

## A Utilitarian Argument: Laying the Foundation for a Coherent System of Law

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*“Morality is not to be discovered but to be made: we have to decide what moral values to adopt: what moral stands to take.”<sup>1</sup> In this paper I argue that, given certain assumptions about human nature, utilitarianism is the most persuasive moral theory. This has important implications for legal policy and principle. In relation to any legal issue, the path that should be followed is the one that will maximise happiness.*

### 1 Introduction

#### *Overview*

Even the most ardent legal positivists agree that as a *matter of fact* there is a connection between law and morality. In most Western legal systems this association is very strong. Underpinning most legal rules is a (real or purported) moral principle – certainly it is difficult to find examples of laws which are *clearly* immoral. The foundation upon which a coherent and justifiable legal system must be built is a theory of morality.

As was noted by Lord Hailsham, in *R v Howe*:

This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and in the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.<sup>2</sup>

In a similar vein, in *Airedale NHS Trust v Bland*, Lord Lowry stated “it is important, particularly in the area of criminal law which governs conduct, that society’s notion of what is the law and what is [morally] right should coincide”.<sup>3</sup>

Given the importance of moral theory to legal principle, it is surprising how little moral philosophy appears in legal literature. By and large, commentary on moral theory is consigned to the philosophy shelves of the library — a place where, in the contemporary age of economic rationalism, it seems fewer lawyers

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<sup>1</sup> J L Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books, London, 1977) 106. [1987] 1 AC 417, 428.

<sup>3</sup> [1993] AC 789. 877. Most recently, see the judgment of the English Court of Appeal in *A (Children)* — the Jodie and Mary Siamese Twins Case: 1/2000/2969, 22 September 2000: <http://www.courtservice.gov.uk/judgments/judg-home.htm> (henceforth *A (Children)*).

are visiting than ever before. This paper represents a small attempt to reverse this trend and to stabilise the foundation upon which law is built. More narrowly, the article undertakes the task of offering a proof for a particular moral theory — utilitarianism.

### *Purpose, Scope and Limits of Paper*

Before turning to substantive matters, let me give a few more details regarding the purpose, scope and what will no doubt be regarded as the limits of this paper. My objective is to convince readers to think more deeply about the need for a *coherent* normative ethic to underpin legal principle and to press upon them that utilitarianism is the soundest normative theory. Utilitarianism has relatively few contemporary adherents. Its popularity has diminished in roughly inverse proportion to the growth of “rights talk”, which now dominates moral discourse — especially, but by no means solely, in the international law arena. The criticisms that have been made of utilitarianism over the centuries number into (probably) the hundreds. All other moral theories have also been subject to intense criticisms. This paper does not seek to add to the ever-growing catalogue of “negative” commentaries that dominate the contemporary philosophical literature on moral discourse. Instead, by advancing a positive proof of a particular moral theory, the opposite (and far more ambitious) tack is taken. Critics will no doubt charge that the argument advanced in this paper is unconvincing — “What about all of the ‘persuasive’ attacks that have been made against utilitarianism over the ages?” My response to this will be two-fold.

First, it is not possible in a paper of this size (and indeed, any size) to respond point for point to every tenable criticism — there will always be another one around the corner. However, I do make a small concession to this end by responding to the *main* criticism against utilitarianism. Further, although my aim here is not to launch a full-scale systematic assault on rights-based moral theories (I have done this elsewhere<sup>4</sup>), given the appeal of rights-based moral theories it is necessary to at least provide an overview of what I believe to be the central problems with such theories. The second response is more pragmatic. It seems that the current approach to moral “enlightenment” (*i.e.*, the thrust and parry of attack, defence and counter-attack, and so on) has not drawn us any closer to identifying the correct moral code. This provides the strongest possible reason for going back to basics and starting at the other end.

Another preliminary point that I wish to make is that the topic of this paper is of particular importance in the area of international law. Ignoring the use of military force or of economic sanctions, moral principle is the only lever that can be used to compel sovereign nations to adhere to a universal legal code. Absent a coherent objective theory of morality, it is always feasible for sovereign states to resist international law standards by charging that the principles underpinning the law in question are subjective or relative and do not form part of the societal standards recognised or practised in that jurisdiction. Discovering

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<sup>4</sup> See M Bagaric, “In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility Between Utilitarianism and Rights” (1999) 24 *Australian Journal of Legal Philosophy* 95.

the moral truth<sup>5</sup> will not only provide a powerful reason for mandating compliance with international law standards, but will also ensure that the right standards are set. Truth is a very powerful catalyst for consensus. It is the moral truth that will ultimately provide the strongest reason for sovereign states to become signatories to treaties which, for example, prohibit the torture of suspects or require the implementation of measures which reduce environmental waste and pollution.

The next part of this paper provides an overview of why rights-based theories should be rejected. This is followed by a brief response to some of the more damaging criticisms of utilitarianism. In section 4, I set out my argument in favour of utilitarianism. However, before doing so (in section 3), I make clear the assumptions that are involved in the proof.

## 2 Overview of Response to Criticisms of Utilitarianism

### (i) *The Dominance of Rights-Based Theories*

As was adverted to above, deontological rights-based moral theories represent the current orthodoxy in moral discourse. Following the Second World War, there has been an immense increase in “rights talk”,<sup>6</sup> both in sheer volume and the number of supposed rights. The rights doctrine has progressed a long way since its simple aim of providing “a legitimization of ... claims against tyrannical or exploiting regimes”.<sup>7</sup> There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.<sup>8</sup> Assertion of rights has become the customary means to express our moral sentiments: “there is virtually no area of public controversy in which rights are not to be found on at least one side of the question — and generally on both”.<sup>9</sup> The domination of rights talk is such that it is unquestionable that “the doctrine of human rights has at least temporarily replaced the doctrine of maximising utilitarianism as the prime philosophical inspiration of political and social reform”.<sup>10</sup>

<sup>5</sup> As to my arguments in favour of the objective nature of moral discourse, see M Bagaric, “Internalism and the Part-time Moralists” (2001, forthcoming) *Consciousness and Emotion*.

<sup>6</sup> By rights talk, I also include the abundance of declarations, charters, bills, and the like, such as the Universal Declaration of Human Rights (1948); the *International Covenant of Economic, Social and Cultural Rights* (1966); and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1966), that seek to spell out certain rights. There were numerous declarations, and the like, of rights prior to the Second World War, such as, the *Declaration of Independence of the United States* (1776) and the *Declaration of the Rights of Man and Citizens* (1789), however it is only in relatively modern times that such documents have gained widespread recognition.

<sup>7</sup> S I Benn, “Human rights — For Whom and For What?”, in E Kamenka and A E Tay (eds), *Human Rights* (Edward Arnold, Melbourne, 1978) 59, 61.

<sup>8</sup> Almost to the point where it is not too far off the mark to propose that the “escalation of rights rhetoric is out of control”: L W Sumner, *The Moral Foundation of Rights* (Clarendon Press, Oxford, 1987) 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> H L A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford, 1983) 196-7.

Not only are rights popular, but in some cases they have proven very effective. As Tom Campbell notes, rights have provided “a constant source of inspiration for the protection of individual liberty rights”.<sup>11</sup> For example, recognition of the (universal) right to liberty resulted in the abolition of slavery and more recently the right of equality has been used as an effective weapon by women and other disempowered groups seeking greater employment opportunities and civil rights (such as the right to vote).

*(ii) The Problems with Rights-Based Theories*

Despite this, I have argued elsewhere that the popularity of deontological rights-based moral theories is not justified by their substance.<sup>12</sup> Such theories are unable to provide coherent answers to questions pertaining to the provenance of rights and their justification. For example, there is simply no basis for distinguishing between real and imagined rights, or for prioritising rights which clash with one another.<sup>13</sup>

This (albeit cursory) assessment of rights discourse could obviously be criticised on the basis that if non-consequentialist rights are fanciful, then one is left with the task of accounting for the significant changes to the moral landscape for which they have provided the catalyst.

There are several responses to this. First, the fact that a belief or judgment is capable of moving and guiding human conduct says little about its truth — the widespread practice of burning “witches” being a case in point. Secondly, at the descriptive level, it is probably the case that the intuitive appeal of rights claims and absolutist and forceful manner in which they are expressed has been normally sufficient to mask over fundamental logical deficiencies associated with the concept of rights. Claims couched in the language of rights seem to carry more emotive punch than equivalent claims grounded in the language of duties. For whatever reason (perhaps due to the egocentric nature of rights discourse) the claim that “I have a right to life”, appears to resonate more powerfully than the assertion that “you have a duty not to kill me”. In effect, the much criticised<sup>14</sup> meta-ethical theory of emotivism, which provides that morality is a set of utterances which express one’s attitude with the aim of influencing the behaviour of others, seems to provide at least a partial explanation for the influence of rights-based discourse.

Finally, and perhaps most importantly, I do not believe that there is no role in moral discourse for rights claims. Rather, as is discussed below, I assert that the only manner in which rights can be substantiated is in the context of a consequentialist ethic.

<sup>11</sup> T Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, Aldershot, 1996) 165.

<sup>12</sup> M Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, London, 2000) ch 4; “In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Incompatibility of Utilitarianism and Rights” (1999) 24 *Australian Journal of Legal Philosophy* 95; “The Errors of Retributivism” (2000) 24 *Melbourne University Law Review* 124.

<sup>13</sup> *Ibid.* See also the discussion of the *A(Children)* case below.

<sup>14</sup> For example, see G L Warnock, *Contemporary Moral Philosophy* (MacMillan Education, Hampshire, 1982 ed) 24-6.

**(iii) The Negative Case against Utilitarianism — Horrendous Consequences, Rights**

I now turn to considering the utilitarian theory of morality. Utility has been defined in numerous ways.<sup>15</sup> I shall adopt what I consider to be the most persuasive and coherent version of utilitarianism: hedonistic act utilitarianism. On this account, the utility which should be maximised is happiness or pleasure, which is the sole intrinsic good, while pain is the sole inherent evil. Henceforth, it is referred to simply as utilitarianism.

<sup>15</sup> Ideal utilitarianism is the theory that in addition to happiness there are other intrinsic goods such as knowledge, love and beauty (see G E Moore, in *Principia Ethica* (Cambridge University Press, Cambridge, 1903) and accordingly we should also attempt to maximise these virtues. Ideal utilitarianism is unstable and ultimately collapses into hedonistic utilitarianism. It is true that we generally pursue virtues such as love, beauty, knowledge, but we do not do so for their own sake. Rather we seek them because they generally tend to generate pleasure. To the extent that we desire other things such as money, power, virtue or fame it is only because they are generally a means to happiness, but this does not change the derivative attraction of such virtues (see J S Mill, "Utilitarianism" in M Warnock (ed), *Utilitarianism* (Fontana Press, Glasgow, 1986, first published 1861) 251, and D Raphael, *Moral Philosophy* (Oxford University Press, Oxford, 1981) 34-43). The most recent substitution of note, is to define utility in terms of preference or desire satisfaction. The corresponding theory is called preference utilitarianism. Preference utilitarianism is outlined in R M Hare in *Moral Thinking: Its Levels, Methods and Point* (Clarendon Press, Oxford 1981) and P Singer, *Practical Ethics* (2nd ed, Cambridge University Press, Cambridge, 1993). Preference utilitarianism does not have the same degree of self-evident appeal as hedonistic utilitarianism. For example, it is unclear why we should seek to maximise desires which make people unhappy. Further, it is impossible to know which act will maximise desire satisfaction, given the overwhelming number of desires which will invariably need to be considered in any particular case. Also it may be argued that our ultimate fundamental desire is generally, if not always, to be happy and hence that preference utilitarianism, too, collapses into hedonistic utilitarianism; or rather, if happiness is defined broadly enough to include fulfilling what one desires (as I believe is the case; see Singer, above, at 14) then there is no conflict between hedonistic and preference utilitarianism (although getting what we want does not always make us happy). A further distinction is made between act utilitarianism and rule utilitarianism. Act utilitarianism is simply the view that the correctness of an action is judged according to the degree of utility that it promotes. Rule utilitarianism is the view that the rightness of an act is assessed by reference to its compliance with rules established to maximise utility. For the rule utilitarian the principle of utility is used as a guide for the rules we should follow, as distinct to the particular actions we should perform. Due to the difficulty in performing the utilitarian calculus necessary to determine which of a number of options we should choose it is claimed that a set of rules guiding us in our decisions would be more likely to achieve the desired goal. The main problem with rule utilitarianism is that it is inevitable that in complying with the rules there will be occasions when happiness will not be maximised. To refuse to break the rule in such circumstances constitutes "rule-worship" (see J C C Smart, "An Outline of a System of Utilitarian Ethics" in J C C Smart and B Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, Cambridge, 1973) 3, 10). It is no answer that in most cases it is beneficial to comply with the rule, otherwise we are putting the rule above its justification. If we do break the rule,

Utilitarianism is a maximising principle and has received a lot of bad press as a result of this. Opponents have argued with great force that utilitarianism fails to protect basic individual interests (such as rights and integrity<sup>16</sup>), and since it does not prohibit anything *per se* condones horrendous outcomes, such as punishing the innocent<sup>17</sup> and forcing organ donations where the donations would maximise happiness by saving the lives of many or assisting those most in need.<sup>18</sup>

#### *Horror Scenarios not that Bad*

This is not the forum to tackle these criticisms exhaustively. However, I have previously argued that on closer reflection, many of the appalling conclusions utilitarianism supposedly commits us to, do not *really* insurmountably trouble us on a post—philosophical level to the extent that one is justified in arguing that any theory which approves of such outcomes must necessarily be flawed.<sup>19</sup> The horror scenarios which it is claimed utilitarians are committed to are in fact consistent with the decisions we as individuals and societies as a whole readily have made and continue to make when faced with extreme and desperate circumstances. Once we come to grips with the fact that our decisions in extreme situations will be compartmentalized to desperate predicaments and will not have a snowball effect and serve henceforth to diminish the high regard we normally have for important individual concerns and interests, we find that when placed between a rock and a hard place we do and *should*, though perhaps somewhat begrudgingly, take the utilitarian option. In the face of extreme situations we are quite ready to accept that one should, or even must, sacrifice oneself or others for the good of the whole.

A pointed example is the decision by the British Prime Minister of the day, Winston Churchill, to sacrifice the lives of the residents of Coventry in order not to alert the Germans that the British had deciphered German radio messages. On 14 November, 1940 the British decoded plans that the Germans were about to air bomb Coventry. If Coventry were evacuated or its inhabitants advised to take special precautions against the raid the Germans would know that their code had been cracked, and the British would be unable to obtain future information about the intentions of its enemy. Churchill elected not to warn the

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we are still being guided by the ultimate principle: act utilitarianism; and rule utilitarianism has nothing distinctive to offer. As I discuss later, it is not that the act utilitarian does not see general rules as playing an important role in our moral decisions, but he or she will only act in accordance with the rules where it is felt that on each particular occasion this will generate most happiness.

<sup>16</sup> For example, see Williams' famous Jim, Pedro and the Indians example: B Williams, "A Critique of Utilitarianism", in J C C Smart and B Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, Cambridge, 1973) 99.

<sup>17</sup> For example, see the small town sheriff example, in H J McCloskey, *Meta-Ethics and Normative Ethics* (Martinus Nijhoff, The Hague, 1969) 180-1. A similar example to McCloskey's is provided in E F Carritt, *Ethical and Political Thinking* (Greenwood Publishing, Oxford, 1947) 65.

<sup>18</sup> R Nozick, *Anarchy State and Utopia* (Blackwell, Oxford, 1974) 206-7.

<sup>19</sup> The distinction I am making between intuitive moral judgements and those formed after due reflection is similar to that made by R M Hare between intuitive and critical levels of moral thinking: see R M Hare, *Moral Thinking: Its Levels, Methods and Point* (Clarendon Press, Oxford 1981).

citizens of Coventry, and many hundreds were killed in the raid which followed. The lives were sacrificed in order not to reveal the secret that would hopefully save many more lives in the future.<sup>20</sup>

A famous modern day example which comes closest to the dilemma of choosing whether to frame the innocent or tolerate massive abuses of rights followed the Rodney King beating in Los Angeles in 3 March 1991. The four police officers who beat King were acquitted under State law of any offence regarding the incident. Riots ensued, resulting in widespread looting, damage to property, and dozens of deaths. Shortly afterwards, the Federal Government announced the almost unprecedented step that the police officers, who one must remember were found not guilty of any offence, would be tried on federal civil rights charges relating to the incident. Two of the police officers were duly found guilty of violating King's civil rights, despite the apparent double jeopardy involved, and were sentenced to thirty months' imprisonment. Whatever one's view of the government's motivation for committing the police officers on federal charges, it seems that justice took a back seat — for a while.<sup>21</sup>

What we actually do does not necessarily justify what ought to be done. Morality is normative, not descriptive in nature: an "ought" cannot be derived from an "is".<sup>22</sup> Nevertheless, the above account is telling because the force of the objection that utilitarianism commits us to horrendous consequences lies in the fact that the utilitarian outcomes so trouble our moral consciousness that utilitarianism can thereby be dismissed on the basis that "there must be a mistake somewhere". However, the objection loses its force when it is shown that the consequences utilitarianism commits us to are in fact no worse than other activities we condone.

### *Horror Examples and Rights*

Further, the horror scenario or extreme moral crisis criticism cuts both ways. While, rights philosophers have gained much mileage from conjuring up extreme examples which supposedly commit utilitarians to perverse conclusions, it is not difficult to cite examples which demonstrate the total impotence of rights-based theories to resolve moral dilemmas. A recent example is the outcome and reasoning in the case of *A (Children)*<sup>23</sup> — the Jodie and Mary Siamese Twins case.

<sup>20</sup> See M Velasquez and C Rostankowski, "Utilitarian Ethics" in M Velasquez and C Rostankowski (eds), *Ethics: Theory and Practice* (Prentice Hall, New Jersey, 1985) ch 4.

<sup>21</sup> For an account of these events, see J Gibbs, *Race and Justice* (Jossey Bass, 1996); D Cole, *No Equal Justice: Race and Class in the American Justice System* (1999) 23.

<sup>22</sup> This has been used as an argument against a naturalistic view of morality. However, see C R Pigden, "Naturalism" in P Singer (ed), *A Companion to Ethics* (Basil Blackwell, Oxford, 1991) 421, 422-6, where he points out that this phenomenon simply reflects the conservative nature of logic — you cannot get out of it, what you do not put in.

<sup>23</sup> B1/2000/2969, 22 September 2000: <http://www.courtservice.gov.uk/judgments/judg-home.htm> (henceforth *A (Children)*). All page numbers refer to the page number of the document printed from this cite.

In *A (Children)* the English Court of Appeal was confronted with what it understandably termed the truly agonising dilemma of what ought to be done in the case of conjoined twins: Marie and Jodie.<sup>24</sup> They each had their own brain, heart and lungs and other vital organs and they each had arms and legs. They were joined at the lower abdomen, and could be separated. But the operation would kill the weaker twin, Mary. That is because her lungs and heart were too deficient to oxygenate and pump blood through her body. Had she been born a singleton, she would not have been viable and resuscitation would have been abandoned. She would have died shortly after her birth. She was alive only because a common artery enabled her sister, who was stronger, to circulate life sustaining oxygenated blood for both of them. Separation would have required the clamping and then the severing of that common artery. Within minutes of doing so Mary would die (and ultimately — following the operation — did so). Yet if the operation did not take place, both would have died within three to six months, or perhaps a little longer.

The parents refused to consent to the operation. The twins were equal in their eyes and they could not agree to kill one even to save the other. As devout Roman Catholics they sincerely believed that it was God's will that their children were afflicted as they were and that they must be left in God's hands. The doctors believed that they could carry out the operation so as to give Jodie a life which would be in most respects relatively normal.

In the circumstances, the hospital sought a declaration that the operation may be lawfully carried out. Johnson J in exercise of the inherent jurisdiction of the High Court granted it on 25th August 2000. The parents applied to the Court of Appeal for leave to appeal against his order. The Court, while granting permission to appeal, unanimously dismissed the appeal.

The judgment in *A (Children)* is over 100 pages in length. The justificatory rationale adopted by two of the Lord Justices, Ward and Brooke LJ, is found in about a dozen words. After considering a plethora of "relevant" rights claims, including the right to life and the parents right to choose and getting no closer to a solution, the answer was only forthcoming when the Lord Justices eventually got around to looking at the situation from a utilitarian perspective. In the end, they resolved the matter "by choosing the lesser of the two evils and so finding the least detrimental alternative".<sup>25</sup>

Of course it is theoretically possible to *attempt* to resolve such dilemmas on the basis of rights theory alone, but this can lead to somewhat curious results. In an attempt to buttress his view that surgery would be in Mary's best interests, Walker LJ stated:

[That surgery would also be in the] best interests of Mary, since for the twins to remain alive and conjoined in the way they are would be to deprive them of the bodily integrity and human dignity which is the right of each of them.<sup>26</sup>

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<sup>24</sup> The facts are taken from the judgment of Ward LJ, 7-8.

<sup>25</sup> See Ward LJ at 42.

<sup>26</sup> At 98.

To this end, he cited Thomas J in *Auckland Area Health Board v Attorney—General*:<sup>27</sup> “human dignity and personal privacy belong to every person, whether living or dying”.<sup>28</sup>

The conclusion reached by Walker LJ is quite remarkable when one remembers that he is talking about the interests of Mary, whom the operation would kill. Bodily integrity and human dignity sound like fine ideals, and undoubtedly the more the better, but they would not seem to be of much value in the grave. Surely a pre-condition to the splendour of such virtues is one’s existence. The failure to grasp this rather basic point, is the sort of perverse logic that stems from reliance on a normative system which is devoid of a logical foundation.<sup>29</sup>

### *Utilitarian Rights*

I have also argued that rights have a place in a utilitarian ethic, and what is more it is only against this background that rights can be explained and their source justified.<sup>30</sup> Utilitarianism provides a sounder foundation for rights than any other competing theory. For the utilitarian, the answer to why rights exist is simple: recognition of them best promotes general utility.<sup>31</sup> Their content is discovered through empirical observations regarding the patterns of behaviour which best advance the utilitarian cause.

Difficulties in performing the utilitarian calculus regarding each decision make it desirable that we ascribe certain rights and interests to people, those which evidence shows tend to maximise happiness<sup>32</sup> — even more happiness than if decisions were made without such guidelines. Rights save time and energy by serving as shortcuts to assist us in attaining desirable consequences. By labelling certain interests as rights, we are spared the tedious task of establishing the importance of a particular interest as a first premise in practical arguments.<sup>33</sup>

Thus utilitarianism is able to explain the existence and importance of rights. It is just that rights do not have a life of their own (they are derivative, not foundational), as is the case with deontological theories. Due to the derivative character of utilitarian rights, they do not carry the same degree of absolutism or “must be doneness” as those based on deontological theories. However, this

<sup>27</sup> [1993] 1 NZLR 235, 245.

<sup>28</sup> At 98.

<sup>29</sup> For further discussion of this case, see my comments in M Bagaric “The Jodie and Mary Case: The Problem with Rights” (2001) 8 *Journal of Law and Medicine* 311.

<sup>30</sup> Bagaric, above n 12.

<sup>31</sup> According to Mill, rights reconcile justice with utility. Justice, which he claims consists of certain fundamental rights, is merely a part of utility. And “to have a right is to have something society ought to defend...if [asked why]...I can give no other reason than general utility”: J.S. Mill, above n 15, 251.

<sup>32</sup> These rights, however, are never decisive and must be disregarded where they would not cause net happiness (otherwise this would be to go down the rule utilitarianism track).

<sup>33</sup> See J Raz, *Morality of Freedom* (Oxford University Press, Oxford, 1986), 191. Raz also provides that rights are useful because they enable us to settle on shared intermediary conclusions, despite considerable dispute regarding the grounds for the conclusions. See also, A Marmor, “On the Limits of Rights” (1997) 16 *Law and Philosophy* 1, 17.

is not a criticism of a utilitarian model of rights, since it is farcical to claim that rights are absolute. The absurdity of absolute rights is illustrated by the extreme lengths some have gone to in order to attempt to justify such a notion. For example, in search of an absolute right it has been stated that “the right of a mother not to be tortured to death by her son is absolute”.<sup>34</sup> However even such extravagant examples fail. One could hardly begrudge a son torturing his mother to death if this is the only way to save the lives of all his other relatives whom the mother is about to unjustifiably kill. Another advantage of utilitarianism is that only it provides a mechanism for ranking rights and other interests. In the event of clash, the victor is the right which generates the most happiness.

### 3 Assumptions

Even a cursory reader of philosophy is aware that oceans of ink have been spilled over the centuries concerning the nature of moral judgments and their content. This paper is not descriptive, thus it would not be helpful to provide an overview of the voluminous literature in this area — in any event, there is no prospect of doing so in a paper this size.<sup>35</sup> For the same reasons, I also do not attempt to pre-empt every criticism that may be made of my argument. However, before setting out my argument in favour of utilitarianism, I first outline some of the more fundamental assumptions (or conversely, the shortcomings) that are involved. In the context of elaborating on the respective premises, I also briefly respond to some of the more telling heresies with which I am likely to be charged.

#### *Irrealism*

First, I reject the realist claim that there are mind-independent values. It is untenable in my view to assert that there are values which are part of the fabric of the world. The Humean position that moral values are contingent upon the characteristics of human nature seems irresistible, and it follows that “morality is not to be discovered but to be made: we have to decide what moral values to adopt: what moral stands to take”.<sup>36</sup> The counter argument, that moral values are *a priori* or analytical truths, runs foul of Mackie’s argument from queerness. The first part of this argument points to the epistemological problem associated with the strange type of cognitive faculty that would be necessary to discern such values. The second part of this argument rejects the plausibility of morality being grounded in beliefs, because such beliefs would have to be about peculiar facts — facts that are intrinsically prescriptive.<sup>37</sup> Thus, Mackie believes that moral judgments are action guiding. According to Hume’s theory this means that they must be desires. Hume distinguishes between two states of mind:

<sup>34</sup> A Gewirth, *Human Rights: Essays on Justification and Applications* (The University of Chicago Press, 1982) 232.

<sup>35</sup> For an overview of the metaethical debate over the past century, I highly recommend S Darwall, A Gibbard, and P Railton, “Toward Fin de siecle Ethics: Some Trends” (1992) 101 *The Philosophical Review* 115.

<sup>36</sup> Mackie, above n 1,106.

<sup>37</sup> *Ibid.*, 38-42.

beliefs and desires.<sup>38</sup> Beliefs are copies or replicas of the way we believe the world to be. Desires are representations of how the world is to be; they are our wants, the states that move us to act. On their own, beliefs can never provide a source of motivation; “they are perfectly inert, and can never either prevent or produce any action”.<sup>39</sup> It is only our desires that can motivate us. Beliefs are mere replicas of the way we believe the world to be. We can assess beliefs for truth and falsehood — a true belief being one which is a copy of the way the world actually is. In order for an action to occur we need a desire that prompts us to affect a certain change in the world and a belief informing us how this change can be achieved.

If Hume is right, then the supposed inherent action guiding character of moral judgements indicates that they are, or necessarily include, desires. This account readily explains the practicality of moral judgments, but appears to be incompatible with the other apparently fundamental aspect of moral judgments: their objectivity — thereby perhaps understating the role of rationality in moral discourse. This is because, according to Hume, only beliefs can be true or false, and hence are subject to reason. Desires, on the other hand are “original facts and realities”,<sup>40</sup> they just fall upon us. They cannot be true or false and therefore are not amenable to rationality. “Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger”.<sup>41</sup> A desire “must be accompany’d with some false judgement, in order to its being unreasonable; and even then ‘tis not the ...[desire]...which is unreasonable, but the judgement”.<sup>42</sup> Since a desire is not subject to rational evaluation it cannot be changed by the dictates of reason, it is only a contrary desire that can have this effect.

<sup>38</sup> For a fuller account of Hume’s theory of motivation see M Smith, “Valuing: Desiring or Believing?” in D Charles and C Lennon (eds), *Reduction, Explanation and Realism* (Oxford: Clarendon Press, 1992) and “Realism”, in P Singer (ed), *A Companion to Ethics*, (Oxford: Blackwell, 1991) 399, 400-2.

<sup>39</sup> D Hume, *A Treatise of Human Nature* (1738) (Oxford: Clarendon Press, 1978) 458. J Dancy, in “Intuitionism”, (ed) P Singer, *A Companion to Ethics* (Oxford: Blackwell, 1991) 411, 416, suggests that beliefs alone are in certain circumstances able to motivate. In support of this claim he provides the example, that when one is crossing a busy road the belief that road is busy is usually sufficient on its own to motivate one to find a gap in it. However, the best explanation for this example is that the reason one avoids traffic is to satisfy his desire to remain alive. The mere fact one does not take time out consciously and deliberately to discern upon which, if any, desire a particular belief (the road is busy) impacts and how one’s actions should be framed in light of this belief/desire combination does not indicate that it was not the presence of a desire which prompted, or was the immediate cause, of the relevant action. At times one does not have an opportunity meticulously to assess how a particular belief relates to a desire. At other times such introspection is unnecessary. The belief may impact so pointedly on a desire which is so intense (to remain alive) that there can be only one response. Whilst such intense desires may not be consciously adverted to in all circumstances they are so constant that they undermine all our decisions and there is no need expressly to resort to them on each occasion they are relevant. For a good recent analysis of Hume’s writings and theory, see J Allan, *A Sceptical Theory of Morality and Law* (Peter Lang, New York, 1998).

<sup>40</sup> D. Hume, above n 39, 416.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* Here Hume makes the point that desires can only be rationally criticised

Although, I accept this account of human cognition,<sup>43</sup> I argue that nevertheless it is possible to objectify morality and, therefore, to obtain convergence in our moral judgments. It follows that I do not accept subjectivism or cultural relativism. Further, any tenable normative moral theory must be consistent with basic moral norms.<sup>44</sup> While there are very few universally accepted moral principles, a list of the ones on which there is general consensus, reads as follows:

- 1 Do not kill or otherwise violate the physical integrity of others;
- 2 Do not steal the property of others;
- 3 Do not lie (this includes keeping promises);
- 4 Assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to oneself (the maxim of positive duty).<sup>45</sup>

These rules are negative in character, apart from the maxim of positive duty — which is only remotely intrusive. It follows that we are free to do as we wish within the ambit of the rules, and in this derivative fashion personal liberty is also an important virtue.

#### *Partial Foundationalism*

Essentially, I adopt a foundationalist methodology and thereby reject the reflective equilibrium approach.<sup>46</sup> Both approaches have their problems, but it seems to me that the failings of the latter are far more acute. The main problem with the reflective equilibrium methodology is that there is no guidance concerning which judgments are to be counted from the outset as being “considered moral judgments”. Given that there is no principled method for treating some intuitions and judgments as more important or basic than others, there is no basis for distinguishing considered moral judgments from moral prejudice.

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when they are the result of false beliefs. For example, if in order to improve my diet I desire to eat grass, this desire may be thought to be irrational. But this is only so because it stems from my false belief that consumption of grass will improve my diet. In which case it is the false belief that is the source of the unreasonableness. Desires that are not based on beliefs, fundamental or basic desires (as opposed to instrumental or derived desires: the desires we acquire by thinking about what we need in order to satisfy some basic desire), the type we are concerned with here, are not subject to such evaluation.

<sup>43</sup> See further my comments in “Internalism and the Part—timer: An essay about the objectivity of moral judgements” (2001, forthcoming), *Journal of Consciousness and Emotion*.

<sup>44</sup> Otherwise we are simply not speaking the same language or referring to the same institution. On this point, see also Mackie, above n 1, 123 who accepts that while morality may need to be remade, this is only in part.

<sup>45</sup> It is for this reason that we are required to, for example, save the baby drowning in the puddle. For a discussion of this maxim, see my comments in “Active and Passive Euthanasia: Is There a Moral Distinction and Should There be a Legal Difference” (1997) 5 *Journal of Law and Medicine* 143

<sup>46</sup> For a discussion of this approach, see J Rawls, “Outline of a Decision Procedure in Ethics” (1951) 60 *Philosophical Review* 177; *A Theory of Justice* (Belknap Press, Cambridge, Mass, 1971).

The “equilibrium” they have reached is one between forces which might have been generated by prejudice, and no amount of reflection can make that a solid basis for morality. It would be impossible for two mutually inconsistent systems to be defended in this way; all that this would show is that their advocates had grown up in different moral environments.<sup>47</sup>

Foundationalists assert that for a judgment to be justified it must be supported by a more basic or foundational judgment. Taken literally this claim is too demanding — which is why I describe myself as a partial foundationalist — since logically it leads to an infinite regress, unless one is able to overcome the (insurmountable) problem of discovering a relevant self-verifying premise or judgment. However, this does not mean that it is necessary to abandon the logic underlying foundationalism altogether. Rather, it entails that one must accept that one’s argument is only as strong as the most fundamental supporting premise.

#### 4 Proof of Utilitarianism

Against this background, my argument in favour of utilitarianism is as follows.

- P1 Morality is the ultimate set of principles by which we should live;
- P2 Morality consists of the principles which dictate how serious conflict should be resolved;
- P3 We all value and our strongest desire is to be happy;
- P4 The ultimate principle governing our conduct should promote our ultimate aim;
- P5 The ultimate principle must apply equally to all of us;
- C Therefore, the aim of morality is to maximum happiness.

I will now elaborate further on some aspects of the above premises, making clear any unstated premises and assumptions that I make about human nature.

##### *Premises One and Two*

The first premise is advanced as a definitional truth concerning the function of morality. Moral judgments are capable of trumping all other types of principles. It is a settled social convention that moral prescriptions can be invoked to justify breaches of all other types of standards and rules; whether they relate to norms of business, sport, politics, etiquette or even law. Thus, we do not condemn the politician who disregards party policy and casts a conscience vote, and many people are prepared to excuse the murderer who commits the offence out of compassion for another.<sup>48</sup>

<sup>47</sup> R M Hare in *Moral Thinking: Its Levels, Methods and Point* (Clarendon Press, Oxford 1981) 12. See also A Brown, *Modern Political Philosophy* (Penguin Books, London, 1986) 74-8.

<sup>48</sup> Opinion polls indicate that most people are firmly in favour of euthanasia. Recent

This first premise is qualified by the second, which makes the point that it is not every aspect of our lives that is governed by morality. As an empirical fact morality does not dictate what color shirt we should wear, who gets to watch their television show, or what career we should choose. Morality is not concerned with trivialities. Further, it only relates to situations where there is an actual or potential conflict of interest between two or more parties — it assesses and weighs the respective interests. In a perfect world, where there were unlimited resources and no possibility of clashes of interests, morality would be redundant.

Premise one also saves the theory from collapsing into a form of ethical egoism. Although, premises three and four focus on the maximisation of individual interests, the ultimate aim is to develop a set of rules by which we should all live.

### *Premise Three*

Premise three is highly controversial and needs further justification if I am to remain true to my foundationalist sentiments. Accordingly to Bentham, the principle of utility was incapable of proof. For him, it was the ultimate principle, which could not be proved by another principle: “is it susceptible of any direct proof? It should seem not: for that which is used to prove every thing else, cannot itself be proved: a chain of proofs must have their commencement somewhere”.<sup>49</sup>

Nevertheless, something more beyond the assertion of the premise can be said. The evidence in favour of this premise is the (practical — not logical) incongruity in the assertion that “I don’t want to be happy”. Such a statement normally prompts puzzlement and requires an explanation — far more so than the denial of any other desire. It normally leads to a suspicion that the agent is either confused, irrational or disingenuous. The same degree of suspicion does not attach to a denial of other desires, which are often regarded as being highly pervasive, such as the desire to be wealthy, wise, famous, beautiful, or even healthy.<sup>50</sup> This observation supports the view that in the end the thing which we desire most is to be happy. In the future, it may be possible for psychologists to devise techniques for ascertaining the precise content and strength of human desires. Until this occurs my analysis is admittedly arm chair speculation, but in the meantime I am “happy” for my argument to rest on the force of the above congruity.

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polls in the United Kingdom, the United States and Canada show approval rates for euthanasia of 78 per cent, 68 per cent, and 78 per cent respectively (Legislative Assembly of the Northern Territory, *Report of the Inquiry by the Select Committee on Euthanasia: The Right of the Individual or the Common Good?* (1995) vol 1, 50-1). The results of a comprehensive range of surveys on euthanasia are detailed in the Report of the Senate Legal and Constitutional Legislation Committee, *Parliament of Australia, Euthanasia Laws Bill 1996* (Canberra, 1997) 81-92. See also M Otlowski, *Voluntary Euthanasia and the Common Law* (Clarendon Press, Oxford, 1997) 257-267, for further poll results on the issue.

<sup>49</sup> J Bentham, *An Introduction to the Principles of Morals and Legislation*, in the Works (ed) J Bowring (William Tate, Edinburgh, 1843, vol) 2.

<sup>50</sup> As an empirical fact, many people seem to pursue such interests even at the expense of happiness. Mill explained this on the basis of the doctrine of “constant

*Premise Four*

The fourth premise follows from the constraints of psychological reality. If the ultimate principle guiding our conduct fails (in at least some manner) to reflect our ultimate desire, it would become redundant very quickly. This could be challenged on the grounds that morality is normative, not descriptive in nature: an “ought” cannot be derived from an “is”,<sup>51</sup> hence the fact that we *do* desire happiness does not entail that we *should* desire it. However, the principle that each person should do that which makes him or her happy is not advanced as the ultimate moral virtue; it is merely a necessary, but not sufficient, aspect of any practical normative theory that it does not cut too deeply across that which is ingrained in human nature.

*Premise Five and Conclusion*

Premise five is not a novel suggestion. Mill’s famous proof of utilitarianism also contended that the general good is a rational goal for individuals. This has been heavily criticised on the basis that just because each person wants his or her (personal) happiness, this does not entail that he or she wants aggregate or general (or indeed anyone else’s) happiness.<sup>52</sup> Thomas Nagel has attempted to justify the move from desiring individual happiness to group happiness on the basis that individuals are able to form an objective view of the world, which “allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully”.<sup>53</sup> However, even though people may be capable of viewing matters from this detached bird’s eye perspective, they still need a reason for doing so.<sup>54</sup>

In my view, the reason that people should do this is that there is simply no logical basis for ranking their happiness more highly than that of the next person. Further, an attempt to do otherwise would be futile. The efficacy of morality is contingent on widespread community support. People seem to have a strong tendency to act on the basis of reciprocity. People who have their interests disregarded or undervalued are less likely to observe the interests of others.<sup>55</sup> If the happiness of certain individuals or a group is put above the rest of the community, there simply will not be enough participants in the moral game to attain individual happiness.

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association”. There is such a close connection between these pursuits as a means to happiness, that many agents in fact confuse them for the ultimate goal.

<sup>51</sup> This has been used as an argument against a naturalistic view of morality. However, see C R Pigden, “Naturalism” in P Singer (ed), *A Companion to Ethics* (Basil Blackwell, Oxford, 1991) 421, 422-6, where he points out that this phenomenon simply reflects the conservative nature of logic — you cannot get out of it, what you do not put in.

<sup>52</sup> For an overview of the criticism’s of Mill’s proof, see J L Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books, London, 1977) 140-144; G Scarre, *Utilitarianism* (Routledge, London, 1996) 96-100.

<sup>53</sup> T Nagel, *The View from Nowhere* (OUP, New York, 1986) 5.

<sup>54</sup> See also Scarre, above n 52, 100-101.

<sup>55</sup> Evidence of this is the grossly disproportionate number of people from deprived social backgrounds in prison. For a discussion about the role of reciprocity, see R

### *Other Supporting Evidence*

Support for the general argument also stems from the fact that utilitarianism explains the universal moral rules discussed earlier. However it is by no means conclusive of this. It is a necessary but not sufficient requirement that the ultimate principle is consistent with these rules. Perhaps other moral principles could be advanced which are also consistent with the rules, although I am not aware of any.<sup>56</sup>

### *Objectivity*

The above theory does not lead to a subjective or relative theory of morality. The objectivity of moral judgments stems from the fact that human nature, in terms of what makes us happy, is not random. "Moral principles rest upon the basic general structure of the human predicament, and this does not change".<sup>57</sup> Correct moral judgments are those that experience shows tend to increase net happiness. This may not seem to be very instructional, but there are some needs that we are certain are essential to happiness: food, shelter, warmth, the preservation of life and the liberty to pursue one's own goals. If morality does no more than maximise these then it will have fulfilled its objective.

Thus, morality is objective in the same sense as other social sciences, such as economics. Economic theory does not exist outside human kind — economic principles do not transcend the parameters of human thought and human engagement. But this does not mean that there are not any economic principles which are right, and others that are wrong. The correct principles are those that will achieve the purpose of the discipline: to attain wealth; the wrong ones are those that will not promote this goal. So too in the case of morality. The correct, the objectively correct, moral principles are the ones that will serve the ultimate ends of the discipline, which is the ultimate end of mankind — to be happy. If one adopts this as the starting premise objectivity will follow. It is just a matter of trial and practice to ascertain which patterns of conduct will best promote this end. It seems that the above four secondary principles are all conducive of this. They are not context sensitive; applying equally in New York and Kenya. There may be others. Only experience will tell whether other virtues, such as loyalty, forgiveness and integrity also facilitate such an end. Such knowledge may be hard to acquire, but difficulties in ascertaining whether the earth was flat, round or otherwise did not prevent it being the subject matter of an objective truth.

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Trivers, "The Evolution of Reciprocal Altruism" (1971) 46 *Quarterly Review of Biology* 35; R Axelrod, *The Evolution of Cooperation* (Basic Books, New York, 1984).

<sup>56</sup> At a cursory glance, it appears that the rules lay down the minimum behaviour which must be followed in order for all people, society as a whole, to live orderly and securely. Therefore it can be postulated that morality is the set of rules which set down the minimum criteria so that each individual can live in an ordered and secure fashion. However, this would appear to underestimate the role and function of the above rules. Whilst the vast majority of moral rules impose only modest expectations or demands, this purpose does not account for the last rule, the maxim of positive duty.

<sup>57</sup> Mackie, above n 1, 122-3.

This argument obviously depends on a certain perception and understanding of human nature, in particular that due to some aspect of biology and/or evolution that there is a degree of uniformity in people. It is important to stress that the degree of uniformity which is necessary is minimal — the avoidance of pain and the corresponding pursuit of pleasure. No doubt, even if I am granted this much, some will question my claim to objectivity: “change the way most people feel (their underlying desires and preferences) and you change the ‘right’ answer”.<sup>58</sup> Yes, but the same can be said concerning the statement that it is (objectively) true that knives kill people — change the way people are constructed, you change the truth of the statement. However, we still feel that the statement that “knives kill people” is objective in a meaningful sense. So too, the normative ethic I describe. It is meaningful simply because we have an external reference by which moral judgments can be evaluated: whether they serve to promote overall human happiness.

This leaves my theory open to the obvious criticism that it has no resources to deal with people who are adamant that they do not wish to be happy, and therefore do not want to play the moral game.<sup>59</sup> This is not a persuasive criticism. Every practice or institution has its limits. The rules of tennis have no operation beyond the perimeter of the tennis court; Victorian criminal law has no operation in the United Kingdom; and etiquette has no application when we are in private. Morality too has its boundaries. However, by sourcing it in the most fundamental and pervasive human desire it is given its widest possible sphere of operation.<sup>60</sup>

There are certainly those who do not want to participate in the moral game. People who are at the bottom of a moral structure that secures benefits for others, but rarely for them, would understandably be reluctant to lead their lives by the dictates of morality; reasoning, “what has it done for me lately”. In my view, appeal to moral arguments will not sway such people. We can only refer to pragmatic reasons — hang in there and your time will come. If this does not convince, we have simply reached the limits of the practice. However, it should be noted that a well-designed moral code is unlikely to lead to too many recalcitrants — otherwise the happiness of only a few is being targeted. Thus, non-players could be encouraged not to opt out of the game, but rather to seek to reform the rules, so that it may serve to better promote their interests. History has shown that this certainly seems to be the most suitable vehicle for securing moral progress. Minority groups, such as gays and ethnic minorities, have made huge social inroads by pointing out to the rest of the community that their happiness has not been properly factored into the moral equation and that their sphere of interests needs greater protection. Rather than opting out of the moral game, they have worked from within to change the rules — the rules now being more conducive to achieving overall happiness, rather than simply that of a small number.

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<sup>58</sup> I thank James Allan for this point.

<sup>59</sup> The same form of objection has been levelled against the universalization principle in the context of the fanatical Nazi.

## 5 Conclusion

There is no such thing as mind-independent moral values. The nature of morality depends upon certain characteristics of human behaviour. We normally view people who claim that they do not want to be happy with disbelief. We do not attach the degree of suspicion to the denial of any other desire. This supports the view that our ultimate aspiration is to be happy. Given the cardinal role that the social construct of the practice of morality has in regulating our activities and the fact that there is no basis for treating the happiness of one person more highly than that of another, utilitarianism is the most justifiable theory of morality. The correct moral judgments are those that experience shows will serve to maximise net happiness. This has important implications for legal policy and principle. In fact it provides the ultimate test for resolving all legal dilemmas. In relation to any legal issue, the path that should be followed is the one that will maximise happiness.

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<sup>60</sup> In practice the manner in which we would deal with such moral recalcitrants is to try to convince them that they are confused in stating that they do not want to be happy.