# Liberal Rights in a Pareto-optimal Code

JONATHAN RILEY
*Tulane University*

A Millian response is presented to Sen's celebrated Paretian liberal impossibility theorem. It is argued that Millian Paretian liberalism is possible, if the application of Paretian norms is restricted to the selection of an optimal code of liberal justice and rights, as well as to individual choices made in compliance with the rules of the code. Key steps in outlining the Millian response include suitably modifying Sen's social choice formulation of the idea of claim-right to personal liberty, and incorporating within social choice theory the distinction between a right and its direction of exercise. The Millian response is illustrated in the context of Sen's original example of the 'prude' and the 'lewd'. If the argument is successful, coherent and appealing liberal versions of Pareto-inclusive philosophies such as utilitarianism, contractualism and neo-republicanism are feasible in principle.

## I. SEN'S PARETIAN LIBERAL IMPOSSIBILITY RESULT

Amartya Sen's celebrated Paretian liberal impossibility theorem presents a fundamental challenge to any Pareto-inclusive moral and political philosophy such as utilitarianism or contractualism that attempts to accommodate liberal rights, taking for granted that the philosophy must rely exclusively on its own normative resources to recommend outcomes in the context of any given profile of individual preferences defined over the feasible outcomes. Sen proved in effect that, if there are at least three options, any philosophy that tries to combine Paretian values and liberal rights as he conceives them will fail to work in the context of some preference profiles.[1] Yet John Stuart Mill's liberal version of utilitarianism is perhaps the best known of those doctrines which do try to integrate liberal rights with Paretian values.[2]

Sen's negative result is not contingent on any narrow idea of preference. The term 'preference' can bear many different interpretations. To say that somebody 'prefers' outcome x rather than outcome y might mean that the person 'desires' x rather than y, for example,

[1] Amartya K. Sen, 'The Impossibility of a Paretian Liberal', *Journal of Political Economy* 72 (1970). Outcomes are 'states of society', which may be described as fully as is convenient for analysis. But preferences and rules for generating outcomes are given apart from outcomes thus understood.

[2] See John Stuart Mill, *Utilitarianism*, in *Collected Works of John Stuart Mill*, ed. John M. Robson, 33 vols. (Toronto, 1963–91), x; and Mill, *On Liberty*, CW, xviii. For my evolving interpretation of Mill's doctrine, see Jonathan Riley, *Liberal Utilitarianism* (Cambridge, 1988); and Riley, *Mill's Radical Liberalism* (London, 2006).

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or 'expects greater pleasure' from x rather than y, or 'judges' x to be 'more valuable' than y, or 'chooses' x rather than y, among other possible interpretations. But I shall interpret 'preference' in terms of 'choice'. $P_i$ is used to denote a person i's (strict) preference or choice, $I_j$ to denote person j's indifference or no-choice, and $R_k$ to denote person k's weak preference, that is, either (strict) preference or indifference. A preference profile $[R_i]$ is a set of complete and transitive (weak) preference rankings defined over the set X of feasible outcomes, one preference ranking for each individual member of society. In due course, I shall introduce other types of preferences defined over other classes of objects, including codes of conduct, and shall employ analogous notation for them.

Of central importance are the normative conditions imposed on the method of generating outcomes from any given preference profile. Define a social decision rule as a function F that yields a non-empty choice set $C^F$ of permissible outcomes from any conceivable preference profile $[R_i]$ with respect to any given subset S of X, i.e. $F([R_i]) = C^F(S) \neq \{\phi\}$, where $\{\phi\}$ is the empty set. To prove his theorem, Sen imposed two conditions on F. The first is a weak version of the Pareto condition, which requires that if every individual happens to reveal the same preference with respect to a given pair of feasible options x and z, then society must not choose the unanimously rejected alternative:

$$\forall i : xP_i\, z \rightarrow C^F(x, z) = \{x\}, \qquad [1]$$

where $\forall i$: $xP_i$ z denotes that every person i prefers or chooses x rather than z, and $C^F(x, z)$ denotes the choice set of permissible outcomes generated by F with respect to $(x, z)$. The second is a condition of individual liberty. Sen formulates a person i's liberal right as a power to ensure that i's choice is decisive for the social choice with respect to some 'protected' pair $(x, y)$:

$$\exists i, \exists x, y : xP_i\, y \rightarrow C^F(x, y) = \{x\}, \quad \text{and} \quad yP_i\, x \rightarrow C^F(x, y) = \{y\}, \qquad [2]$$

where $(x, y)$ is 'protected' for person i because x differs from y solely in terms of some feature that is i's 'personal' concern. This idea of a right is reminiscent of Mill's notion of a right to choose as one wishes among 'purely self-regarding' acts and omissions that pose no risk of harm to others without their consent.[3] Sen showed, however, that if even as few as two individuals each have only one such right with respect to

[3] No attempt will be made to clarify further what Mill means by 'self-regarding' choices, which he says do not directly cause any form of 'perceptible damage' to other people unless they give their 'free, voluntary, and undeceived consent' to the harm (*On Liberty*, CW, xviii. 225). I have treated the issue at length elsewhere. See Jonathan Riley, *Mill on Liberty* (London, 1998); and Riley, *Mill's Radical Liberalism*.

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their own distinct 'protected' pair, then a conflict arises between their exercise of their rights and the Pareto condition so that society is left with no permissible outcome to choose.

To illustrate the theorem, Sen imagined a simple two-person society in which 'prude' and 'lewd' each have rights to choose whether or not to read *Lady Chatterley's Lover*. At x, prude alone reads the book; at y, nobody reads it; and at z, lewd alone reads it. Otherwise, these three possible outcomes are indistinguishable. Suppose prude reveals a complete and transitive preference $yP_ixP_iz$, and lewd reveals $xP_jzP_jy$. Prude prefers most that nobody reads the book but, if someone is to read it, he chooses that he rather than the unstable lewd reads it. Lewd prefers most that the uptight prude should be exposed to Lawrence's novel but, otherwise, he chooses to read it himself rather than have nobody read it. By virtue of [1], society must reject z with respect to $(x, z)$. Prude's 'protected' pair is $(x, y)$ so, by virtue of [2], society must reject x with respect to $(x, y)$. Lewd's 'protected' pair is $(y, z)$ so, again by virtue of [2], society must reject y with respect to $(y, z)$. By thus respecting rights and Paretian values, however, society is led into a dilemma. Society's choice set of permissible outcomes with respect to the feasible set $X = (x, y, z)$ is empty, that is, $C^F(X) = \{\phi\}$. In short, no Paretian liberal social decision function F exists.

Sen's impossibility result has stimulated a large critical literature. Many have disputed the negative result and various ways of dissolving the difficulty have been proposed. Yet none of the proposed escapes should fully persuade utilitarians or contractualists seeking to accommodate liberal claims to personal liberty. The Paretian liberal impossibility remains a puzzle for anyone who aims to ground liberal rights in some conception of the general welfare or the common good to which all reasonable people are supposed to consent. How might utilitarian liberals like Mill reasonably respond to Sen? Is a coherent version of utilitarian liberalism possible? Or is a liberal commitment to rights to personal liberty fundamentally at odds with any utilitarian commitment to Pareto conditions?

## II. A MILLIAN RESPONSE

I shall sketch what I consider to be an appealing Millian response, which indicates the possibility of utilitarian liberalism along Mill's lines. His non-standard version of utilitarianism gives priority to the establishment of an optimal legal and moral code of justice, as he emphasizes in *Utilitarianism*, V, and the rules of such an optimal public code distribute equal rights and correlative duties in order to promote the general welfare. These reciprocal rights and duties secure certain vital interests of each individual, including a vital interest in

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self-regarding liberty, and such general security is by far the most valuable component of the general welfare as he conceives it. In light of the priority given to security of equal rights, Pareto conditions are imposed on the procedure used by the members of society to select a code of justice. Pareto criteria also apply to the permissible choices that individuals make in compliance with the rules of an optimal code to produce outcomes. But Pareto criteria do not apply to impermissible choices disallowed by the rules. Such choices are rejected on the grounds that permitting them to determine outcomes would reduce the general welfare from the level made possible by general compliance with the rules.

As is already apparent, Mill's philosophy calls for a social decision procedure G that is more complex than a social decision function F as defined above. The requisite procedure G is a compound of two functions, $\mu$ and $\eta$, that operate at two different levels. At one level, the members of society choose a code of justice from a set M of feasible codes, where any code distributes a distinctive set of individual rights and duties defined with respect to the set X of feasible outcomes. To form his preferences over codes, any individual attempts to predict and compare how people will interact under the different codes to produce outcomes. At the other level, these same individuals choose, for some given code $m^*$ selected at the first level, how to exercise their rights assigned under $m^*$ so as to achieve their preferred outcomes from any given subset S of X. But individuals are only permitted to pursue their preferred outcomes by exercising their rights and duties. They cannot permissibly attempt to achieve outcomes by ignoring their duties and making choices they have no right to make.

Suppose that any person has two sorts of preferences, $\check{R}_i$ and $R_i$, the one defined over M, the other defined over X. The function $\mu$ maps any given preference profile $[\check{R}_i]$ onto a non-empty choice set $\check{C}^{\mu}$ of codes, where any person i's $\check{R}_i$ is a complete and transitive ranking defined over M. Since Pareto conditions are imposed on $\mu$, any code in the choice set is Pareto-optimal. Given an optimal code $m^*$, the function $\eta$ then maps any given preference profile $[R_i]$ defined over X onto a non-empty choice set $C^{\eta}$ of outcomes. In short, $\eta$ is an outcome function that translates into outcomes the exercise by individuals of their various rights and duties distributed by $m^*$. Any person i's claim-right to self-regarding liberty, I shall argue, is itself a kind of operator that imposes correlative duties on other persons to make certain choices that accord with the right-holder's. By exercising his claim with respect to his protected pair $(x, y)$, person i is guaranteed that others are obligated to choose as if unanimity existed with respect to $(x, y)$. After observing the members of society exercise their personal claims and correlative duties under the given code, it becomes possible to determine for any

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given $[R_i]$ the non-empty choice set $C^{\eta}(S)$ of permissible outcomes with respect to any subset S of X. The function $\eta$ is liberal in form in that it merely recapitulates all of this rights-exercising activity.

Nevertheless, Pareto conditions are not imposed on $\eta$, and it is instructive to see why. Any person engages in impermissible conduct with respect to $m^*$ if he fails to make the choices that he is required to make by virtue of the duties distributed to him by $m^*$. The optimal code will sanction suitable punishment of impermissible conduct, and also establish expedient measures to prevent such conduct. In light of this, the outcome function $\eta$ rejects any impermissible choices when mapping preference profiles into choice sets. This does not mean that normative restrictions are being placed arbitrarily on the domain of preference profiles over which $\eta$ operates. Rather, conditions that authorize suitable prevention and punishment of impermissible preferences are built into the form of $\eta$. Thus, $\eta$ counts impermissible preferences by rejecting them. As a result of such rejection, what might otherwise be unanimous choices with respect to some pairs of options may be ignored.[4]

The outcomes generated by $\eta$ may be sub-optimal in relation to any given profile $[R_i]$ defined over X, yet those same outcomes can be defended as Pareto-optimal if we expand our focus to consider the two-level procedure G that considers profiles of (perhaps very incomplete) preferences $[\underset{\sim}{R}_i]$ defined over the Cartesian product of M and X to yield a choice set $\underset{\sim}{C}^G$ of outcomes under codes.[5] A fundamental assumption of Mill's philosophy, I shall maintain, is that all rational people who seek to promote the general welfare will prefer some code $m^*$ in contrast to the null code $m^{\circ}$ which includes no rules that assign equal rights and correlative obligations. The null code leaves individuals free to act as seems best to their own judgement and inclinations, where those inclinations might be narrowly selfish or benevolent to a saintly degree, and thus is compatible with a competitive 'war of all against all' as well as with a saintly paradise in which all individuals recognize their duties to perform the best acts in every situation and agree in their calculations as to what those best acts are. If the general welfare will

[4] In *Liberal Utilitarianism*, I showed that Mill's doctrine as I interpret it works over a suitably restricted domain of preference profiles defined over X. Individuals could in principle be educated to confine their choices within the restricted domain. Even so, that argument does not resolve Sen's negative result, and was never intended to do so, because it simply leaves open what to do in the case of preference profiles outside the restricted domain. My present argument does not rely on domain restriction.

[5] The Cartesian product of M and X is given by $\Sigma_{i=1}^{k}\ \Sigma_{j=1}^{n}\ m_i, x_j$, with typical element $(m_i, x_j)$ denoting the j'th outcome under the i'th code, where there are k distinct codes in M, and n distinct options in X.

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be higher under some code $m^*$ rather than $m^\circ$, then G can be seen as a Paretian liberal procedure that generates outcomes on the basis of liberal rights-exercising under a Pareto-optimal code. In this two-level procedure, the imposition of Pareto conditions on $\mu$ necessitates their abandonment on $\eta$, except in the very special case where all individuals invariably make choices in compliance with the optimal rules.[6]

It is worth pointing out that if the null code were optimal, so that $m^* = m^\circ$, then the two-level procedure G would collapse, and we would be left with a social decision function F. In that case, Sen's Paretian liberal impossibility reappears.

In what follows, I shall assume that there exists some code $m^*$ that is unanimously preferred to $m^\circ$ so that we have:

$$\forall i : m^* P_i m^\circ \rightarrow \check{C}^\mu(m^*, m^\circ) = \{m^*\}. \qquad [3]$$

Indeed, for convenience, I shall suppose that $\mu$ is fully utilitarian in form so that a unique best code $m^* \neq m^\circ$ has been selected, that is, $\check{C}^\mu(M) = \{m^*\}$. I shall also assume that individuals invariably comply with the rules of $m^*$ when making their choices with respect to X. In this case, any outcomes generated by $\eta$ will be Pareto-optimal because individuals always choose to pursue outcomes by means of their rights and duties assigned by the rules. Impermissible preferences are never observed. This assumption of full compliance might be relaxed but it allows me to explain more easily how it is possible in principle to have a process of rights-exercising that always results in Pareto-optimal outcomes. It permits me to avoid specifying the conditions whereby $\eta$ prevents and punishes choices that are impermissible in relation to $m^*$, and to sidestep the issue of whether the general welfare might at least sometimes be promoted by choices that break the rules of the optimal code. Rather, attention can be focused on showing how individuals' exercise of their claims to personal liberty is necessarily compatible

[6] In my view, Mill can be read as a rule-utilitarian because of the priority he gives to a liberal code of justice in his utilitarianism. His approach might also be seen as a sophisticated version of act-utilitarianism in which any person's best acts in any situation coincide with obeying the optimal rules. But he cannot be read as a crude act-utilitarian who dispenses with rules distributing rights and correlative duties for the calculation of best acts. Hare and Harsanyi have offered sophisticated versions of act-utilitarianism and rule-utilitarianism, respectively, although their approaches both differ in important respects from Mill's as I understand it. See Richard M. Hare, *Moral Thinking* (Oxford, 1981); John Harsanyi, 'Rule Utilitarianism, Equality, and Justice', *Social Philosophy and Policy* 2 (1985); John Harsanyi, 'Game and Decision Theoretic Models in Ethics', *Handbook of Game Theory*, ed. R. J. Aumann and S. Hart (Amsterdam, 1992), vol. i.

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with Paretian values, taking for granted that the general welfare is maximized by full compliance with the optimal code.

To show this necessary compatibility, I shall propose certain modifications to Sen's conception of a right to personal liberty. The modifications are formulated in terms of social choice theory, and are intended as further refinements of the social choice apparatus developed by Sen and Kenneth Arrow.[7] There is no need to jettison Arrow–Sen social choice theory in favour of game theory, although the Millian approach can also be elaborated in terms of a suitable game-theoretic framework.[8]

This is not the place to discuss in detail Wesley Hohfeld's influential schema, which distinguishes among claims, liberties, powers and immunities. But I shall make use of it to some extent in order to indicate that the right to personal liberty is a complex right.[9] After reformulating the right in terms of social choice theory, I shall conclude by illustrating how the Millian approach works in the context of the prude–lewd case. Sen's negative result does not destroy the

[7] K. J. Arrow, *Social Choice and Individual Values*, 2nd edn. (New Haven, 1963).

[8] For assessments of the relative merits of standard social choice and game form formulations of rights, which I do not consider in this article, see, for example, Jonathan Riley, 'Rights to Liberty in Purely Private Matters: Parts I & II', *Economics and Philosophy* 5 & 6 (1989–90); and Amartya K. Sen, *Rationality and Freedom* (Cambridge, Mass., 2002), pp. 642–58. Although I propose now to modify his social choice formulation of rights, I agree with Sen that social choice theory is a highly versatile tool of analysis which is best seen as complementing game theory. I do think that game theory is versatile as well, however, and remain agnostic as to their relative merits. Leading proponents of game form formulations include Robert Sugden, *The Economics of Rights, Cooperation and Welfare* (Oxford, 1986); Robert Sugden, 'Rights: Why Do They Matter and to Whom?', *Constitutional Political Economy* 4 (1993); Wulf Gaertner, Prasanta K. Pattanaik and Kotaro Suzumura, 'Individual Rights Revisited', *Economica* 59 (1992); and Rajat Deb, Prasanta K. Pattanaik and Laura Razzolini, 'Game Forms, Rights and the Efficiency of Social Outcomes', *Journal of Economic Theory* 72 (1997). Sen suggests that game form formulations are tied to a liberal deontology like Nozick's, yet they might instead be embedded in a larger game-theoretic model of an indirect consequentialist society along the lines proposed by Harsanyi. For further discussion, see Robert Nozick, *Anarchy, State and Utopia* (Oxford, 1974); Harsanyi, 'Game and Decision Theoretic Models', esp. pp. 694–7; Prasanta K. Pattanaik and Kotaro Suzumura, 'Individual Rights and Social Evaluation: A Conceptual Framework', *Oxford Economic Papers* 48 (1996); and Jonathan Riley, 'Optimal Codes, Game Forms, and Rights', unpublished manuscript.

[9] Hohfeld not only distinguished among claim-rights, liberties, powers and immunities. He also identified their logical correlates (respectively, duties, no-rights, liabilities and disabilities), and noted their logical opposites (respectively, no-rights, duties, disabilities and liabilities). For further discussion of Hohfeld's schema in the context of various theories of justice and rights, see, among many others, Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. W. W. Cook (New Haven, 1919), esp. pp. 35–64; Hillel Steiner, *An Essay on Rights* (Oxford, 1994); and Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, *A Debate Over Rights* (Oxford, 1998).

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possibility of a coherent liberalism based on utilitarian or contractualist foundations.[10]

## III. REFORMULATING THE RIGHT OF SELF-REGARDING LIBERTY

A right to self-regarding liberty is a complex right. More specifically, its elements include at least three types of simple rights. One element is a liberty-right to make one's own choices with respect to some feasible set of self-regarding acts and omissions without coercive interference from other people. But the liberty-right does not imply that others have correlative duties to allow the liberty-holder to achieve his preferred outcome. Rather, others may possess liberty-rights of their own to make competitive choices in an attempt to achieve their own preferred outcomes.

A second element is a claim-right that protects or shelters the liberty-right by distributing correlative duties to others to allow or even positively assist the claim-holder to achieve his preferred outcome. The claim-right is a claim for social protection of the claim-holder's vital interest in personal liberty. The protection consists in the assignment to others of duties that correlate to the claim and properly form part of its meaning. These correlative obligations require their bearers to perform some feasible acts or omissions so as to render secure the claim-holder's vital interest in achieving his preferred outcome by means of his own chosen acts or omissions.[11]

The third element is a power-right to exercise the claim, that is, demand or waive fulfilment of the correlative duties. If the power-holder demands fulfilment of the duties, then the duty-bearers must choose to fulfil them. It is undeniable, of course, that others do not always do as they ought. If anybody ignores his duty correlative to another's claim, however, then he has violated the other's claim by choosing an impermissible act or omission. It is a separate question just what practical steps a civilized society should take in order to prevent or punish such impermissible behaviour. Although I have bracketed this question for present purposes, Mill makes clear in *Utilitarianism*

[10] My discussion also has implications for various analogues of Sen's impossibility result. A Paretian republican impossibility result has been presented, for instance, to show that a neo-republican philosophy faces a deep conflict between its conception of 'freedom as non-domination' and Paretian efficiency in the absence of normative restrictions on the profiles of individual preferences. But I shall not explicitly treat such analogues of Sen's theorem. See Christian List, 'The Impossibility of a Paretian Republican? Some Comments on Pettit and Sen', *Economics and Philosophy* 20 (2004).

[11] Following Bentham, a claim-right to liberty can be said to transform a 'naked' liberty-right into a 'vested' one. Claims to liberty are vested liberty-rights, in other words, liberties bolstered by claims. See H. L. A. Hart, *Essays on Bentham* (Oxford, 1982).

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that society should, whenever it is expedient to do so (which is not always the case), threaten and inflict legal penalties as well as social stigma to deter duty-holders from ignoring their duties.

An adequate conception of the complex right to self-regarding liberty must take account of these three types of elementary rights. There is also a crucial conceptual distinction, however, between a right and its direction of exercise. To formulate a right in social choice terms, it is essential to make use of hypothetical preferences, that is, potential choices which the right-holder is entitled to make if he wishes to make them. In contrast, to formulate the right's direction of exercise, reference must be made to the actual preferences revealed by the right-holder, that is, his actual choices.

In a more complete analysis than the present one, social choice formulations of each of the three types of elementary rights would be provided.[12] But I shall limit attention here to formulation of the claim-right to self-regarding liberty. There is really no need to formulate the other elementary rights to clarify the Millian response to Sen's impossibility result. In the special case of the complex right to personal liberty, the claim-holder must also be the holder of the liberty-right as well as of the power-right, and the holder exercises all three types of elementary rights simultaneously by making an actual choice. I shall return to this point in due course.

Mill insists that claim-rights should *invariably* be distributed to protect individual liberty in the case of self-regarding choices that pose no risk of harm to others without their consent. He argues in *On Liberty* that the individual has a vital interest in individuality or self-development, and that equal claim-rights to *complete* liberty of self-regarding conduct are justified to promote individuality as an important ingredient of the general welfare.[13] Sen is not committed to this radical Millian argument that every adult in every civilized society ought to be assigned an equal claim-right to complete liberty of self-regarding choices. But a germ of it lurks in his prude–lewd example. Suppose again that x differs from y solely in terms of whether the prudish person i is reading or not reading *Lady Chatterley's Lover*, and

[12] A more complete analysis is offered in Jonathan Riley, 'A Paretian Liberal Framework for Social Choice', unpublished draft manuscript.

[13] Mill rejects any suggestion that individuals should have complete liberty in the case of personal choices that are *not* self-regarding in this sense. He classifies as 'social' any acts and omissions that pose a risk of harm to others without their consent, so that personal choices among these acts and omissions are 'social' (or what some commentators call 'other-regarding') as opposed to 'self-regarding' in nature. In his view, liberty-rights (unsheltered liberty-rights as well as liberties sheltered by claim-rights) to choose freely among *some* (subsets of) other-regarding acts and omissions should be distributed by an optimal code. But Mill's views on individual liberty with respect to other-regarding matters need not concern us here.

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that i's choice to read or not read is purely self-regarding in the Millian sense that no other person j is harmed by it unless j consents and participates in the harm. Person i's claim-right to self-regarding liberty with respect to (x, y) can be formulated as a function $\mathcal{R}_i^{[x,y]}$ that maps any given profile of individual preferences restricted to (x, y) into a set of unanimous preferences that accord with the claim-holder's personal preference over (x, y). More specifically, the claim-right operates by specifying correlative duties with respect to (x, y) which others are required to fulfil if the claim-holder demands fulfilment. If person i chooses to read by revealing $xP_iy$, for example, then every other person j has a correlative duty $\Omega_j^{[x,y]}$ to reveal $xP_jy$, whatever j's own subjective attitudes with respect to (x, y) might be. In short, every person j is obligated to choose some personal act or omission that facilitates person i's achievement of x rather than y from (x, y). Similarly, if person i chooses not to read by revealing $yP_ix$, then everyone else has a correlative duty to reveal $yP_jx$, thereby facilitating the achievement of i's preferred outcome y.

A person i's claim-right to personal liberty with respect to any protected pair (x, y) can be formulated as follows:

$$\exists i, \exists x, y : \mathcal{R}_i^{[x,y]} = \mathcal{R}_i^{[x,y]}\left([R_i/^{(x,y)}]\right) \qquad [4]$$

such that

$$\left\{\mathcal{R}_i^{[x,y]}(xP_iy) \leftrightarrow \forall j \neq i : \Omega_j^{[x,y]}(xP_jy)\right\} \rightarrow \forall i : xP_i\, y \rightarrow C^{\eta}(x, y) = \{x\},$$

and

$$\left\{\mathcal{R}_i^{[x,y]}(yP_ix) \leftrightarrow \forall j \neq i : \Omega_j^{[x,y]}(yP_jx)\right\} \rightarrow \forall i : yP_i\, x \rightarrow C^{\eta}(x, y) = \{y\},$$

where $\mathcal{R}_i^{[x,y]}$ $([R_i^{(x,y)}])$ denotes i's claim-right to personal liberty with respect to (x, y) for any given profile $[R_i^{(x,y)}]$ of individual preferences restricted to (x, y), $\mathcal{R}_i^{[x,y]}$ $(xP_iy)$ denotes i's claim-right that society will protect his self-regarding choice of x rather than y from (x, y) if he makes such a choice, $\Omega_j^{[x,y]}$ $(xP_jy)$ denotes any other person j's duty correlative to the claim, $C^{\eta}(x, y)$ denotes the choice set generated by the outcome function η with respect to (x, y), and so forth. Person i's claim-right to liberty guarantees that person i can achieve his preferred outcome by means of his own choice from (x, y). The claim gives him exclusive control over this self-regarding portion of his life and conduct because it assigns correlative duties to others to refrain from coercive interference with his choice about whether to read or not read. The duty-bearers cannot permissibly interfere with his freedom to achieve whatever outcome he prefers to achieve from (x, y) by means of whatever acts

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or omissions he chooses from his feasible set of self-regarding acts and omissions.

The individual and social choices involved in [4] are hypothetical rather than actual choices. The hypothetical choices are transformed into actual ones if and only if the claim to liberty is exercised. In the meantime, the claim exists independently of any claim-holder's or duty-bearer's actual subjective attitudes about $(x, y)$. It exists provided that society has established a legal or moral code that distributes the relevant claims and correlative duties. The same thing is true of the liberty-right and the power-right that are also elements of the complex right to self-regarding liberty.

Actual choices are relevant not to the idea of the right but rather to its direction of exercise with respect to the protected domain. Person i exercises his claim to liberty by actually choosing to demand or waive fulfilment of the correlative duties by their bearers. Consistently with [4], the exercise of his claim-right can be expressed as follows:

$$\exists i, \exists x, y : xP_iy \rightarrow \forall i : xP_iy \rightarrow C^{\eta}(x, y) = \{x\},$$
$$\text{and} \quad yP_ix \rightarrow \forall i : yP_ix \rightarrow C^{\eta}(x, y) = \{y\}, \qquad [5]$$

where the relevant choices are now actual rather than hypothetical ones as in [4].

This claim-right to self-regarding liberty is a rather special claim because it protects the claim-holder's freedom to make his own choices. Other sorts of claims protect other vital interests of the claim-holder, e.g. a claim-right not to suffer unprovoked physical attacks protects the individual's vital interest in health and life rather than his freedom to choose among self-regarding acts and omissions as he pleases. In the special case of a claim to personal liberty, nobody but the claim-holder can exercise his liberty-right that is sheltered by the claim. Nobody but the claim-holder can use his liberty to make his own choices, or fail to use it. Others can only use, or fail to use, *their* liberties to make their own choices. Of course, by revealing $xP_iy$ and thereby exercising his liberty-right with respect to $(x, y)$ in that direction, the individual chooses at the same time *not* to reveal $yP_ix$ and thus not to exercise his liberty-right in that direction. But his liberty-right is still being exercised in the one direction – it is not being waived altogether. We might say that its exercise in the other direction is being waived. But waiver in that sense must be carefully distinguished from waiver of the right *tout court*. An individual cannot *choose* to waive his liberty-right altogether. He exercises his liberty if he makes any choice at all. He can only waive his liberty-right altogether involuntarily, that is, by not making any choice at all. This might happen if the liberty-holder is unaware of his liberty-right, for example, or he is mentally incapable of

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making any choice. In my terminology, a person i who holds a liberty-right, but does not make any actual choice with respect to a given pair (x, y), reveals $xI_iy$. This does not mean that i's liberty-right no longer exists, only that he fails to exercise it with respect to (x, y).

Since a claim to self-regarding liberty can only be exercised by an individual who holds both the liberty-right and the claim-right that protects his liberty, the enjoyment of this liberty cannot be had unless the same individual also holds the power-right to exercise the claim. If someone else holds the power-right, then the claim-holder has no ultimate authority to exercise as he would prefer his claim to choose without interference among his self-regarding acts and omissions. Rather, the distinct power-holder may choose to ignore the claim-holder's self-regarding choices, and thereby interfere with the claim-holder's freedom to achieve a preferred outcome within his protected domain.

It might seem that, on the contrary, a proxy could be entrusted with the power to exercise a claim to liberty on behalf of the claim-holder, as is the case with other claims like the claim to be safe from unprovoked physical attack. If the claim-holder is unconscious as a result of some life-threatening injury, for example, and he has made clear that he wishes to be kept alive by artificial means if necessary rather than the alternative, then it is surely reasonable to entrust a proxy with the power to demand fulfilment of a doctor's obligation to keep the claim-holder alive by artificial means, as he would choose if he could. Still, this familiar example does not show what it is usually taken to show. The unconscious person is incapable of making his self-regarding choices and thus is forced by circumstances to waive his liberty-right as well as the claim that protects it, at least temporarily. To avoid waiving permanently his claim to liberty, he must be kept alive. While he is unconscious, his claim-rights can only be exercised by somebody else. In particular, his claim to be kept alive must be exercised by another person empowered to exercise it for him. Yet, if the claim is exercised by another, it is no longer a claim to *personal liberty* in the sense of choosing without coercive interference among one's self-regarding acts and omissions. Rather, it becomes a claim for medical assistance to the liberty-holder, until he recovers sufficiently to make his own choices again. Strictly speaking, therefore, this kind of example does not illustrate a power-right to exercise another's claim to make his own choices.

Nevertheless, the example does indicate something crucial, to wit, the great value of protecting (if at all possible) the individual's liberty-right to make his own self-regarding choices. Mill argues that, to promote the general welfare, the claim-holder along with everybody else should be assigned equal disabilities to waive altogether his claim to liberty. The

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claim-holder cannot have a power-right to sell himself into genuine slavery, for example, and he must have an immunity-right from being sold into slavery by anyone else acting on his behalf. It follows that, if he or his proxy negotiates a slavery contract, public officials will properly refuse to recognize it. Moreover, public officials may be empowered to use coercion to prevent him or his proxy from making such a choice. In that case, some public official would hold a power-right to prevent the claim-holder or his proxy from ignoring the disability anybody has to waive altogether the claim to self-regarding liberty. Someone other than the claim-holder would hold the power to prevent him or his proxy from choosing to give up his claim to make his own choices. Even if society decides not to employ coercion in this way, however, the claim-holder or his proxy still has no power-right to waive the claim.

Again, a distinction needs to be drawn between exercising the claim in one direction and thereby waiving its exercise in the opposite direction, and waiving the claim altogether. A power-right to waive the claim *tout court* is a power to resign altogether the shelter that the correlative duties provide for the claim-holder's personal choices, and thus abandon the guarantee of achieving preferred outcomes from any protected pair. Mill insists that a power-right to waive altogether the claim to self-regarding liberty should not be held by anybody.

Ignoring as illegitimate any power-right to waive altogether the claim-right to self-regarding liberty, person i exercises his power-right to exercise his claim to self-regarding liberty by revealing $xP_iy$ or $yP_ix$ as an actual preference. Of course, he must exercise his power-right (together with his claim-right and the liberty-right it shelters) in one direction rather than another at any one time. In other words, he must actually choose either $xP_iy$ or $yP_ix$ at any point in time. He is free to alternate between the two choices over time. But nobody can possibly choose both at the same time.

It emerges that any person i, for any given pair (x, y) with respect to which he is assigned a complex right to self-regarding liberty, exercises the component rights (namely, the liberty-right to make his own choices, the claim-right that shelters the liberty-right, and the power-right to demand or waive fulfilment of the duties correlating to the claim) *simultaneously* by revealing either $xP_iy$ or $yP_ix$ as an actual choice.

## IV. MILLIAN PARETIAN LIBERALISM

Given the proposed social choice formulations of the idea of a claim-right to liberty in [4] and its direction of exercise in [5], the Millian response to Sen's negative result can be quickly spelled out. It is important to keep in mind that the right to liberty is formulated in terms of hypothetical preferences, that is, choices that the right-holder

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has legal or moral authority to make *if he wishes to make them*. The right's direction of exercise depends, however, on what its holder actually chooses to do.

Recall that the profile of individual preferences in Sen's prude–lewd example is as follows:

| Prude | Lewd |
|---|---|
| $y = (o, o)$ | $x = (r, o)$ |
| $x = (r, o)$ | $z = (o, r)$ |
| $z = (o, r)$ | $y = (o, o)$ |

[6]

The direction of individual preference runs from top to bottom. For convenience, an indication of who is reading or not reading is provided at any outcome so that, for instance, at $x = (r, o)$, prude reads and lewd does not read the book.

Given that rules of justice have distributed to prude and lewd equal claim-rights to self-regarding liberty with powers to exercise the claims over their respective protected pairs $(x, y)$ and $(y, z)$, the profile of preferences depicted in [6] is impermissible and would be rejected by the outcome function $\eta$. The problem is that the duties correlative to the separate claims are not being fulfilled. Prude reveals $yP_ix$ and thereby exercises his claim that shelters his choice to not read rather than read the book. Yet lewd does not fulfil his correlative obligation to reveal $yP_jx$. Rather, lewd reveals $xP_jy$, that is, he chooses an act or omission that violates prude's claim-right to achieve y rather than x. In other words, lewd is implicitly doing something to interfere coercively with prude's self-regarding choice to not read the book.

Prude is also violating his correlative duty not to obstruct lewd's self-regarding choice. Lewd reveals $zP_jy$ and thereby exercises his claim to read rather than not read the book. Yet prude reveals $yP_iz$ when his duty is to reveal $zP_iy$. In short, prude is also implicitly choosing some act or omission that obstructs lewd's self-regarding choice to read the book.

If prude and lewd are exercising their separate claims to not read and read the book, respectively, then the only permissible profile of individual preferences is:

| Prude | Lewd |
|---|---|
| z | $z = (o, r)$ |
| y | $y = (o, o)$ |
| x | $x = (r, o)$ |

[7]

Evidently, there is no longer any conflict between Paretian values and liberal rights-exercising in the context of [7]. When prude and lewd fulfil their correlative duties, as they must do to recognize and respect

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each other's separate claim-rights, the Millian Paretian liberal outcome is $C^{\eta}(X) = \{z\}$.

Even so, $(x, z)$ remains a protected pair for a voluntary association of prude and lewd because x differs from z solely in terms of some feature that is a combination of their self-regarding concerns. Mill is clear that voluntary associations should be empowered to create and exercise claim-rights to co-ordinate their own affairs by unanimous consent. So prude and lewd can mutually negotiate a contractual agreement and exercise their contractual claims with respect to $(x, z)$, if they both so choose. And both do choose x rather than z in the context of [6]. If they are jointly exercising their contractual claim-rights to bring about an outcome at which prude reads whereas lewd does not read, however, then the profile of preferences given in [7] is no longer a suitable response to Sen's Paretian liberal impossibility.

Nevertheless, another response is available because [6] is still an impermissible profile if prude and lewd are choosing to co-ordinate their self-regarding choices by way of a contract. Again, duties correlative to the contractual claims are not being fulfilled. Prude has a contractual duty to read rather than not read the book if lewd does not read it. Yet prude reveals $yP_ix$ instead of fulfilling his duty to reveal $xP_iy$. Similarly, lewd has a contractual duty to not read rather than read if prude reads the book. We cannot tell if lewd is failing to fulfil his contractual duty, however, because, by assumption, there is no feasible outcome $w = (r, r)$, at which both prude and lewd are reading the book, and so we cannot observe whether lewd would actually choose $xP_jw$ instead of fulfilling his duty to choose $wP_jx$. It would not be surprising for lewd to choose $xP_jw$ given that he actually chooses $zP_jy$, of course, but we simply cannot tell whether he would. In any case, since prude is failing to fulfil his contractual duty, their contractual agreement to co-ordinate their self-regarding choices is not governing the parties' self-regarding choices.

If prude and lewd are jointly exercising their contractual claims, and lewd continues to choose $zP_jy$ as in [6], then the only permissible profile of preferences is:

| Prude | Lewd | |
|---|---|---|
| x | $x = (r, o)$ | |
| y | $y = (o, r)$ | [8] |
| z | $z = (o, o)$ | |

Again, there is no conflict between Pareto and liberal rights-exercising in the context of [8]. When prude and (as far as we can tell) lewd are fulfilling their contractual duties, as they must do to recognize and respect their contractual claim-rights, the Millian Paretian liberal outcome is now $C^{\eta}(X) = \{x\}$.

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This sole permissible outcome would not change even if lewd changed his mind and chose $yP_jz$ instead of $zP_jy$ as in [6]. The permissible profile of preferences would then alter from [8] to [9]:

| Prude | Lewd | [9] |
|---|---|---|
| x | x = (r, o) | |
| y | y = (o, o) | |
| z | z = (o, r) | |

But the Millian Paretian liberal outcome would still be $C^{\eta}(X) = \{x\}$ in the context of [9].

Prude and lewd can choose to exercise separately their individual claims to make their own self-regarding choices and thereby bring about z as the outcome, or they can choose to exercise jointly their combined claim to co-ordinate their self-regarding choices and thereby achieve x as the outcome. They can choose to exercise their rights in either of these directions at any point of time without encountering any Paretian liberal conflict, as long as they fulfil their correlative duties. They can also choose to exercise their rights in one direction and then the other at different points of time, thereby alternating between z and x over time, without encountering any Paretian liberal conflict, although this will involve preference changes and thus changes in the exercise of rights and duties correlative to claims. But it is physically impossible to choose to exercise their rights in both directions at the same time. Prude cannot simultaneously read and not read the book, for example, nor can lewd. Prude cannot fulfil his duty not to obstruct lewd's choice to read rather than not read when prude himself is not reading, and at the same time exercise his contractual claim that lewd not read the book when prude himself reads it. Lewd cannot fulfil his duty to let prude not read rather than read when lewd himself is not reading, and at the same time demand that prude fulfil his contractual obligation to read the book when lewd himself does not read it!

More generally, by assuming permissible patterns of individual preferences defined over a suitably expanded feasible set X, Millian Paretian liberalism can be seen to be compatible with any number of individuals choosing to exercise their claims to self-regarding liberty to achieve an indefinite variety of outcomes, including outcomes in which everybody is reading copies of a book, or nobody is reading, or some but not others are reading, as the case may be, so long as everyone fulfils their correlative duties. True, any individual must be assumed to choose consistently to exercise his rights in one direction rather than another at any point of time, and his choice will preclude others he could have made instead at that time. But this constraint on human action is hardly paradoxical.

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The Millian response to Sen's negative result would be quite different if prude and lewd were assumed to have 'naked' liberty-rights rather than liberties sheltered by claims and associated powers. Prude and lewd might be viewed as having separate naked liberties to attempt to achieve their preferred outcomes with respect to $(x, y)$ and $(y, z)$, respectively, as well as a joint naked liberty to attempt to achieve any unanimously preferred outcome with respect to $(x, z)$. Since there are no duties correlative to naked liberty-rights, however, all that can then be said in the context of [6] is that is $C^{\eta}(X) = \{x, y, z\}$. Prude and lewd are each attempting to do what is physically impossible in so far as prude chooses both to read and not read at the same time if lewd does not read, whereas lewd chooses to read if prude does not read and at the same time he chooses not to read if prude reads. As long as that profile of individual choices remains unchanged, we cannot predict which of the three possible outcomes will actually emerge as the social choice. All of them remain permissible. But there is no logical problem to resolve. Irreconcilable conflicts of naked liberties pose no problems of contradiction since there are no conflicts of correlative duties. No holder of a mere liberty is assured of achieving an outcome he prefers. The exercise of mere liberty-rights alone does not guarantee anyone a preferred outcome in any context.[14]

## V. GENUINE PARETIAN LIBERALISM?

A Millian utilitarian liberal argues that certain rules of equal justice are essential for maximizing the general welfare. Utilitarian procedural norms, including Paretian norms, are properly confined to the choice of an optimal code, and to choices made in compliance with the rules. Such a code distributes various equal rights, including claims, liberties, powers and immunities and combinations of the same, to the members of society. The code may also contain higher-order rules for amending the rules and the rights distributed by them. Focusing on the complex Millian right to self-regarding liberty which seems to be implicated in Sen's prude–lewd illustration of the Paretian liberal impossibility result, I have argued that there is no fundamental incompatibility between Paretian values and liberal rights-exercising within such a utilitarian liberal doctrine or its contractualist cousins. The two-level procedure G is clearly a Paretian liberal procedure if everyone chooses to comply with the optimal code $m^{*} \neq m^{\circ}$.

[14] Naked liberty-rights are at issue in Gibbard's well-known examples, in my view, so that all feasible outcomes remain permissible. See Allan Gibbard, 'A Pareto Consistent Libertarian Claim', *Journal of Economic Theory* 7 (1974).

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It might yet be objected that this Millian response does not really touch the Paretian liberal impossibility result, because the response supposes that Paretian norms do not count if they are applied to preferences that violate the rights and correlative duties distributed by the rules of justice. Indeed, rather than generate outcomes by responding positively to such impermissible preferences, G will include measures for preventing and/or punishing such choices in order to enforce $m^* \neq m^\circ$. If prude and lewd are exercising their separate rights in the context of [6], for example, steps will be taken to suppress $yP_iz$ and $xP_jy$ because these choices are impermissible in terms of the optimal rules. As a result, what would otherwise be the unanimous choice of x rather than z is ignored rather than positively reflected in society's decisions.

The formal validity of Sen's result is not in doubt. Nevertheless, the Millian response does call into question the result's normative significance. More specifically, the Millian maintains that it is possible consistently to combine liberal rights and Paretian values so as to promote the general good, and that Sen's result does not destroy this possibility.

In this regard, it is useful to distinguish between two cases. In the one case, there is no dispute that people who refuse to comply with an optimal code $m^* \neq m^\circ$ are choosing to do wrong in so far as their actions violate others' rights and thereby detract from the general welfare. In that case, the Paretian liberal impossibility result, though strictly valid in its own terms, is irrelevant to the normative force of Millian utilitarian liberalism. There is no denial that, to maximize general welfare, we must restrict the application of the Pareto principle in the way utilitarian liberalism restricts it. Questions remain about how best to suppress impermissible choices. But there is no question that impermissible choices should be suppressed for the general good.

In the other case, it is disputed that a code of justice $m^* \neq m^\circ$ is essential for maximizing the general happiness. Rather, the optimal code is said to be the null code, i.e., $m^* = m^\circ$. In this case, the objection, it seems, boils down to an assertion that utilitarian liberalism is not a genuine Pareto-inclusive maximizing utilitarianism. Paretian values should be applied to choices that break the rules, including the rules for changing rules and rights, because choices that violate rights and correlative duties could maximize the general welfare, at least in some situations. If so, Sen's Paretian liberal impossibility would retain normative significance because, contrary to the pretensions of utilitarian liberalism, agents should not have binding obligations correlative to others' rights. Instead, to maximize general utility, agents might have duties to act in ways that violate any alleged rights of others.

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The objection in this form presents a formidable challenge to the Millian response. Many observers apparently remain persuaded that pure maximizing utilitarianism is equivalent to a crude act-utilitarianism. But that is a highly contestable assertion, about which Mill, Harsanyi and Hare, among others, have raised serious doubts. While disagreement remains, the controversy cannot be settled merely by declaring against these sophisticated liberal utilitarians.

jonriley@tulane.edu

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