice theory as preferable because it justifies this discomfort.²⁹ The problem with this, however, is that it seems to beg the question. Why should one feel uncomfortable with mandatory rights if one has not already adopted the duty version of the choice theory of rights? The fact that we speak naturally of mandatory rights and even legally enforce them certainly gives us some reason to think that an adequate theory of rights should take account of mandatory rights or at least not be incompatible with them.

Rights of Children and the Mentally Incompetent: It is plausible to suppose that both children and the mentally incompetent have rights such as the right to adequate medical treatment and the right not to be abused. Critics of the choice theory claim that this presents a problem for the choice theory, since young children and mentally incompetent persons cannot exercise control over the duties or liberty of others.³⁰ This is because they do not have the mental capacity to realize that there are duties, liberties and options to control duties or liberties. Both versions of the choice theory presuppose voluntary choice, and thus neither can easily escape this objection. The benefit theory which does not rely on the choice of the right-holder is, of course, not faced with this problem.

As previously noted, the Millian analysis is compatible with the claim that children and the mentally incompetent have rights which correlate with duties that cannot be eliminated by the right-holder's choice, since children and the

²⁸ *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954).

²⁹ Sumner, *op. cit.*, p. 51, citing R. E. Robinson, et al. «The Logic of Rights,» *University of Toronto Law Journal*, vol. 33 (1983), pp. 268-269.

³⁰ Christopher Arnold, «Analyses of Right,» in E. Kamenka and A. Tay (eds.), *Human Rights*, (London: Edward Arnold, 1978), pp. 80-81. See also Rex Martin and James W. Nickel, «Recent Work on the Concept of Rights,» *American Philosophical Quarterly*, vol. 17 (July 1980), p. 171.

mentally incompetent are exceptions to Mill's harm principle. Also, on Mill's analysis, children and the mentally incompetent have a claim to the various services to which they have rights. While children and the mentally incompetent lack the competence to make these claims on their own behalf, others may make these claims for them. This is what happens in the area of legal rights where parents and guardians make claims on behalf of children or mentally incompetent persons under their care.

It might be thought that the use of proxies in this way could also save the choice theory from this objection. The problem is that it is difficult to see how the proxy could make the choice that the child or mentally incompetent person would make if not a child or mentally incompetent. The child or mentally incompetent person may not have sufficiently elaborate values on which to base a proxy choice. In such cases the proxy is simply substituting his or her choice for that of the incompetent person. Since it is the proxy who is empowered to make the choice and the choice does not necessarily reflect what choice the incompetent person would have made, it appears, on the choice theory, that it is the proxy who has the right. But, this is just what the objection takes issue with.

Minor Rights: On some interpretations, the liberty version of the choice theory is faced with a fatal objection which the duty version and the Millian analysis avoid. There are minor rights which no one would claim warrant a restriction of liberty. If a friend promises to buy me lunch, I have a right to a lunch purchased by my friend. If, however, my friend reneges on his or her duty, I surely do not have a right to restrict my friend's liberty by forcing my friend to purchase a lunch for me. On the duty version of the choice theory, my right to lunch means that I can keep my friend's duty in force or eliminate it. What I cannot do is restrict my friend's liberty. Similarly, if A promises B to pay him or her \$10, then B has a right to the \$10 even though B would not be justified in forcibly taking the money from A.

On the Millian analysis, I can decide whether or not to make a claim for the \$10. While my claim is for the protection of society, Mill is careful to point out that the claim does not always justify a complete restriction of the liberty of the offender. The reason provided for a restriction of liberty may be overridden by other reasons. In addition, the claim may justify protection in the form of creating conditions (e.g., social disapprobation) which merely make it more difficult to exercise liberty, rather than completely restricting liberty.

It should also be noted that we are prepared to allow societal coercion in cases in which we would not be willing to allow individual coercion. In the case of the \$10 it seems justifiable to allow a small claims court to resolve the dispute and award the \$10 to B. This award can then be backed up with sanctions. As noted, however, we would not think it justifiable for B to take it upon himself or herself to coerce A. In the previously mentioned example of a broken promise

to take a friend to lunch, even the use of a small claims court might constitute unjustifiable coercion. Here the claim must be for minor social sanctions on the part of friends and acquaintances. It is a significant advantage of the Millian analysis that it gives us a rational for making this sort of distinction.

In general, the Millian analysis is able to avoid all of the common objections to the choice theory while the two versions of the choice theory fall to one or another of the various objections.

PROBLEMS FOR THE BENEFIT THEORY

Exercising Rights: Advocates of the choice theory claim that only the choice theory accounts for the notion of exercising rights.³¹ All theories can account for the exercise of liberty rights. To exercise a liberty right is simply to do what one has a liberty right to do. To refrain from exercising such a right is simply to refrain from acting. The problem arises with welfare rights. On the benefit theory, it is not clear what it is to exercise a right to receive a benefit. Others simply have a duty to provide the benefit, and that is the end of it. Both versions of the choice theory can give an account of exercising welfare rights, however. On the liberty version, one exercises a right by restricting the liberty of those who would violate one's right. One fails to exercise the right merely by failing to restrict the liberty of others. On the duty version, presumably one exercises a right by keeping the correlative duties in force, and one fails to exercise a right by eliminating the duties.

The Millian view can also account for how welfare rights are exercised. On the Millian view, the person who exercises his or her right to something makes a claim. The person who does not exercise a right simply declines to make a claim even though he or she continues to have a claim.

Paternalism: The benefit theory runs the risk of unjustifiable paternalism. If the right-holder has no control over the duty of another to provide benefits, then the right-holder may be benefited whether or not he or she wants the benefit or even considers it a benefit. Such paternalism is a serious restriction of liberty. As has been noted, Mill emphatically rejects this strong paternalism.

Fortunately, the Millian analysis of rights does not entail a form of paternalism which Mill rejects in *On Liberty*. Since the Millian analysis of rights places what Mill says about rights within the context of the harm principle, right-holders have, as has been noted, a veto power over whether they receive the benefits which others owe them. The exception are children and incompetent adults. Such people have no veto power over whether they receive benefits, but paternalism is surely justified in such cases. Even here, however, proxies

³¹ H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 187f, cited in Sumner, *op. cit.*, pp. 50-51.

such as parents and guardians may decide whether or not to make claims on behalf of children and the incompetent. This further softens potential criticisms based on paternalism.

Theoretical Concerns: As Sumner points out, the choice theory has a theoretical advantage over the control theory.³² The choice theory uses the term “rights” to distinguish clearly between the ethics of autonomy and the ethics of welfare. There is no concept other than rights which can be readily used for this purpose. The benefit theory draws a distinction between duties to a specific person and duties to promote the general welfare, but this distinction can, according to Sumner, be captured as readily by the concepts of relational and non-relational duties.³³ This theoretical advantage of the choice theory is an advantage of both the liberty and duty versions. Both versions create spheres of autonomy for the right-holder and thereby draw the appropriate distinction between the ethics of autonomy and the ethics of welfare.

The Millian analysis of rights shares this important theoretical advantage with the choice theory, since it carves out a sphere of autonomy for the right-holder by allowing the right-holder or the right-holder’s proxy to determine whether or not to exercise a particular claim for societal protection. In this way the right-holder can determine whether social pressure is to be brought to bear. Mill’s analysis of rights must also be seen in the light of Mill’s liberty principle. As we have seen, the liberty principle allows competent adults in effect to eliminate duties which others have to provide benefits.

CONCLUSION

The Millian analysis of rights is able to avoid the central objections to the benefit theory and both versions of the choice theory while capturing the advantages of each. It does this without adopting a single theory that reduced all types of rights to one type of right or to one function of rights, but which shows how various functions of rights fit into a coherent analysis.

I have argued that what Mill says about rights must be seen within the context of his substantive moral theory. It might be objected that if non-utilitarians cannot adopt the Millian analysis of rights, this is a serious theoretical problem with his analysis. After all, it has been the non-utilitarians who have been most concerned with rights, and it would be ironic if the most plausible analysis of rights were useless to them.

Although it is important to see statements about rights within the context of his substantive moral theory, especially his essay *On Liberty*, the essentials of the Millian analysis could be adopted by non-utilitarians. What is needed to

³² Sumner, *op. cit.*, pp. 97-100.

³³ Sumner, *op. cit.*, pp. 100.

capture the advantages of the benefit and choice theories while avoiding their problems is an explanation of the way in which duties correlated with rights provide benefits, an explanation of how rights provide for claims and a version of the harm principle which allows exceptions in the case of incompetent persons and children. Thus, while one could reject Mill's utilitarianism and come up with a plausible analysis of rights that was essentially Millian, one could not reject Mill's harm principle and come up with a plausible Millian analysis of rights. In this respect Mill's analysis of rights is inextricably bound up with his substantive moral theory.³⁴

³⁴ Earlier drafts of this paper were read at the University of Minnesota, Duluth and at Macalester College. I am especially indebted to Gerald Gaus and Henry West for their helpful comments and suggestions.