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Privacy in the networked world: a Millian utilitarian appraisal

by

Colter Thomas Bayard

A thesis submitted to the graduate faculty

in partial fulfillment of the requirements for the degree of

MASTER OF SCIENCE

Major: Information Assurance

Program of Study Committee:
Alex Tuckness, Major Professor
Jennifer Davidson
Clark Wolf

Iowa State University

Ames, Iowa

2009

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For my mom.

אָמַרְתִּ֫ י אֲנִי בְּלִבִּי לְכָה־נָּא אֲנַסְּכָה בְשִׂמְחָה וּרְאֵה בְּט֑וֹב וְהִנֵּה גַּם־הוּא הָ֫בֶל

κατανο•σατε τ• κρ•να Π•ς α•ξ•νει ο• κοΠι•
ο•δ• ν•θει λ•γω δ• •μ•ν ο•δ• Σολομ•ν •ν
Π•σ• τ• δ•ξ• α•το• Περιεβ•λετο •ς •ν το•των

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Introduction

This thesis is about how John Stuart Mill's utilitarianism can be applied to contemporary information assurance privacy cases. The expanded use of networked computing creates an exponentially growing demand for innovative approaches to privacy issues. The global scope of privacy challenges requires an approach to resolving policy questions that is pluralistic enough and robust enough to cross cultural lines and yet provide an objective way to reach a solution.

Questions about how to respect privacy are not in themselves new. What is new in this thesis however is the context (information assurance) and the method for answering those questions (Millian utilitarianism).

Utilitarianism is essentially a philosophical approach to ethics. Its established history and applicability within pluralistic contexts makes it an attractive approach for modern information assurance policy situations. Dating as far back as the ethical hedonism of Epicurus and continued into the modern period by Jeremy Bentham and James Mill utilitarianism determines good from bad in a policy by the amount of pleasure or happiness it promotes. Because it focuses on happiness as the ultimate standard and ends to any ethical decision, utilitarianism is sometimes referred to as being consequentalist as opposed to deontologic or duty based.

Why should anyone care what Mill thinks or how his particular type of utilitarianism could be applied to contemporary problems? To answer this it should be keep in mind that Mill has been an enormously influential figure for philosophers of ethics. His ideas although almost two centuries old still gain a hearing. As will be discussed more fully later on, Mill presents a new type of utilitarianism. As opposed

to previous versions, Mill's differentiates between the *quality* of happiness as opposed to just the *quantity*. In a more general sense Mill is an appropriate philosopher if for no other reason because he was ahead of his time. While some might call the contemporary intellectual climate a secular age (Taylor, 2007) Mill's system should interest policy makers because it grants an approach that can transcend international jurisdictions. One of the real problems in crafting policy with an international scope (as some have argued is needed with something as global at the Internet) is finding common values and principles. Utilitarianism with its emphasis on happiness can be used as a contribution to reach this common ground.

What relevance does privacy and Millian utilitarianism have for networked information? I would argue that although obvious technological differences (the difference between using a land-line telephone, an internet phone carrier, or a cell phone) exist, the fundamental question over the right way to protect persons transmitting information will be the same. Although technological innovations may require further technological innovations to practically ensure protections to privacy, in a sense though, the actual technology employed is irrelevant. The kind of happiness ends the Millian utilitarian will be interested in might easily be the same.

This thesis is divided into three sections. The first deals with privacy as a general concept. I describe various approaches to treating privacy as something that is governable or legislated. The second section is about Millian utilitarianism. For readers unfamiliar with his utilitarianism I provide an introduction to his particular brand. The final section is about applying the ideas discussed regarding Millian

utilitarianism to six actual cases that address the issue of privacy.

The six cases I examine are *Katz v. United States*, *Alana Shoars v. Epson America, Inc Beacon Journal Publishing v. City of Akron*, *Condon v. Reno*, *Toysmart.com*, and *Gilmore v. Ashcroft.* These cases survey a diverse set of issues. They all however address the issue of privacy within the context of electronic communications. *Katz* is an important case involving the use of a wiretap to overhear a conversation in a phone booth. The issue in *Katz* is whether the Fourth Amendment to the US Constitution extends to situations where there is no physical breach but yet a breach of privacy offers. *Alana Shoars* is about the privacy of employee email in the workplace. *Beacon Journal Publishing* is a case involving the confidentiality of the social security numbers of city employees. *Condon* addresses a jurisdictional dispute that resulted when a department of motor vehicles wanted to sell driver information. *Toysmart.com* is a former online toy retailer. Toysmart had an online contest that required customers give up personal information. Toysmart guaranteed that the information collected would never be sold. However in the process of bankruptcy Toysmart offered to sell the personal information. Do online customers who gave up personal information and given a guarantee their information would never be sold have an expectation that the guarantee will hold after guarantor goes bankrupt? *Gilmore* focuses on the issue of whether or not airline travelers are required to provide identification. Gilmore is a traveler who refuses to show identification when he travels and is suing that his right to travel anonymously is being infringed upon.

My main goal in the application section is to describe how Millian utilitarianism

would address these cases. I first discuss the cases in the light of two important Millian principles. I then identity various kinds of happiness that are at issue in the case. Finally I attempt to describe how a Millian utilitarianism would prioritize the kinds of happiness identified.

Chapter 1. What is Privacy?

In this section I will introduce a variety of approaches to the concept of privacy. My objective here is to provide a sampling of the many different ways that privacy is understood. What is privacy? And in what way is our conception of privacy altered when *information transmitted over information technology* is what we want private? These are the two central questions that this section hopes to address. For both I draw heavily from George Washington University Law Professor Daniel Solove's California Law Review article "Conceptualizing Privacy".

Privacy is an exhaustive subject. This section does not hope to do justice in describing the full discourse comprehensively. An important point that Solove and others make is that privacy is a difficult thing to categorize. "Time and again philosophers, legal theorists, and jurists have lamented the great difficulty in reaching a satisfying conception of privacy." (Solove, 2002). He quotes Alan Westin "[f]ew values so fundamental to society as privacy have been left so undefined in social theory …" (Solove, 2002) and legal theorist Robert Post "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I despair whether it can be usefully addressed at all." (Solove, 2002).

One of the points that readers should take from this section is that because privacy is so amenable to a variety of conceptualizations and rationales there is a need for an ethical system, such as utilitarianism that can be applied regardless of which approach is preferred. Typically the literature falls into one of two agendas either a. advancing a conception of privacy or b. advancing an approach to policies

or regulation that justify privacy as a desirable end. My emphasis is on the first topic. I am not as concerned with how privacy is to be governed, legislated, limited, or balanced here as much as just giving readers an account of how privacy has been understood.

Conceptualizing Privacy: Solove's Six Categorizations

In his article "Conceptualizing Privacy" law professor Daniel Solove after an extensive review of the discourse on privacy places the various approaches under six major headings: (1) The right to be left alone, (2) limited access to the self, (3) secrecy, (4) control over personal information, (5) personhood, and (6) intimacy. To some extent each of these categorizations are relevant to the privacy challenges generated by the use of information technology, but in the end I argue Solove's pragmatic approach is one of the best for utilitarian purposes.

The Right to Be Left Alone

One of the most influential articulations of privacy in American law is the famous December 1890 Harvard Law Review by Professors Louis D. Brandeis (the future Supreme Court justice) and Samuel D. Warren. At issue in their review was the "yellow journalism" (Freedman, 1987) that they argued delved too closely into the private family and social activities of Justice Warren's wife. It is in this article that the infamous phrase that privacy is the "right to be left alone" first had a sustained defense. Warren and Brandeis argued that "many past court decisions that had granted redress on the basis of private property ought to have been based on a principle of privacy. They believed that the concept of rights must evolve alongside advances in society and that the right to privacy was no different." (Bailey, 2004).

This change in emphasis from privacy as a component of property law to privacy as right unto itself should not be understated. The article "in just 26 pages ... succeeded in virtually creating a new right of action for aggrieved individuals where none had existed before." (Bailey, 2004 qte. Smith, 2000).

Two very influential cases in American privacy law are *Olmstead v. United States* and *Katz v. United States*. Justice Brandeis powerful descent in *Olmstead* was the basis for its overturning in *Katz.*

Olmstead held that "wiretapping was not a violation under the Fourth Amendment because it was not a physical trespass into the home. Brandeis fired off a dissent that was to become one of the most important documents for Fourth Amendment privacy law, stating that the Framers of the Constitution 'conferre, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.'" (Solove, 2002).

In reviewing the literature on privacy it is difficult to find a source that does not mention *Katz*. "At issue in *Katz* was the legality of an FBI bugging device that was attached to the outside of a telephone booth in order to monitor conversations about gambling operations. Katz argued that the telephone booth was a constitutionally protected area, and the government argued 'with equal vigor that it was not.'" (Regan, 1995).

"In its Fourth Amendment jurisprudence, as well as its substantive due process protection of the right to privacy, the Court frequently has invoked Brandeis's formulation of privacy as 'the right to be let alone.' '[The right to privacy] is, simply stated, the right to be left alone,' Justice Fortas observed, 'to live one's life

as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community under a government of law.'"(Solove, 2002).

It is one of the key court cases that draws a kind of privacy right directly from the Fourth Amendment and addressed the more nuanced understanding that protections again unwarranted searches do not have to be purely physical spaces.

Limited Access to the Self

The next categorization that Solove recognizes in the discourse on privacy he terms "limited access to the self" (Solove, 2002). The following is a summary of his discussion found in *Conceptualizing Privacy*.

Solove describes the conception of limited access to the self to be "closely related to the right to be let alone conception, and is perhaps a more sophisticated formulation of that right." (Solove, 2002). Referring to a number of authors from E.L. Godkin, Sissela Bok, Hyman Gross, Ernest Van Den Haag, and Anita Allen, Solove devotes considerable attention to David O'Brien and Ruth Gavisons' renderings. O'Brien's concept is reduced to simply "being alone" (Solove, 2002) which does not include "an approach to understanding the content of the private sphere" (Solove, 2002). Solove says that "...O'Brien would claim that a person stranded on a deserted island has complete privacy, but this is better described as a state of isolation. Privacy involves one's relationship to society; in a world without others, claiming that one has privacy does not make much sense." (Solove, 2002).

The problem that Solove finds with the limited-access conceptions is that they "do not tell us the substantive matters for which access would implicate privacy."

(Solove, 2002) Solove finds this approach to be either "too broad or too vague". If privacy is viewed as a "continuum" between "no access to the self to total access" (Solove, 2002) where should the line be drawn? Without a clear view of the value privacy provides this is difficult.

"The most compelling conception" (Solove, 2002) of the limited-access view Solove thinks is by legal theorist Ruth Gavison. Gavison's "aim is to define a neutral concept of privacy" (Solove, 2002). Limited-access is a "the common denominator of privacy" (Solove, 2002). Solove quotes Gavison; "Our interest in privacy is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention." (Solove, 2002). For Gavison privacy is mix of "three independent and irreducible elements: secrecy, anonymity, and solitude." Ultimately Solove determines this approach to be too narrow because he imagines situations where although information is gathered the activity does "not reveal secrets, destroy anonymity, or thwart solitude." (Solove, 2002).

Secrecy

If information is private does that mean that it is secret? Solove quotes Judge Richard Posner in citing two "distinct interests" (Solove, 2002) embraced by the word privacy. First is the previously mentioned "right to be left alone" (Solove, 2002), "The other privacy interest, concealment of information, is invaded whenever private information is obtained against the wishes of the person to whom the information pertains." (Solove, 2002). Privacy as secrecy according to Solove is less

broad than limited-access because secrecy concerns "the concealment of personal facts" (Solove, 2002).

Secrecy as privacy is an important aspect to a constitutional right to information privacy. Citing the US Supreme Court case *Whalen v. Roe*. Solove mentions a "zone of privacy" (Solove, 2002) where the "individual interest in avoiding disclosure of personal matters" (Solove, 2002) as well as a protected area for individual "independence in making certain kinds of important decisions." (Solove, 2002).

Control Over Personal Information

As a "subset of the limited access conception" (Solove, 2002) of privacy control over personal information is distinct in its emphasis on the *control* over information. Solove finds this conception to be flawed for several reasons. First is that there are activities that are private but are not wholly "informational" (Solove, 2002) such as "fundamental decisions about one's body, reproduction, or rearing of one's children." (Solove, 2002).

Control over personal information also fails because it is too vague. It is unclear precisely what kind of information advocates of this view have in mind. Also it is unclear *who* should have control over personal information and how that control should be determined. Solove faults Ferdinand Schoeman for placing too much emphasis on purely individual control because society's influence would also have to have an input. Other control-over-information advocates are unconvincing because they either as in the case of Richard Parker "[define] the scope of personal information extremely broadly" (Solove, 2002) or as in the case of Charles Friend

"links [their] definition of the scope of personal information to the value of privacy." (Solove, 2002).

Solove continues to find fault with this concept of privacy because it is unclear what is meant by *control*. Tracing the origin of contemporary intellectual property rights to John Locke "[E]very man has a *property* in his own *person*." (Solove, 2002) Solove finds difficulty determining how exactly property rights could extend to personal information. "Unlike physical objects, information can be possessed simultaneously with the minds of millions. ... The complexity of personal information is that it is both an expression of the self as well as a set of facts, a historical record of one's behavior." (Solove, 2002). It is also an unacceptable concept for Solove because of the reduction of privacy to purely informational concerns, ignores the notion of "decisional freedom", and place too strong an emphasis on individual choice. (Solove, 2002).

In the end Solove thinks this conception is at times "too vague, too broad, or too narrow." (Solove, 2002).

Personhood

Solove describes the "theory of privacy as personhood" (Solove, 2002) in this way: "The theory of privacy as personhood differs from the theories discussed earlier because it is constructed around a normative end of privacy, namely the protection of the integrity of the personality." (Solove, 2002) Professor Solove divides the categorization of privacy as personhood into two camps: first the camp of individuality, dignity, and autonomy and the camp of anti-totalitarianism.

Solove cites philosopher Stanley Benn's notion "that privacy amounts to

respect for individuals as choosers" (Solove, 2002) and quotes Benn's use of Jean Paul Sartre's Being *and Nothingness*. "Benn explains that being 'an object of scrutiny, as the focus of another's attention, brings one to a new consciousness of oneself, as something seen through another's eyes.'" (Solove, 2002). "Personhood is defined in terms of the individual's capacity to chose" (Solove, 2002).

The following summary is taken from Solove's discussion about the anti-totalitarian aspect of privacy as personhood. Solove cites Jed Rubenfeld's "influential article" (Solove, 2002), *The Right of Privacy*. Rubenfeld "Personhood cannot exclude 'intolerant' identities without abandoning it value-neutrality as between identities.' This fact leads Rubenfeld to conclude that personhood's "final defense" rests on a view of what is fundamentally important to individual identity." (Solove, 2002). Solove notes Rubenfeld's the hypocrisy of this move. "When the state endeavors to protect personhood, it must adopt and enforce its own conception of individual identity, impinging upon the freedom of individuals to define what is central to their identities for themselves." (Solove, 2002). Solove criticizes Rubenfeld's conception of "privacy as 'the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state.'" (Solove, 2002) for failing "to abandon a personhood conception" (Solove, 2002) because any law that could protect privacy "would be to seize from individuals their right to define themselves." (Solove, 2002). While Solove ultimately agrees with Rubenfeld that (laws?) may "impose a view of what aspects of life are essential to the individual." (Solove, 2002), laws are not necessarily all bad and do not always hinder personhood.

Intimacy

Solove concludes his overview of the six categorizations by discussing privacy as intimacy. Privacy as intimacy is unique because it expands the concept from being purely about individual autonomy to focusing on human relationships, specifically the high value of the kinds of relationships that can develop where privacy is present. Solove notes that "[w]e form relationships with differing degrees of intimacy and self-revelation" (Solove, 2002). The intimacy conception of privacy is also unique because it concerns "what (aspects) of life" (Solove, 2002), we might want to be private as opposed to a general category of "information" (Solove, 2002).

Solove continues his discussion with an examination of the difficulty of defining the scope of intimacy. Fried and Rachels regard it as "information ... which individuals want to reveal only to a few other people. (Solove, 2002). Philosopher Jeff Reiman argues that a "particular kind of caring" (Solove, 2002) is also needed. A person might give information to their therapist that they would not give their spouse, but this does not mean that that person could be said to be in an intimate relationship with their therapist." (Solove, 2002) Further computer databases (Solove, 2002) can pose an alarm for privacy but not because they affect personal relationships.

Ultimately Solove finds this conception to be at times too broad or too narrow. Too broad because the scope of intimacy is unclear. And too narrow because it places too much emphasis on relationships as an end to the exclusion of a "private life that is devoted to the self alone." (Solove, 2002).

Chapter 2. Millian Utilitarianism

In this section I will attempt to provide a basic introduction to John Stuart Mill's *Utilitarianism*. My purpose is two fold: 1. To give readers unfamiliar with the text *Utilitarianism* an overview of important and relevant aspects Mill's thought and 2. contrast Mill's utilitarianism with another version namely Bentham's *quantitative* utilitarianism and discuss why Mill's is better prepared to help determine contemporary policy questions. Although this section is chiefly about the utilitarianism advocated in Mill's *Utilitarianism* I will also describe Mill's approach to individuality advocated in his *On Liberty*.

Despite its influence *Utilitarianism* was not in its original forms directed at academics. Wendy Donner summarizes: "Mill's *Utilitarianism* was not written as a scholarly treatise but as a series of essays for a popular audience. It was first published in three installments in *Fraser's Magazine* in 1861 and appeared in book form in 1863. *Fraser's Magazine* was a magazine with a general audience and the essay was written with this readership in view." (Donner, 2006). By the time that all sections of *Utilitarianism* has reached the presses, Mill's other works, particularly his *System of Logic* finished in 1840 and *Principles of Political Economy*, completed in 1847 had earned him considerable fame.

It is important at the onset to state that Mill did not himself invent utilitarianism. As an ethical philosophy its origins can be traced as far back as Epicurus. One of Mill's first encounters with modern utilitarian thought however, no doubt came upon reading the French translation Jeremy Bentham's *Introduction to the Principles of Morals and Legislation*. Postema describes the encounter as

having had "the intensity of a conversion experience" (Postema, 2006) in the following way. "Later, in his *Autobiography*, he [Mill] wrote of its immediate impact on him.

"When I laid down the [book], I had become a different being. The 'principle of utility' understood as Bentham understood it … gave unity to my conceptions of things. I now had opinions; a creed, a doctrine, a philosophy; in one among the best senses of the word, a religion " (Mill 1989:68)" (Postema, 2006).

As will be noted below although Bentham had a major impact upon Mill's appreciation of utilitarian doctrine, ultimately it was Mill's own reassessment of those ideals that brought new interest and attention to utilitarianism as a viable ethical system. "Mill thought Bentham's conception of the good, his quantitative hedonism, was narrow and misconceived and made him vulnerable to the criticism that utilitarianism is 'a doctrine worthy only of swine' (CW X:210)" (Donner, 2006). Despite Mill's concern on this point Bentham's overall influence was substantial. "Bentham's thought, and his person and intellect, had a profound impact on Mill. Yet ... Mill found it necessary to forge his own understanding of the utilitarian creed, drawing inspiration from the same moral and philosophical insights as Bentham did. It is primarily Mill's rather than Bentham's, version of the creed that has entered the modern philosophical canon." (Postema, 2006).

In contrast to his predecessors what makes Mill's version of utilitarianism unique is its emphasis on qualitative measures of happiness. For the Mill all pleasures were not the same. "It is quite compatible with the principle of utility to recognize the fact, that some kinds of pleasure are more desirable and more

valuable than others. It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone (Mill, 1861).

Bailey compares Mill's version of utilitarianism to Bentham's. Mill's is "rather more complicated." (Bailey, 1997) Bentham saw the "personal good" (Bailey, p.6) as more "simply psychological phenomenon." (Bailey, 1997).

Greatest Happiness Principle

Both Mill and Bentham constructed their respective versions of utilitarianism around what is typically referred to as "The Greatest Happiness Principle". A commonly quoted description is found in the second chapter of Mill's *Utilitarianism*.

"The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." (Mill, 1861).

Mill continues his argument by defining what he means by *happiness*.

"By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure." (Mill, 1861).

For utilitarianism, the benchmark for the morality of any given course of action is the degree to which it produces the greatest happiness, both for individuals and for aggregates of individuals (i.e. society). This is a key distinction because it provides a bridge between the practice of utilitarianism for the individual with its practice within societies governed by the rule of law.

Philosopher Wendy Donner illustrates a kind of utilitarian demand for altruism.

She argues that Mill's utilitarianism is "organized around a core concept of human happiness" (Donner, 2006) not just for the self but also for others. The mature Millian utilitarian is not just a single minded narcissist but instead an individual who relates and recognizes the happiness of others with their own.

Deriving from the Greek *hedone* or pleasure, utilitarianism as a kind of hedonistic ethical system thinks pleasure as the highest ideal. For Mill "pleasure and freedom from pain, are the only things desirable as ends; and ... all desirable things (which are as numerous in the utilitarian catalogue as in any other scheme) are desirable either for pleasure inherent in themselves, or as means to the promotion of pleasure and the prevention of pain." (Mill, 1861).

The fact that Millian Utilitarianism is ultimately grounded upon something as subjective as perceiving pleasure has lead to criticism. Bailey questions the "psychological hedonism" (Bailey, 1997) that Mill seems to have advocated. Citing chapter four on the "proof" of utilitarianism Bailey describes Mill's logic. " Since ethics is concerned with the general ends of which human conduct is to tend, the general end of human conduct is to bring about as much happiness as possible--hence utilitarianism. Anything else would just seem absurd." (Bailey, 1997).

Bentham's Quantitative Utilitarianism

Given that Mill's utilitarianism is a more expanded and developed version of Jeremy Bentham's it is worth giving a brief overview of Bentham's version and mark the important areas that it diverges from Mill's.

Felicific Calculus

One of the most important differences between Millian and Benthamite utilitarianism is how pleasure or happiness is determined. For Bentham happiness or pleasure (the words can be used interchangeably) was something that could be measured quantitatively. John Plamenatz gives an example of this "[w]e can say that a pleasure or pain of a given intensity experienced by a person for two minutes is equal to that same pleasure or pain experienced by two persons for one minute;" (Plamenatz, 1966).

Bentham's felicific calculus has been criticized for the difficulty that arises in attempting to determine the quantity of a pleasure. Bentham provides a number different dimensions of pleasure, such as intensity and duration. But how should the intensity of a pleasure be measured?

Bentham defends his method in much the same way Mill defends the greatest happiness principle. Just as the principle is justified because the maximization of happiness is what people *already* do, the act of calculation pleasures before deciding a course of action is just as common. People all the time weigh if whether their decisions will predictably lead to happiness.

Ultimately I will be using Millian utilitarianism instead of Bentham's because of the emphasis upon qualities of happiness. I do not think that pleasure or happiness is something that lends itself to quantitative happiness in any practical sense. I think that when we talk about happiness we do not tend to use numerical designators to describe what we mean. What we do is invoke a more complicated and nuanced means to evaluate our experiences and determine rules for how to govern our activities. Mill's method is preferable because it allows us to compare one end like

privacy with another directly. Would privacy in this case lead to happiness or would a disruption of privacy by surveillance?

East Germany in the last half of the twentieth century undoubtedly had *some* happy people in it, although many influential citizens where under the eye of state intelligence. Mill's utilitarianism allows me to use more nuanced appraisal. Perhaps freedom from surveillance is good because it leads to a higher quality of pleasure like privacy. Because Millian utilitarianism allows us to differentiate between pleasures on the basis of factors other than intensity or duration is for my purposes a superior system than Bentham's.

As was mentioned above utilitarianism, in general is sometimes referred to as consequentalist, teleological, and hedonistic as opposed to de-ontological or idealist. By being consequentialist utilitarianism is interested primarily in the *ends* of proposals as opposed to the *means*. For Millian utilitarianism happiness is the obvious, ultimate end that other ethical systems attempt to acquire but never in fact actually declare this intention outright. Beyond problems with happiness being a kind of exclusive end, critics have charged that the pursuit of pleasure alone will ultimately lead to a kind of depreciation of the pleasures pursued.

Qualitative Happiness

"It is better to be a human being dissatisfied than a pig satisfied; Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, is a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides." (Mill, 1861).

In *Utilitarianism* Mill addresses the charge that if happiness is the only ideal to

be pursued people will ultimately behave like animals; pursuing whatever kind of pleasure gives them satisfaction in the moment. Against this charge Mill makes a contrast that distinguishes his brand of Utilitarianism from any brand that came before it. The *quality* of pleasure was as important, if not more so than the *quantity*.

Often in quoting the above text interpreters tend to place emphasis on the difference in quality of pleasure between Socrates and a pig. But there is another point here that deserves attention. Mill is essentially describing his *method* for determining which pleasures are preferable. *The other party to the comparison knows both sides.* (Mill, 1861). Mill later on more formally spells out his methodology more explicitly:

"On a question which is the best worth having of two pleasures, or which of two modes of existence is the most grateful to the feelings, apart from its moral attributes and from its consequences, the judgment of those who are qualified by knowledge or both, or, if they differ, that of the majority among them, must be admitted as final. And there needs to be the less hesitation to accept this judgment respecting the quality of pleasures, since there is no other tribunal to be referred to even on the question of quantity." (Mill, 1861).

"What means are there of determining which is the acutest of two pains, or the intensest of two pleasurable sensations, except the general suffrage of those who are familiar with both?" (Mill, 1861).

This is an important aspect to Mill's utilitarianism. For Mill those with experience of two competing pleasure and know from experience which is to be preferred are the ones most able to inform and recommend what option to take.

Principle of Dignity

In chapter two of *Utilitarianism* Mill describes a kind of relationship between higher and lower orders of happiness. Mill argues that although the person who prefers a lower order of happiness might likely be satisfied more often, there is a quality which is lacking that those who prefer higher order of happiness possess. Mill calls this a "sense of dignity, which all human beings possess in one form or other," (Mill, 1861). Mill thinks that in those in whom this sense is "strong" (Mill, 1861) there is a willingness to bear pain for the sake of the higher order of happiness. The superior quality of happiness will be worth it in those whom this sense is strong. In this case Mill is suggesting a more humane mode of being. I argue that this higher order of happiness would in principle would be advanced by Mill. Wendy Donner notes the importance Mill places upon the self-development capacity of education. Education because it fosters a higher order of happiness is example of where this principle of dignity can be applied. Education is desirable because it teaches people to enjoy pleasures that are more congruent with being a Socrates than with being a swine.

Interpreters: Act, Rule, or Neither

A recurring question that appears in the literature is the question as to what type of utilitarian Mill advocated. Typically a mode of utilitarianism is categorized as either *act* or *rule*. Interpreters of Mill are as creative and convinced of their opinions as they are numerous. Donner and Berger argue that Mill was neither act or rule. (West, 2006). Sumner believes Mill was an act utilitarian. (West, 2006). Urmson believes Mill was a rule utilitarian. (Urmson, Foot, 1967). More examples could be

given.

Act Utilitarianism

Although more associated with his predecessor Jeremy Bentham, act utilitarianism is concerned about the morality of case-by-case actions. As a method it is still anchored to the greatest happiness principle in that happiness is the end goal by which to measure any particular action. Tavani gives a good introductory example.

"An act, X, is morally permissible if the consequences produced by doing X result in the greatest good for the greatest number of persons affected by X." (Tavani, 2004).

A case scenario could be allowing 99% of the population who do not fit any terrorist profile to be free from any kind of surveillance or extra security when at an airport. The surveillance and close scrutiny given to the remaining 1% fit a terrorist profile who might be planning terrorist acts is morally justified even if it violates the constitutional rights of the 1%, because it leads to the greatest happiness (peace of mind) to the other 99%. The end of goal of the greatest happiness for the greatest number, for the act utilitarian is the only standard that needs to be met for any particular action to be moral.

As nice as it is to have the greatest part of the population happy something does seem wrong with discriminating against the remaining 1% simply because they match a profile. What if a particular person in that 1% is totally innocent but given extra security and therefore misses her flight? Surely, some other standard has been violated that needs to be taken into account.

Rule Utilitarianism

Rule utilitarianism as opposed to act utilitarianism is less concerned with individual actions themselves as but instead is interested in what policies or rules are invoked in taking a particular action.

To summarize Barrow the difference between act and rule utilitarianism is the value we place on rules. That does not mean that the rule utilitarian thinks, "where there is no rule, anything goes." (Barrow, 1991) But that the way to attain a "world of complete happiness" (Barrow, 1991) may require that rules be made. Rules form a governing element to human activity.

Tavani describes the logic of rule utilitarianism: "An act, X, is morally permissible if the consequences of following the general rule Y, of which act X, is an instance, would bring about the greatest good for the greatest number." (Tavani, 2004).

In the case scenario mentioned above it is morally justified to give 1% of the population who fit the terrorist profile extra security attention at the airport if it fits within the bounds of a rule. If the rule is "Security is always the most important outcome in air travel" then it justified to discriminate against that 1% because it is an instance of an act within a particular rule.

Miller thinks that how we interpret chapter 1 of *Utilitarianism* is key to whether Millian utilitarianism is interpreted as rule or act. The "two-level structure" (Miller, 2006) that Mill describes between pleasure and its influence upon "lower-level rules or principles" (Miller, 2006) is where the need for rules becomes apparent. An example that I would make is that off a two-story house. The upper level is

happiness, the lower level a good of some kind. Friendship could be an example. Lets say that separating the two floors is a stairway.

The task of the rule utilitarian is to find rules that can serve as a stairway that will almost always lead to happiness. So the rule utilitarian could ascribe a rule like "we should strive to make friends" if it could be show that making friends would lead to happiness. The value of all rules ultimately rests with how successful they are in reliably getting us to happiness.

The act utilitarian approach, under this example, is different because it does not attempt to build or find a stairway. On each attempt to reach the upper level of happiness, a fresh search for a way to get there must take place. Advocates of act utilitarianism would find this preferable because of the degree of freedom, but also frustrating, as there would be no sure way to know if an individual attempt will be successful.

Urmson's Rule Interpretation

For the sake of this thesis I will be interpreting Mill to be a rule utilitarian using the argument from the major contemporary proponent of this interpretation: J.O. Urmson.

"It seems clear that when Mill speaks of his quest being for morality' 9p. 10 for a 'test of right and wrong' 9p. 20, he is looking for a 'means of ascertaining what is right or wrong' (p. 2) not for a definition of these terms." (Urmson, 1967)

Urmson, who as one of the chief advocates that Millian utilitarianism, is rule-utilitarianism gives four points of how rules should be approached.

"A. A particular action is justified as being right by showing that it is in accord with some moral rule. It is shown to be wrong by showing that it transgresses some moral rule.

B. A moral rule is shown to be correct by showing that the recognition of that rule promotes the ultimate end.

C. Moral rules can be justified only in regard to matters in which the general welfare is more than negligibly affected.

D. Where no moral rule is applicable the question of rightness or wrongness of particular acts does not arise, though the worth of the actions can be estimated in other ways." (Urmson, Foot, 1967).

As a terminological point it should be mentioned that where the phrase 'moral rule' occurs above Mill uses the phrase 'secondary principle' more generally, though he sometimes says 'moral law'/ My these terms, whichever is preferred, Mill is referring to such precepts as 'Keep promises', 'Do no murder', or 'Tell no lies'." (Urmson, 1967).

The case for Mill being a rule utilitarian is often illustrated by quoting an appeal to secondary principles in chapters two. "There is no case of moral obligation in which some secondary principle is not involved; and if only one, there can seldom be any real doubt which one it is, in the mind of any person by whom the principle itself is recognized." (Mill, 1861). "We must remember that only in (these) cases of conflict between secondary principles is it requisite that first principles should be applied to." (Mill, 1861).

If Mill's utilitarianism can embrace moral rules than it is not too big of a stretch

for it to embrace sets of laws. These sets of laws are a type of secondary principles that maybe appealed to.

Value of Rules

John Rawls in writing about utilitarianism describes the value rules provide.

"The point of having rules derives from the fact that similar cases tend to recur and that one can decide cases more quickly if one records past decisions in the form of rules." (Rawls, 1967). Rules also allow decisions to be made without having to reexamine our entire approach on a "case-by-case" (Rawls, 1967) basis.

The following summary is an example of how, according to Rawls rules help us to save time by not having to examine every aspect of situation before being able to apply utilitarian analysis. Rawls asks us to "consider a rule, or maxim," (Rawls, 1967) over informing someone that they are fatally ill. We may from a utilitarian point of view, recognize a rule that we should never inform people of their condition. "The point to notice is that someone's being fatally ill and asking what his illness is, and someone's telling him, are things that can be described as such whether or not there is this rule. The performance of the action to which the rule refers doesn't require the stage-setting of a practice of which this rule is a part." (Rawls, 1967).

Security as Rule

The following quote philosopher Alan Fuchs shows a general sense of security as a kind necessary rule procedurally. "Mill gives several reasons why the rules of morality should be "taken seriously," (Fuchs, 2006) that is, why they should be upheld even on those occasions when it would definitely produce a marginal increase in utility to break them. The foremost argument which he offers is based on

everyone's need for guaranteed expectations of security. The moral rules that insure everyone's freedom from bodily harm are literally essential for those individuals' well being. Rules ensuring such security must therefore be understood, internalized, and enforced as unconditional rights, not subject to the possibility of case-by-case exceptions based on ad hoc calculations.

Security, no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good, beyond the passing moment. This security, he argues, is the "groundwork of our existence," (Fuchs, 2006) and therefore the rules protecting it must a "character of absoluteness" (Fuchs, 2006) and an apparent "incommensurability with all other considerations" (V, 25)." (Fuchs, 2006).

***On Liberty* and a Millian Utilitarian analysis**

Mill's 1859 work *On Liberty* is about what Mill called "struggle between Liberty and Authority" (Mill, 1859). The central topic to the work is the relationship between individual freedom and the exercise of social power. As justification for his argument Mill treats utility or the greatest happiness principle as the "ultimate appeal on all ethical questions". (Mill, 1859).

Mill argues that the few cases where individual liberty may be usurped by society are to prevent harm. Even in those cases where the harm is caused is to the person himself society has limited to no authority to compel the individual.

Although does not in *On Liberty* show exactly how individual liberty is justified by increasing the aggregate pleasure directly, his work provides a number of application cases where society has legislated individual behavior. In chapter five

he discusses how fornication and gambling are themselves allowable for individuals but questions if that means one should be free to be a pimp, or to keep a gambling-house (Mill, 1859) and thinks that if for example, gambling is made illegal, the practice would continue in secret.

Although *On Liberty* does not explicitly advance a concept of privacy, Mill probably would have conceived as Warren and Brandeis do as the "right to be let alone". (Brandeis, 1890). His emphasis upon the importance of individuality being protected from social disruption would lead him to think that individual privacy is a preferable end than social surveillance.

Liberty as Rule

Professor Fuchs sees Mill as a rule utilitarian regarding liberty.

"Mill further argues for a rule- rather than act-utilitarian conception of moral duties because of the enormous importance that he gives to individual liberty. ...Mill contends that only by adherence to strict rules guaranteeing individual liberty can we bring about the conditions under which individuals capable or achieving his rich notion of happiness will develop and flourish." (Fuchs, 2006).

I think that a Millian concept of liberty could be treated as a component of a "privacy practice" (Solove, 2002). There are some cases where individual liberty will work in tangent with and bolster privacy and could be described as normative to that activity.

Conclusion

Millian Utilitarianism is like its Benthamite predecessor in the its adherence to the maxim of the Greatest Happiness Principle with the exception that the former

places an added emphasis on quality where the later version does not. Mill's essay *Utilitarianism* is available to a number of interpretations over the exact kind of utilitarianism he espoused. For my purposes I will be interpreting Mill's essay in a rule utilitarian way, presuming that any predisposition Millian utilitarianism has for rules may be transferred a general openness to the rule of law.

Finally I want to make a point in conclusion about the relevance of Millian Utilitarianism. Much can be written on this topic alone. Two aspects however make utilitarianism attractive. First utilitarianism is workable in modern, secular, and pluralistic societies. Second, Millian utilitarianism is a comprehensive and robust enough system to successfully reach decisions to vexing contemporary information assurance policy questions. To quote Wendy Donner, "Mill's utilitarianism continues to fascinate and frustrate because of its richness, its complexity and its refusal to back away from and remain uninvolved with the messiness of social and political reality." (Donner, 2006).

The arguments I present here are not offered to be construed as either expressed or implied mechanisms for actual judicial practice. I do not think that by Millian utilitarian principles and arguments alone judicial decisions should be made. This thesis in the context of the cases below, is best seen as a theoretical exercise in the implications that Millian utilitarianism could have on policy, not jurisprudence.

Chapter 3: Application Areas

In this section I analyze six important legal cases involving privacy from the perspective of Millian utilitarianism. *Katz v. US*, *Alana Shoars v. Epson America, Inc.*, *Beacon Journal Publishing v. City of Akron*, *Condon v. Reno*, *FTC v. Toysmart.com*, and *Gilmore v. Ashcroft* are six cases that involve "information privacy". While there is variety in the situations out which these cases emerged, there is an underlying question of how privacy should protected or compromised under the law. Obviously this is by no means an exhaustive list of the many cases that addressed information privacy, but the variety of contexts within which Courts have had to decide how to treat privacy makes it interesting to see if there can be an underlying, universal approach that Millian utilitarianism would take or if each case represents its own precedence from a utilitarian perspective.

As a disclaimer, it needs to be said that the way in which a US appellate or Supreme Court will rule on a case will be vastly different than how a Millian utilitarian would. An obvious, but important difference between how a court might determine a case and how an ethicist using Millian utilitarianism would is that there will be a difference of priorities. A Supreme Court Justice will likely as "is this law or policy constitutional?" The Millian utilitarian will ask "is the policy or course of action, by utilitarian lights, right?" Whereas a Court might generate its analysis based upon an *interpretive* approach of a statute or prior case, where the focus will be on interpretive consistency or precedence, a utilitarian analysis does not necessarily arrive at its conclusion in that way. The utilitarian analysis is going to be more interested in increasing the quality of aggregate happiness that results from any

given policy.

Just as there is controversy and dissent in the normal course of judicial analysis, it is absolutely possible that other, even opposing conclusions could be drawn of how Millian utilitarianism would decide on a case. An analysis does not have to necessarily need to claim to be the definitive way Millian utilitarianism would decide the issue to be accurate.

Before discussing the six cases I should briefly describe how I am relate a Solove's pragmatic approach to privacy with utilitarianism. How does an approach that draws its strength from experience as opposed to an *a priori* knowledge base hope to be compatible with utilitarianism? Isn't utilitarianism, the idea that the right ruling is that one that leads to the greatest happiness based upon a hoped for or theoretical basis?

To answer this I return to how John Dewey addressed schemas or theoretical frameworks. In the course of our explorations of the world we will construct schemas based up on our experiences. What is critical is that we do not hold these schemas as based upon any *a priori* type understanding, but that we continue to ground our schemas in experience. In the normal course of our explorations as we gain more experience we may discard or strengthen our schemas.

I do not think that Millian utilitarianism, specifically if interpreted as "rule-utilitarianism" will have any problem with pragmatism at this point at all. To repeat a point made in Section II, one of the "proofs" that Mill gave for the principle of utility is because in truth they already do. Whereas John Dewey would say "make sure you are reasoning from experience." Mill would say, "We have the experience of

invoking a utilitarian analysis all the time, although we might not realize it."

Katz v. United States

The issue in this case is whether Fourth Amendment protections against "unwarranted searches and seizures" (US Constitution) extends to nonphysical searches, such as in the case of a wiretap.

As a part of their surveillance investigators placed a tap onto the outside of a phone booth used by Mr. Katz to place bets. The agents however did not get a warrant to conduct their wiretap. The information investigators collected from their surveillance was presented as evidence to convict Mr. Katz of illegal gambling charges.

As one of the most commonly cited and important cases concerning privacy and electronic communication *Katz v. U.S*. revolved around the question of whether or not Fourth Amendment protections should extend to nonphysical searches.

In overturning an earlier Supreme Court case (*Olmstead v. US)* that addressed this same issue, the court referred to the dissenting opinion of Justice Brandeis and concluded that yes, the Fourth Amendment can be interpreted to include nonphysical searches. "For the Fourth Amendment protects people, not places." (*Katz v. United States*, 1967) The ruling clarified and reinforced the Courts rejection of "antecedent justification" for a warrant. The Government argued that federal agents were conducting the surveillance properly because of the limited scope of the surveillance. They took it upon themselves to only listen to Katz's conversation and believed that they had probably cause that Katz was conducting an illegal gambling operation. The Court reiterated its position that a "neutral" body

between the police and the citizen was required to oversee the entire operation. The court ruled that police must obtain a warrant before monitoring a phone conversation. "Since Katz, law enforcement officials generally have to obtain a warrant before beginning a wiretap or other surveillance of an individual's conversations." (Henderson, 2006).

The Fourth Amendment of the US Constitution protects against arbitrary searches and seizures, including "nonphysical" searches. Being that the Fourth Amendment "protects people, not places" a warrant was required before the wiretap could be legally conducted. In a general sense the relevance for information transferred over networks is that information itself is not necessarily always conceived of as a physical thing, but can also be conceptualized as “an actions” (Post, 2005). In interpreting the Fourth Amendment to protect persons, it may not be too far a stretch to include actions persons take over networked technology.

Utilitarian Analysis

A utilitarian analysis of *Katz* could take a variety of divergent paths depending upon the exact activity being addressed. The way agents conduct a wiretap, the presence or absence of a warrant, the general question of the role the State should have in overhearing an unconvicted individual's telephone conversation and the way to faithfully interpret the constitution could all be examined using utilitarian reasoning. Some of these topics are more germane to a thesis in information assurance than others. Here though I will stick to the more general question of how Millian utilitarianism would approach wiretapping and the Fourth Amendment.

For the all utilitarians the highest and most important standard by which to

judge the rightness or wrongness of any policy is the degree to which it promotes the greatest happiness principle. To quote again Mill, "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." (Mill, 1861) Mill would not be confined to the interpretative question of the US Constitution that the Supreme Court was. The first job of the utilitarian would instead be to determine what kinds of happiness that could be involved. As mentioned in the second section, Mill distinguished between different types and qualities of happiness. For Mill the pleasures derived from the intellect was to be respected as a higher order over bodily pleasures. Obviously in the case of a wiretap physical pain or pleasure will be irrelevant.

I argue that there are at least five different kinds of happiness that could be at stake over wiretapping. The first is a general sense of control over reputation. To varying degrees, it matters what people think of us. A good reputation for example can help secure stable employment. A bad reputation could mean not even getting an interview. Wiretapping allows parties to gain information about a subject which may itself be transmitted and influence reputation. The second kind of happiness I think is involved is a general sense or expectation of privacy. Privacy as I am using it here would most resemble what Solove would call the "right to be left alone". Privacy as I am using it here would most resemble what Solove would call “The Right to Be Left Alone”. (Solove, 2007).

When we make phone calls we want to believe that only the party we are directly communicating with is listening. It is unsettling to think that our

conversations maybe overheard. A third kind of happiness could generally be called "public safety". This is the sense of security and peace that citizens derive from the knowledge that dangerous criminals are being pursued. That they do not have to live in fear that their physical security will be disrupted. A fourth kind of happiness that I think is relevant here is the happiness derived from equality under the rule of law. In a general sense all citizens are equal. And our policies over wiretapping will extend equally to all. Finally, I think that a general sense of dignity is a kind of happiness that is relevant here.

As was noted in the second section, Mill in *On Liberty* was an advocate of what has generally been called the "harm" principle. Basically the principle is that individuals are free to act in any manner they which, and so society has not basis to legislate individual freedom, except when the exercise of individual liberty causes harm to others or subjugates their rights. If we were to apply this principle to *Katz* on the question we would want to answer is if any activity of any individual in the case (wiretapping, conducting a illegal multi-state gambling operation, etc.) could in fact be shown to harm or hinder others.

From here think that there are two major ways utilitarians will attempt to resolve policy questions over wiretapping. The first is to focus on the larger, more theoretical question of how the State should authorize wiretaps. The second and more practical question is if *this* particular wiretap leads to the greatest aggregate happiness. Both ways of approaching the topic are going to contain a degree of uncertainty. Where the more theoretical focus is about the amount of happiness in a general sense. The practical approach reflects in retrospect on how successful a

policy which lead to a set of events actually was in generating the greater amount of happiness. Rule utilitarianism can act as a bridge to these two perspectives. By creating a rule such as "agents must obtain a warrant before conducting a wiretap of telephone conversation" the theoretical topic as well as the particular practical issue, although maybe not exhaustively is addressed. Utilitarian analysis will move on then to ask the question; does the rule lead to a greater aggregate happiness?

I argue that Mill would have condoned the wiretap because conducting an illegal multi-state gambling operation could have harmed others. Society should Mill would argue, exercise its power to stop this particular instance of individual freedom. Conducting an illegal gambling operation could harm a number of different actors. First off there may be a number *legal* gambling operations, legitimate businesses that have to by law take the time and trouble to meet certain standards for their operations. Many states that allow gambling have an official gambling or gaming commission to oversee that standards are met. How is it fair that some gambling establishments have to follow the law and others do not? This first issue supports a second, what about gamblers? Although their odds of winning will vary depending upon what kind of event is being bet on, gamblers expect a standard of fairness. In extreme examples gamblers would want a court or commission to take their complaints to in the event that they feel that they are being treated unfairly. With an illegal operation there is no such commission to oversee that fairness of the games bet on. Another problem with illegal gambling is zoning. An illegal gambling operation can be set up *anywhere*. Even as is evidenced in *Katz, a phone booth*. A real problem with illegal gambling is that it has the potential to bring other social ills

with it. Why would the conductors of gambling operation stop with gambling? Citizens have a right to decide where to live based upon their own preferences. By what right can some rezone a residential neighborhood into a gambling district simply because they want to? Finally there is the issue of poverty and the misery that it can bring. If gambling is conducted without any official oversight, it is possible that some may gamble away more than they can afford. Mill would certainly have been against any policy that would increase this particular kind of pain. These are just a few of the reasons Mill would have been in favor of conducting a wiretap to stop an illegal gambling operation.

But wiretapping is also an issue that the harm principle may be applied to. Typically as in this case we think of wiretapping as something done by society or by sanctioned surrogates for society's interests such as the police. Wiretapping conducted by unsanctioned individuals is a separate instance (although if this might also be an example of where individual actions would need to be controlled to protect the rights of others). Wiretapping conducted by police would be, as in this case condoned by Mill if it protected the free exercise of the rights of others. In *Katz* however the court does not have a problem with the fact that the wiretap was conducted to stop an illegal gambling operation. The issue the Court had was that the police did not receive a warrant before conducting their surveillance. As was reasoned in the court ruling, the necessity of a warrant lies with the fact that it is given by an authoritative neutral body whose task it is to objectively adjudicate between the police and the citizen. Mill would probably have agreed with this logic in theory because warrants work to protect individual rights. In practice Mill would

want to have known the exact reason for the warrant. There is a difference between the FBI needing a warrant to conduct surveillance on an illegal gambling operation, versus the Stasi in East Germany needing a "warrant" to conduct surveillance on political dissidents.

Mill would have been interested that people be respected as human beings. Under this logic Mill would have agreed with the Court. In *Katz* the court reached its ruling on the principle that the Fourth Amendment protected "people, not places" (*Katz v. United States*, 1967). The idea that people have the right to be free from arbitrary searches would have found a supporter in Mill because it is based on this principle of dignity.

What kind of happiness should the right conducting of a wiretap lead to? Above I mentioned five kinds of happiness. Mill would not have necessarily reduced the different happiness options down to preset categories or attempted to quantify them. Mill would want to pursue a policy where most if not all of the kinds of happiness of a particular kind, namely of high quality were maximized. In a situation where you might have two competing kinds of happiness, Mill argued that only those who have experienced both pleasures could adjudicate between the two as which was more preferred. Wiretapping itself is an activity that is conducted for a variety of reasons. Certainly a chief reason would be the fourth kind of happiness I discuss, namely public safety. But a problem comes when comparing kinds of happiness. The real question is does a happiness like public safety trump a potentially competing happiness like personal dignity? Or is the happiness gained from being left alone of higher quality than the happiness of equality under the law? Given the

importance Mill placed on personal dignity, it is difficult to see what kind of argument would cause him to subjugate it. If for example the happiness of public safety or equality under the law were pitted against the happiness derived from personal dignity, Mill would have argued that personal dignity should not be lessened.

Mill I think would have agreed with the Court in *Katz* because it is possible to imagine that all five kind of happiness here could be realized. By requiring officers be granted a warrant the court protected unfair or arbitrary harm to a citizen's reputation. Requiring a warrant advances a general sense of privacy and public safety. Citizen can feel safe that the police may not listen in on their phone conversations for their entertainment. Surveillance could only be conducted in the interest of public safety and with a warrant. This requirement of having a warrant advanced the happiness gained by living under the "rule of law". The rights of the police as well as citizens are protected from the whims of arbitrary subjugation. Finally, although it was used earlier as a principle, the Court by advancing the previous four kinds of happiness promoted a general sense of dignity for the individual parties involved. Citizens being wiretapped as well as police conducting them are treated as equals.

It is difficult to say how exactly Mill would respond to *Katz*. In this section I described five kinds of happiness that a utilitarian would want to promote. I address the general topics of the case namely illegal gambling and wiretapping from the point of view of Mill's "harm principle" as described in *On Liberty*. I compared Benthamite and Millian utilitarianism, describing how Bentham would have reduced the five kinds of happiness into his prescribed categories and applied his felicific calculus to

determine an outcome. Finally I argue that Mill would have agreed with how the Court ultimately ruled because it worked to promote the five kinds of happiness I described.

Alana Shoars v. Epson America, Inc.

Alana Shoars is an important case about the privacy of employee email that was brought to trial in Los Angeles Circuit Court. It is one of the first that addresses the privacy of email. Although not rising to the stature of a Supreme Court or Appellate case, *Alana Shoars* is precedent setting.

Alana Shoars was an employee of Epson America, Inc. One of Shoars responsibilities at Epson was to inform users of the company's email system that their messages were "private and confidential," (*Alana Shoars v. Epson America, Inc.*, 1990). Shoars however learned that her supervisor had printed out and read some of the emails users had been sending. Shoars reported her supervisor to the general manager. Upon learning of this, Shoars' supervisor fired her for "insubordination" (*Alana Shoars v. Epson America, Inc.*, 1990). "Shoars sued Epson, claiming her manager's actions constituted wiretapping and eavesdropping under state law," (Levine, 2000). The court ruled in Epson's favor "stating employers have the right to monitor communications in the workplace, especially when they own the e-mail system." (Levine, 2000).

Given the necessity that networked communication plays in the successful operation of an e-mail system, the policy issues addressed in Alana Shoars has the potential to serves as a guide for directing policy in network management.

A key question in this case is should employees have an expectation of

privacy when using an email account provided by their employer? To answer this question, Solove's descriptions of privacy (although themselves possessing the limitations he describes) as "limited access to the self" and "control over personal information", are probably most appropriate.

Utilitarian Analysis

Does an employer have a right to monitor communications in the workplace? With this situation (as with any others) the most important criterion for a utilitarian analysis ultimately is the amount and quality of happiness that would result from a proposed policy. One of the challenges in applying utilitarian analysis is to determine whose happiness and what quality of happiness will take priority. This in a general sense can be difficult to determine conclusively because of the wide variety that there is among people. In one sense we can only guess what will satisfy the particular parties involved. As a remedy for our lack of insight, we need to change the question from what will increase the happiness in this *particular situation*, to what *in general* will lead to the greatest happiness. To discuss the case in this way assumes similarities among people, that they will share the same rights and enjoy the same kinds of happiness if put in a similar situation.

A Millian analysis of the case would likely invoke the two principles mentioned before, namely the harm principle and the dignity principle. Mill would have opposed any act by society to hinder the liberty of individuals except in the case where such exercise would cause harm to others or hinder the exercise of others rights. In the case of *Alana Shoars* it is difficult to apply the harm principle exactly because we are not dealing with society in any legislated or governing sense. We are simply dealing

with the particular practices of Epson Corporation and trying to determine how the harm principle might apply. Companies, by the nature of the employment relationship restrict, sanction, or condemn the actions and therefore the liberty of individual employees all the time. The only real liberty the employee might have in some cases is whether or not to enter into the employment relationship or to be free from certain kinds of conditions such as an unsafe work environment or harassment.

The one instance that Mill might recognize as will be mentioned later in the discussion of the various kind of happiness involved is the issue of property rights. As a permutation of the harm principle, an individual cannot use their property in such a way as to undermine the rights of others. Epson Corporation by reading the emails that passed through its system could be argued to be using its property (the email system) in just such a fashion. But the problem with this logic is that employees do not necessarily possess the same kinds of rights or expectations to privacy as they would against the state. This lack of discussion of how privacy rights play out between non-state actors if readers remember back to the section on privacy above is a problematic limitation with the privacy discourse.

The principle of dignity in a general sense though could come into play in *Alana Shoars*. This appears to be a major kind of argument in this case. Alana Shoars basically did not like the dishonesty that the Epson Corporation was displaying in telling users it was not reading their emails, when in fact they were. This act of reading the email of persons told that their correspondences would be private amounts to an attack on the dignity of the users. If dignity is the "core" (Mill, year) of happiness how can employees expect to experience any kind of happiness

if dignity is violated? It is difficult to determine which action of the Epson Corporation violated the dignity of users more, the act of reading emails or the act of lying to users about their privacy.

Although Mill would probably have agreed with the ruling for Epson Corporation on the basis of private property rights would have condemned Epson for lying to users and undermining of their dignity by reading emails users were lead to believe would be private.

There are chiefly four major types of happiness that Mill would have recognized and promoted above all others. Property rights, privacy, employment, and integrity all though probably not usually thought of as types of happiness, would ultimately be translated as such for utilitarian purposes. Mill believed that utility or the pursuit of happiness was the actual underlying motivator for all moral reasoning. First the notion of property rights. Epson Corporation, as a private company, when monitoring the activity on its e-mail system was merely exercising its rights of ownership. Mill would have thought that the right to private ownership was a higher order happiness because it is grounded in his notion of individual liberty. If a company is merely an aggregate of individuals, Mill would have believed that whatever rights society affords to individuals should be transferred on to a group of individuals. The right to own property would be seen as a higher order of happiness because it can allow for the another type of happiness Mill would have recognized: the ability to use property in such a way as to *stay in business*. By monitoring its employees' e-mail, Epson was ensuring that standards of productivity and accountability were met. Epson was justified in its actions because they could mean

that the company would stay productive and profitable. Doing the reverse could have potentially meant economic pain for the company and its employees.

Mill would have linked privacy to individuality. He would have argued that privacy is an element that needs to be present for other elements of individuality such as freedom of decision and thought to be exercised to their fullest. We value privacy to the degree to which it provides us with a sense of happiness. There are times when too much privacy could be confused with isolation or loneliness, pains that we would try to avoid. Certainly within the context of sending email users take comfort in the believe that there messages will only be read by their intended recipients.

Employment, as was touched on with property rights, with the income and sense of stability it brings is a type of happiness. In this case employment was an important factor for both parties. Alana Shoars was trying to do her job and Epson was trying to make a profit, stay in business, and provide employment for its users. Although controversial Mill was advocated the use of contraceptives by the poor as a way to protect against the pain of poverty. Mill would have been in agreement with any policy that seeks to eliminate the pain caused by poverty. Epson Corporation if it could be shown to be ultimately protecting the productivity and financial profitability of the company and thus securing the jobs of its employees would be helping to limit this kind of pain.

Finally, integrity is an important. By integrity I mean here a general sense of truthfulness. Epson in this case was not being truthful with users. Mill in chapter 5 of *Utilitarianism* would have called this "to break faith" (Mill, 1861) with users.

Unless there is some greater reason for violating its promise to users, Mill would have condemned this practice. Ms. Shoars in this case was merely bringing this breach of trust to her supervisor. She was working to simply maintain the standard that Epson gave lip service to.

Is asking employees to waive any right or expectation to privacy condoned by Millian utilitarianism? For utilitarianism the decision to do anything goes back to whether or not an action increases or decrease the aggregate happiness. I think that in general Mill would argue that people should hold unto their results against whatever opposition. A society where citizens have rights would likely be a happier one than those where citizens do not.

Mill again would only allow people to waive their rights if such an action led to greater happiness. In the case of an employment arrangement, if the waiving of a right to privacy were show to increase productivity and there for overall profits and salaries then Mill would be for it. If however the waiving of a right led to unnecessary disclosures of person information which let to a work culture of fear and uncertainty clearly utilitarianism would be against it.

"The employment law firm *Peninsula* report(s) that employees spend up to a staggering three hours a day on personal internet surfing - thats 40% of their working day.b?" (Thompson, 2006). Although the impact of personal web surfing and email has been had mixed results for productivity I think Mill would be more interested in the happiness gained by enforcing a system of rights.

It is questionable though if this case is really about *rights*. Yes, Alana Shoars does have certain rights constitutionally and legally, but it is unclear how those rights

were violated by any practice by Epson. Epson as a private employer is not necessarily bound by the Fourth Amendment in the same way police or other government agents. Ms. Shoars in using a company email account was in a sense agreeing to the terms of use that Epson decided to adopt.

So it would be a false dichotomy here to say that a Millian utilitarian has to choose between the pleasure gained from property rights and staying profitable as a business on the one hand and protect property rights on the other. If Epson had agreed or mislead Ms. Shoars into thinking that her e-mail correspondences would be private and betrayed that trust, that would be a different situation. Here though Mill would have sided with the Los Angeles Circuit Court and sided for Epson.

Beacon Journal Publishing v. City of Akron

The issue in this case is whether or not civil employees have an expectation of privacy over personal information, such as their social security number. A related but corollary issue is whether the exposure of city employee information leads to greater transparency in government. Although possessing the limitations Solove mentions, the categorizations of privacy as “control over personal information” and “secrecy” I think are probably most in play here. In this case it was determined that the social security numbers of city employees are not "public records" requiring disclosure. In August 1992 (*Beacon Journal Publishing v. City of Akron*, 1994) parties for Beacon Journal Publishing brought a suit against the City of Akron. The journals complaint was that the city was obligated to disclose the social security numbers of city employees. Akron countered that they were under no obligation to do so. The court ultimately ruled "that disclosure of employees' SSNs would violate

the employees' right to privacy." (*Beacon Journal Publishing v. City of Akron*, 1994). Given the fact that the SSNS were likely stored in an electronic database managed by the City of Akron that required networked computing to access, the policy questions regarding privacy raised in Beacon can serve as an example of some of the issues raised in network access management.

Utilitarian Analysis

This case is unique in that it addresses the rights of civil employees. Should individual privacy rights hold for civil employees? I argue that by Millian lights they would. I begin my analysis using Mill's harm and dignity principles. First to apply the harm principle, it is important to recognize that although they may work in a civil capacity, that fact alone does not mean that individuals suddenly surrender their rights. Even if there were a direct link between a civil employee's social security number and a questioned civic function, it would still be uncertain if society has a right to know the social security number. Imagine for example a case where a city employee was embezzling money into their bank account. Upon learning of and prosecuting the employee, would society even in that case have a need to know the city employee's social security number? Given that this case is about the action of the city to keep its employees social security numbers private, the only conduct that the harm principle could address is those particular actions. This would not be the case if say for example Beacon, rather than suing for the information, decided to hack into city databases and steal the social security numbers. Because it is difficult to say that the harm principle should apply to the act of bring a lawsuit, the application should be confined just to the issue of how to manage the information of

city employees. That said it is difficult to see how individuals acting to protect the confidentiality of their own information in this instance would necessarily the rights or exercise of liberty of others.

It is at this point that the dignity principle should be invoked. As was just mentioned this case is about individuals, who happen to be city employees keeping their information private. There is something about that Mill would agree about that in principle because it promotes the dignity of city employees. Individuals should be treated as though they are second class citizens simply because they work for the city. They should expect that they will be able to enjoy the same rights as citizens.

Although I will discuss this in greater detail below, identity theft is an issue here that could invoke both the harm and dignity principles. By not protecting the social security numbers society would be exposing city employees to the potential harm caused by identity theft. This fact alone creates the kind of situation that the harm principle address. Individual city employees and the city itself in this case are not harming anyone by keeping the social security numbers confidential. The harm caused by identity theft would be unacceptable based on the dignity principle. The person whose identity is stolen is not treated as simply a person, but as a means to some other end. The victim's good name and credit history is a means to the criminal's purposes. Clearly for just this reason alone the dignity principle would instruct us to keep the social security numbers of city employees private.

I argue that there are four particular kinds of qualitative happiness at stake here. Confidentiality, freedom from fear of identity theft, sense of security gained from government transparency, and control over reputation will all need to be

evaluated from a utilitarian point of view. I concede that there could easily be more kinds at stake than these four, but that these are some of the most important.

Clearly in *Beacon* confidentiality is a type of happiness that is at stake. City employees like probably most people enjoy the knowledge that somethings about themselves are unknown to others. This general belief that our lives are not open books to everyone we meet gives us space to craft a social identity or social self that we project. Taking away confidentiality limits the spectrum of how we may present ourselves. If for example we might have a conflict if we have extremely bad credit and yet want our friends to think that we are financially responsible. If we can not keep our credit information confidential, can not chose when and how such personal information is disclosed how can we hope to influence much less control the social self that we are trying to project? I call this kind of happiness control over reputation. Although we can not control what others will say about us, we should at the very least be in a position to influence what personal information other have. This confidentiality when present gives can give rise to a particular kind of happiness - freedom from fear of identity theft. Last year almost 10 million people were victims of identity theft (identitytheft.org, 2005). The harms caused by this crime can range from unauthorized credit purchases to false imprisonment. Living free from these harms is in itself a kind of happiness or deprivation of pain. Finally the sense of security gained from transparency of government is at stake. This particular happiness is the reason Beacon gave justifying its need for the social security numbers. As citizens in a democracy we want to know that our government truly is accountable to the people. We want to know what and how our government is

carrying out its activities. When we do not know what the government is doing, when this sense of transparency is absent it does not take much for a minor mistake to be construed as the beginning of a hegemonic police state.

Mill I think would have in the end agreed with the Court. The happiness of transparency of government is not really at issue here. Is not clear as was mentioned above how knowing the social security numbers of city employees would lead to this. Even in the case where an employee was causing harm, it still does not follow that the employee must give up their social security number. The happinesses of confidentiality, control over reputation, and freedom from fear of identity theft are the kinds that Mill would have approved of. Mill would have argued as he did *On Liberty* that individual liberty should not be impeded by society. The action of city employees to keep their social security numbers private from the encroaching eyes of the majority would be such an example.

In general utilitarianism is on its own indifferent to open record or freedom of information policies. Utilitarianism however, would be concerned in the end over the consequences of the policy. Did the policy increase the aggregate happiness? In a general sense it is almost impossible to speculate what a utilitarian would say. Utilitarianism would be better employed on a case by case basis. In some instances the freedom of information policy might promote more happiness and thus be considered good. In other instances an open record policy might not increase the general happiness and be determined bad.

Does a policy which keeps social security numbers from being disclosed lead to greater happiness? Or are social security numbers actually public records, the

disclosure of which, will lead to the greater happiness? I think for Mill though this situation really is a trade off between the happiness derived from a policy that keeps social security numbers private and the happiness derived from total disclosure and availability of public records.

In the actual court case, as here, the issue revolved around the issue of whether or not the social security numbers of city employees could properly be called "public records." The court ultimately decided that they were not. Mill would have sided that the pleasure of gained from having a social security number private was greater than any pleasure the public would have had in their disclosure. because of the quality of pleasure involved. Court records cite the situation of a city employee who was denied credit because of "delinquent accounts with retail credit institutions." (*Beacon Journal Publishing v. City of Akron*, 1994) This protection again identity theft and fraud would have benefits that extend beyond just the city employees but the greater public at large.

Condon v. Reno

Should states be allowed to sell personal information it requires citizens provide to the Department of Motor Vehicles (DMV). In the process of granting drivers licenses and registering vehicles, state departments of motor vehicles collect a vast amount of information about citizens. *Condon v. Reno* is about whether states may sell this information to generate revenue. It should be noted that this is already do this. To protect citizens information congress has instructed limits to how states may use the information. *Condon* is similar to *Beacon* in that a network of somekind was likely required to access and distribute the personal information of

citizens.

The "Driver's Privacy Protection Act of 1994 (DPPA), ... establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent," (*Condon v. Reno*, 2000) Apparently citizens when filling out forms for their DMV often must check a box for positive consent that their information may be sold. States may not assume a negative consent, i.e. assume that because citizens have not blocked the sale that they are free to proceed. Here Solove's categorization of privacy as "control over personal information" is probably most applicable. Although topically this case is about privacy of personal information given to DMVs, the interstate nature of selling information prompted the US Supreme Court to rule on the case over the question as to whether or not they had jurisdiction. So while privacy is the issue in this case is useful, the actual legal reasoning of the Court is not as important.

Utilitarian Analysis

I used Mill's harm principle in this case in the same manner as in *Beacon*. Again, the harm principle says that individual rights can only be disrupted if the exercise of those rights infringes upon the rights of others. In *Condon* the issue is over the rights of citizens over information that they must give the state to obtain a drivers license or register their vehicle. Mill would have agreed with how states currently must manage this information. By requiring that states obtain citizens' positive permission by checking a box, at no point is an individual compelled to give up their privacy unless they chose to. Citizens in this case still retain a great deal of power over how their information is used. First by the mere question over whether

their information may be sold and second by voting for representatives who will see that the revenue generated will be spent in the citizen's interest. Giving citizens the power to chose when and how their information is disclosed to vendors does not necessarily harm anyone unjustly and Mill based upon the harm principle would have approved of this way of handling the information.

Mill for similar reasons would have approved of requiring citizens to give their permission on the principle of dignity. Citizens and their information in this case are not treated as mere financial ends. All citizens here have complete control over if their information is sold. No one is treated as less than anyone else.

I argue that in *Condon* there are four major kind of happiness involved: revenue/freedom from poverty, privacy of drivers' information, control over disclosure of information, and the rule of law. The money that states make from the sale of information can go to better schools, safer roads, and cleaner parks. Clearly more money for the state could lead to a greater standard of living for all citizens. Also, revenue in this case is not generated by raising taxes on anyone, but from simple commerce. Privacy of drivers' information could be rendered as general confidentiality. In this case as in others, the simple knowledge that their information will not reach identity thieves or used in inappropriate way is a kind of pleasure that citizens might enjoy. As a facet of privacy discussed earlier, control over disclosure of information is relevant here. In contrast to a general sense of confidentiality the key concept here is the *control* that citizens enjoy. They may or may not allow the state to sell their information, but the choice is up to them. This aspect of choice entails a certain element of empowerment. Finally, this rule of law is an important

kind of happiness here because the policy answers here are generated by democratically sanctioned legislation. The law in this case governs all parties; citizens and their information, states wanting revenue, and vendors wishing to purchase the information.

For Mill again the focus is going to be on the amount and quality of happiness that results. Again there are not enough details to reach the definitive decision of what Mill would have decided. Depending upon the amount of revenue state generate from the sale of personal information, the benefits gained might actually lead to the greater happiness. If the sale of personal information led to lower taxes or more money for education wouldn't that justify things? But the opposite might also be true. It might be the case that no amount of revenue could deliver the amount of happiness gained by the peace of mind society would have knowing that their information was private. For Mill it would matter what impact the selling of their personal information by the state, would have on citizens. Mill would care that their psychological as well as their financial well being were wholly considered.

However it could be argued that if enough revenue is raised, the state could offset harms caused by misuse of the information. What if the sale of driver information lead to revenue to hire more police or create a state agency or task force to prevent and stop identity theft? What if the revenue generated allowed a more advanced system to be developed or purchased to more quickly catch identity thieves?

Again, any hope of answering how Mill would have answered will be wholly speculative based upon whatever pleasure Mill would have thought should be

promoted. Given Mill's staunch defense of individuality, he probably would have been opposed to the sale of personal information by the state. Regardless of how much money were raised, Mill would have at the very least wanted individuals to have a choice in how their information were used. Individuals may choose to forfeit their privacy, but it should be the individual, not the state that makes that determination. So to that end the control over information that citizens retain as well as the fact that decision making process is governed by the rule of law promote the policy in *Condon* of giving citizens a voice in determining whether their information is sold.

FTC v. Toysmart.com

Toysmart.com was an online toy retailer that went bankrupt. While in business, toysmart.com collected information from customers and gave assurances that the information collected would not be sold. Toysmart provided customers with a privacy statement stating: "Personal information voluntarily submitted by visitors ... is never shared with a third party." (*FTC v. Toysmart*, 2000). After filing for bankruptcy and in the process of liquidating its assets Toysmart decided to renege on its promise and attempted to sell customer information. Toysmart.com essentially decided not to honor the guarantee it gave customers. The question important question here is this: although toysmart.com went bankrupt was there in fact still a duty not to sell customer information? Did toysmart.com actually engage in deceptive commercial practices by later offering to sell its customer lists? The Federal Trade Commission ruled that toysmart did engage in a deceptive practice by representing itself to customers that it could hold to its guarantee. As an internet

business, with a potentially global customer base network technology played a crucial role in Toysmart's operation. In this case as with the others, network technology served as a kind of magnifier or the number of people whose privacy was affected.

Utilitarian Analysis

Toysmart has the potential to present a number of topics for utilitarian analysis. The duties of bankrupt companies to keep promises made, the continued expectation of customers that their information is used in ways they consented to, the identification of the proper kind of wrong committed, etc are all possible avenues of discussion. What I am interested in with this case is the general expectation of privacy that customers should be entitled to enjoy. Unfortunately, while this for me is the main issue, privacy in this case was protected by a promise. So any discussion of privacy in this case will turn on the expectations people may have of bankrupt companies to keep their promises. Privacy thought of as what Solove categorizes as "control over personal information" is probably most common in this context.

Mill according to the harm principle would have agreed with the FTC. Society in this case has a right to sanction a company (as an aggregate of individuals) from causing harm to and undermining the rights others. As has been mentioned with the situations above where identity theft was a real threat, Toysmart was harming its customers by exposing them to this kind of pain.

The dignity principle would also coincide with the FTC's ruling. Customers gave Toysmart their information in good faith on the basis of trust in a privacy promise given. Customers here were treated as mere means to Toysmart desire to

generate revenue to pay off its debts. Clearly this is not treated people with dignity. Toysmarts actions in this case violates any notion of dignity because of its abusive treatment of its customers information.

For the purpose of a utilitarian analysis I argue that there are four principal kinds of happiness involved here. Income generated to pay off debts, loss of control over personal information, dignity, honesty/integrity.

Mill would have sided with the Federal Trade Commission. Income generated to pay off debts is a kind a happiness, but as I will describe here ultimately is not substantial enough to over-rule the other three kinds of happiness at stake. Certainly the prospect of making money is a kind of happiness. The money generated could pay off banks and other creditors. It could help pay off parties that suffered as a result of the businesses failure. But the central question here is would any amount of money, reasonably expected to be generated, justify the sale of information that Toysmart promised it would keep confidential? By selling the information Toysmart exposed its customer to the pain of loss of control over personal information. It is difficult to imagine an amount of money that would compensate for the potential harm that customers might have experienced. If everyone of the customers for example were the victims of identity theft and an unauthorized credit card were issued and used in their name what amount of money would right the situation? Mill would have condemned Toysmart because it did not treat its customers with dignity. If Toysmart treats its customers with dignity it would not have reneged on its promise. Finally, honesty and integrity would be a kind of happiness too important to be sacrificed. Clearly the aggregate happiness is more

likely to be obtained by a policy that requires companies to honor their promises and obligations. A commercial climate that allows one party to disregard their expressed promise to the other and violate the trust granted is not in the best interest of the overall happiness because it could render contracts or other agreements meaningless. In comparison, the pain that Toysmart would endure by being unable to pay its debts and go out of business due to bankruptcy is not as great as a society where businesses can arbitrarily disregard important promises.

While it is true that the greater happiness results from a general climate of responsibility and trustworthiness, the demand for these qualities is given even greater importance when dealing with information about the customer. If customers can not trust that companies will not keep certain information private, on what basis can customers expect that any information at any time will be private? The uncertainty and general anxiety that would result from a policy which allows the arbitrary disclosure of personal information promised to be held in confidence makes it almost impossible for a utilitarian to endorse it. It is difficult to imagine any principled consequentialist policy that would favor blatant deception and Millian utilitarianism in this case is no different.

Gilmore v. Ashcroft

Should all airline passengers be required by law to show identification? In 2002 a private citizen, John Gilmore attempted to board a commercial aircraft in San Francisco to fly to Washington, DC.. However because he refused to show any identification Gilmore was denied entry to the aircraft. At the airport Gilmore refused to provide identification because officials could not cite what regulation or

law required him to provide identification. Further Gilmore contends that there is in fact no law requiring citizens to identify themselves in order to travel on commercial aircraft. "According to Gilmore "For the first time in this Nation's history, the US government is using secret regulations to restrict First, Fourth and Fifth Amendment rights." (*Gilmore v. Ashcroft*, 2002).

As a screening procedure requiring potential passengers to show identification allows for their name to be checked against terrorist surveillance or "No-Fly" lists this kind of screening in theory could apprehend or at least deter potential terrorists. On his website Gilmore questions this logic. "There is good reason to believe that any list of "known terrorists" contains "suspected" terrorists, not actual terrorists, and is full of errors besides. Particularly when the list is secret and neither the press nor the public can examine it for errors or political biases." (*Gilmore v. Ashcroft*, 2002).

The relevance of networked technology in this case is largely speculative because of the secrecy *Gilmore* is concerned about. However because it is probably safe to speculate that network technology might play some role in the process of screening passengers, *Gilmore* can potentially serve as an example of the privacy issues that might be addressed in cases involving elements of secrecy.

Utilitarian Analysis

What I want to address here is simply how utilitarians would approach the requirement to provide identification. I think Solove's categorization of privacy as "personhood" will be most in line with what Mr. Gilmore would have had in mind.

I will be distancing myself from Gilmore's reasoning because he seems to

think that the government's requirement that identification be shown is the function of some "secret law" that he hopes to have disclosed. For my purposes this kind of concern is not the main issue. The question I want to address here is if governments should require citizens to provide identification before being allowed to travel on commercial aircraft and how that requirement would be justified or condemned by Millian utilitarianism.

As in all the other cases I have discussed I want to start by analyzing the policy in light of the harm and dignity principles that Mill advanced. The harm principle stops the exercise of individual liberty only in those cases where the exercise will cause harm to others or hinder their rights. It is difficult to see how just the act of not providing identification will do this *directly*. Clearly there are other modes of transportation that do not require identification. The instances of riding the city bus or riding in a taxi, for example are just two that do not require passengers to provide identification. Why should commercial air travel be any different? Apologists for requiring identification might reply at this point that commercial air travel is an entirely different mode of travel. Air travel includes exposure to a variety of dangers not present in others and for this reason justifies an identification requirement. This I will call the *indirect* justification by the harm principle. It is indirect because while it might be that individual rights are directly usurped in requiring them to identify themselves, a greater interest namely their safety and very lives are what is being protected. With the threat of terrorist hijacking of domestic commercial aircraft the policy that passengers provide identification is undertaken with their best interests in mind. Although from a security point of view this logic

may hold, privacy advocates will disagree with it. Why should individuals be forced to identify themselves simply because there is the *fear* of terrorism. Shouldn't there at least be a credible threat before officials identify passengers? In this case a policy that respects the preferences of an individual to not identify themselves could harm others and put the rights of others at risk. What if the one person who does not want to be identified actually is a terrorist? Doesn't society have a right to stop the harms inflicted by terrorism upon citizens? Mill would think so and on the basis of the harm principle would side with government requirements for identification.

I think that along similar lines here Mill would argue for the same result under the dignity principle. It is difficult to see how the mere requirement that passengers identify themselves is in itself harmful to a person's dignity. Each and every passenger is required to provide identification. There is no arbitrariness or ostracizing involved with this particular policy. The policy of requiring identification could in fact be argued to protect dignity. By screening for terrorists the policy implicitly entails a sense of dignity for the lives of passengers. The policy works to ensure that their rights are protected.

I argue that there are four main kinds of happiness at stake in this case: convenience, control over person information, individuality, and public safety. By convenience I mean a general sense of ease and proximity. Those sympathetic with Gilmore could argue his case on simply the basis that requiring identification can at times be inconvenient. If passengers must go through a security check point before boarding an airplane why should they have to take the additional time of having their name compared to a list of potential terrorists? There are numerous cases of

innocent travelers from infants to the elderly being confused with a name on a no-fly list. What grievances should society afford in these cases? Is this kind of inconvenience acceptable given the other kinds of happiness at stake? Control over personal information is a kind of happiness that while Gilmore and his sympathizers may argue is important. I argue that it would be difficult to maintain this as reason. A person's name is not necessarily the same kind of personal information that say their social security number is. Surrendering a name does not in itself expose them to the threat of identity theft for example. Here too I do not see how the happiness of individuality would be hindered by requiring identification. By far one of the strongest rationales that proponents can give will entail a concern for public safety. Being safe from terrorists would in general lead to a greater amount and type of happiness than a moment of anonymity. Societies where passengers travel free from fear of terrorist attack is clearly preferable to whatever temporary inconvenience the temporary denial of anonymity may cause. Certainly Mr. Gilmore is not completely anonymous to the government. From taxes to drivers license Mr. Gilmore can and does not expect to live in a world of complete anonymity. The consequence of not identifying a terrorist or group of terrorists clearly is a greater threat to the aggregate happiness than identifying individual passengers.

Conclusion

This thesis is about how Millian utilitarianism can be applied to cases regarding privacy. I began with an explication of Daniel Solove's categorizations of the current privacy discourse and his "pragmatic approach". Next I describe Millian utilitarianism. Finally I apply Millian utilitarianism to six important privacy cases.

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