

TWO CONCEPTS OF RULES*

IN THIS paper I want to show the importance of the distinction between justifying a practice¹ and justifying a particular action falling under it, and I want to explain the logical basis of this distinction and how it is possible to miss its significance. While the distinction has frequently been made,² and is now becoming commonplace, there remains the task of explaining the tendency either to overlook it altogether, or to fail to appreciate its importance.

To show the importance of the distinction I am going to defend utilitarianism against those objections which have traditionally been made against it in connection with punishment and the obligation to keep promises. I hope to show that if one uses the distinction in question then one can state utilitarianism

* This is a revision of a paper given at the Harvard Philosophy Club on April 30, 1954.

¹ I use the word "practice" throughout as a sort of technical term meaning any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments.

² The distinction is central to Hume's discussion of justice in *A Treatise of Human Nature*, bk. III, pt. II, esp. secs. 2-4. It is clearly stated by John Austin in the second lecture of *Lectures on Jurisprudence* (4th ed.; London, 1873), I, 116ff. (1st ed., 1832). Also it may be argued that J. S. Mill took it for granted in *Utilitarianism*; on this point cf. J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," *Philosophical Quarterly*, vol. III (1953). In addition to the arguments given by Urmson there are several clear statements of the distinction in *A System of Logic* (8th ed.; London, 1872), bk. VI, ch. xii pars. 2, 3, 7. The distinction is fundamental to J. D. Mabbott's important paper, "Punishment," *Mind*, n.s., vol. XLVIII (April, 1939). More recently the distinction has been stated with particular emphasis by S. E. Toulmin in *The Place of Reason in Ethics* (Cambridge, 1950), see esp. ch. xi, where it plays a major part in his account of moral reasoning. Toulmin doesn't explain the basis of the distinction, nor how one might overlook its importance, as I try to in this paper, and in my review of his book (*Philosophical Review*, vol. LX [October, 1951]), as some of my criticisms show, I failed to understand the force of it. See also H. D. Aiken, "The Levels of Moral Discourse," *Ethics*, vol. LXII (1952), A. M. Quinton, "Punishment," *Analysis*, vol. XIV (June, 1954), and P. H. Nowell-Smith, *Ethics* (London, 1954), pp. 236-239, 271-273.

in a way which makes it a much better explication of our considered moral judgments than these traditional objections would seem to admit.³ Thus the importance of the distinction is shown by the way it strengthens the utilitarian view regardless of whether that view is completely defensible or not.

To explain how the significance of the distinction may be overlooked, I am going to discuss two conceptions of rules. One of these conceptions conceals the importance of distinguishing between the justification of a rule or practice and the justification of a particular action falling under it. The other conception makes it clear why this distinction must be made and what is its logical basis.

I

The subject of punishment, in the sense of attaching legal penalties to the violation of legal rules, has always been a troubling moral question.⁴ The trouble about it has not been that people disagree as to whether or not punishment is justifiable. Most people have held that, freed from certain abuses, it is an acceptable institution. Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it. The difficulty is with the justification of punishment: various arguments for it have been given by moral philosophers, but so far none of them has won any sort of general acceptance; no justification is without those who detest it. I hope to show that the use of the aforementioned distinction enables one to state the utilitarian view in a way which allows for the sound points of its critics.

For our purposes we may say that there are two justifications of punishment. What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong

³ On the concept of explication see the author's paper *Philosophical Review*, vol. LX (April, 1951).

⁴ While this paper was being revised, Quinton's appeared; footnote 2 supra. There are several respects in which my remarks are similar to his. Yet as I consider some further questions and rely on somewhat different arguments, I have retained the discussion of punishment and promises together as two test cases for utilitarianism.

should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

What we may call the utilitarian view holds that on the principle that by-gones are by-gones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.

I have stated these two competing views very roughly to make one feel the conflict between them: one feels the force of *both* arguments and one wonders how they can be reconciled. From my introductory remarks it is obvious that the resolution which I am going to propose is that in this case one must distinguish between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.

We might try to get clear about this distinction by imagining how a father might answer the question of his son. Suppose the son asks, "Why was *J* put in jail yesterday?" The father answers, "Because he robbed the bank at *B*. He was duly tried and found guilty. That's why he was put in jail yesterday." But suppose the son had asked a different question, namely, "Why do people put other people in jail?" Then the father might answer, "To protect good people from bad people" or "To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn't be able to go to bed at night and sleep in peace." There are two very different questions here. One question emphasizes the proper name: it asks why *J* was punished rather than someone else, or it asks what he was punished for. The other question asks why we have the institution of punish-

ment: why do people punish one another rather than, say, always forgiving one another?

Thus the father says in effect that a particular man is punished, rather than some other man, because he is guilty, and he is guilty because he broke the law (past tense). In his case the law looks back, the judge looks back, the jury looks back, and a penalty is visited upon him for something he did. That a man is to be punished, and what his punishment is to be, is settled by its being shown that he broke the law and that the law assigns that penalty for the violation of it.

On the other hand we have the institution of punishment itself, and recommend and accept various changes in it, because it is thought by the (ideal) legislator and by those to whom the law applies that, as a part of a system of law impartially applied from case to case arising under it, it will have the consequence, in the long run, of furthering the interests of society.

One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view. Thus both views have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one's initial confusion disappears once one sees that these views apply to persons holding different offices with different duties, and situated differently with respect to the system of rules that make up the criminal law.⁵

One might say, however, that the utilitarian view is more fundamental since it applies to a more fundamental office, for the judge carries out the legislator's will so far as he can determine it. Once the legislator decides to have laws and to assign penalties for their violation (as things are there must be both the law and the penalty) an institution is set up which involves a retributive conception of particular cases. It is part of the concept of the criminal law as a system of rules that the application

⁵ Note the fact that different sorts of arguments are suited to different offices. One way of taking the differences between ethical theories is to regard them as accounts of the reasons expected in different offices.

and enforcement of these rules in particular cases should be justifiable by arguments of a retributive character. The decision whether or not to use law rather than some other mechanism of social control, and the decision as to what laws to have and what penalties to assign, may be settled by utilitarian arguments; but if one decides to have laws then one has decided on something whose working in particular cases is retributive in form.⁶

The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices, that of the judge and that of the legislator, and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for what is done under the cover of these offices can be paired off with the competing justifications of punishment. One reconciles the two views by the time-honored device of making them apply to different situations.

But can it really be this simple? Well, this answer allows for the apparent intent of each side. Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering? Surely not.⁷ What retributionists have rightly insisted upon is that no man can be punished unless he is guilty, that is, unless he has broken the law. Their fundamental criticism of the utilitarian account is that, as they interpret it, it sanctions an innocent person's being punished (if one may call it that) for the benefit of society.

On the other hand, utilitarians agree that punishment is to be inflicted only for the violation of law. They regard this much as understood from the concept of punishment itself.⁸ The point of

⁶ In this connection see Mabbott, *op. cit.*, pp. 163-164.

⁷ On this point see Sir David Ross, *The Right and the Good* (Oxford, 1930), pp. 57-60.

⁸ See Hobbes's definition of punishment in *Leviathan*, ch. xxviii; and Bentham's definition in *The Principle of Morals and Legislation*, ch. xii, par. 36, ch. xv, par. 28, and in *The Rationale of Punishment*, (London, 1830), bk. I, ch. i. They could agree with Bradley that: "Punishment is punishment only when it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is

the utilitarian account concerns the institution as a system of rules: utilitarianism seeks to limit its use by declaring it justifiable only if it can be shown to foster effectively the good of society. Historically it is a protest against the indiscriminate and ineffective use of the criminal law.⁹ It seeks to dissuade us from assigning to penal institutions the improper, if not sacrilegious, task of matching suffering with moral turpitude. Like others, utilitarians want penal institutions designed so that, as far as humanly possible, only those who break the law run afoul of it. They hold that no official should have discretionary power to inflict penalties whenever he thinks it for the benefit of society; for on utilitarian grounds an institution granting such power could not be justified.¹⁰

The suggested way of reconciling the retributive and the utilitarian justifications of punishment seems to account for what both sides have wanted to say. There are, however, two further questions which arise, and I shall devote the remainder of this section to them.

First, will not a difference of opinion as to the proper criterion of just law make the proposed reconciliation unacceptable to retributionists? Will they not question whether, if the utilitarian principle is used as the criterion, it follows that those who have broken the law are guilty in a way which satisfies their demand

merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be." *Ethical Studies* (2nd ed.; Oxford, 1927), pp. 26-27. Certainly by definition it isn't what it pretends to be. The innocent can only be punished by mistake; deliberate "punishment" of the innocent necessarily involves fraud.

⁹ Cf. Leon Radzinowicz, *A History of English Criminal Law: The Movement for Reform 1750-1833* (London, 1948), esp. ch. xi on Bentham.

¹⁰ Bentham discusses how corresponding to a punitive provision of a criminal law there is another provision which stands to it as an antagonist and which needs a name as much as the punitive. He calls it, as one might expect, the *anaetiosostic*, and of it he says: "The punishment of guilt is the object of the former one: the preservation of innocence that of the latter." In the same connection he asserts that it is never thought fit to give the judge the option of deciding whether a thief (that is, a person whom he believes to be a thief, for the judge's belief is what the question must always turn upon) should hang or not, and so the law writes the provision: "The judge shall not cause a thief to be hanged unless he have been duly convicted and sentenced in course of law" (*The Limits of Jurisprudence Defined*, ed. C. W. Everett [New York, 1945], pp. 238-239).

that those punished deserve to be punished? To answer this difficulty, suppose that the rules of the criminal law are justified on utilitarian grounds (it is only for laws that meet his criterion that the utilitarian can be held responsible). Then it follows that the actions which the criminal law specifies as offenses are such that, if they were tolerated, terror and alarm would spread in society. Consequently, retributionists can only deny that those who are punished deserve to be punished if they deny that such actions are wrong. This they will not want to do.

The second question is whether utilitarianism doesn't justify too much. One pictures it as an engine of justification which, if consistently adopted, could be used to justify cruel and arbitrary institutions. Retributionists may be supposed to concede that utilitarians *intend* to reform the law and to make it more humane; that utilitarians do not *wish* to justify any such thing as punishment of the innocent; and that utilitarians may appeal to the fact that punishment presupposes guilt in the sense that by punishment one understands an institution attaching penalties to the infraction of legal rules, and therefore that it is logically absurd to suppose that utilitarians in justifying *punishment* might also have justified punishment (if we may call it that) of the innocent. The real question, however, is whether the utilitarian, in justifying punishment, hasn't used arguments which commit him to accepting the infliction of suffering on innocent persons if it is for the good of society (whether or not one calls this punishment). More generally, isn't the utilitarian committed in principle to accepting many practices which he, as a morally sensitive person, wouldn't want to accept? Retributionists are inclined to hold that there is no way to stop the utilitarian principle from justifying too much except by adding to it a principle which distributes certain rights to individuals. Then the amended criterion is not the greatest benefit of society *simpliciter*, but the greatest benefit of society subject to the constraint that no one's rights may be violated. Now while I think that the classical utilitarians proposed a criterion of this more complicated sort, I do not want to argue that point here.¹¹ What I want to show is that

¹¹ By the classical utilitarians I understand Hobbes, Hume, Bentham, J. S. Mill, and Sidgwick.

there is *another* way of preventing the utilitarian principle from justifying too much, or at least of making it much less likely to do so: namely, by stating utilitarianism in a way which accounts for the distinction between the justification of an institution and the justification of a particular action falling under it.

I begin by defining the institution of punishment as follows: a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.¹² This definition specifies what I shall understand by punishment. The question is whether utilitarian arguments may be found to justify institutions widely different from this and such as one would find cruel and arbitrary.

This question is best answered, I think, by taking up a particular accusation. Consider the following from Carritt:

. . . the utilitarian must hold that we are justified in inflicting pain always and only to prevent worse pain or bring about greater happiness. This, then, is all we need to consider in so-called punishment, which must be purely preventive. But if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian 'punishment' because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicitic.¹³

Carritt is trying to show that there are occasions when a utilitarian argument would justify taking an action which would be generally condemned; and thus that utilitarianism justifies too much. But the failure of Carritt's argument lies in the fact that

¹² All these features of punishment are mentioned by Hobbes; cf. *Leviathan*, ch. xxviii.

¹³ *Ethical and Political Thinking* (Oxford, 1947), p. 65.

he makes no distinction between the justification of the general system of rules which constitutes penal institutions and the justification of particular applications of these rules to particular cases by the various officials whose job it is to administer them. This becomes perfectly clear when one asks who the “we” are of whom Carritt speaks. Who is this who has a sort of absolute authority on particular occasions to decide that an innocent man shall be “punished” if everyone can be convinced that he is guilty? Is this person the legislator, or the judge, or the body of private citizens, or what? It is utterly crucial to know who is to decide such matters, and by what authority, for all of this must be written into the rules of the institution. Until one knows these things one doesn’t know what the institution is whose justification is being challenged; and as the utilitarian principle applies to the institution one doesn’t know whether it is justifiable on utilitarian grounds or not.

Once this is understood it is clear what the countermove to Carritt’s argument is. One must describe more carefully what the *institution* is which his example suggests, and then ask oneself whether or not it is likely that having this institution would be for the benefit of society in the long run. One must not content oneself with the vague thought that, when it’s a question of *this* case, it would be a good thing if *somebody* did something even if an innocent person were to suffer.

Try to imagine, then, an institution (which we may call “telishment”) which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society. The discretion of officials is limited, however, by the rule that they may not condemn an innocent man to undergo such an ordeal unless there is, at the time, a wave of offenses similar to that with which they charge him and telish him for. We may imagine that the officials having the discretionary authority are the judges of the higher courts in consultation with the chief of police, the minister of justice, and a committee of the legislature.

Once one realizes that one is involved in setting up an *institu-*

tion, one sees that the hazards are very great. For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? How is one to limit the risks involved in allowing such systematic deception? How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like? In addition to these considerations, it is obvious that people will come to have a very different attitude towards their penal system when telishment is adjoined to it. They will be uncertain as to whether a convicted man has been punished or telished. They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won’t at any time fall on them. If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely.

It happens in general that as one drops off the defining features of punishment one ends up with an institution whose utilitarian justification is highly doubtful. One reason for this is that punishment works like a kind of price system: by altering the prices one has to pay for the performance of actions it supplies a motive for avoiding some actions and doing others. The defining features are essential if punishment is to work in this way; so that an institution which lacks these features, e.g., an institution which is set up to “punish” the innocent, is likely to have about as much point as a price system (if one may call it that) where the prices of things change at random from day to day and one learns the price of something after one has agreed to buy it.¹⁴

¹⁴ The analogy with the price system suggests an answer to the question how utilitarian considerations insure that punishment is proportional to the offense. It is interesting to note that Sir David Ross, after making the distinction between justifying a penal law and justifying a particular application of it, and after stating that utilitarian considerations have a large place in determining the former, still holds back from accepting the utilitarian justification of punishment on the grounds that justice requires that punishment be proportional to the offense, and that utilitarianism is unable to account for this. Cf. *The Right and the Good*, pp. 61–62. I do not claim that utilitarianism can account for this requirement as Sir David might wish, but it happens, nevertheless, that if utilitarian considerations are followed penalties will be proportional to offenses in this sense: the order of offenses according to seriousness can be paired off

If one is careful to apply the utilitarian principle to the institution which is to authorize particular actions, then there is *less* danger of its justifying too much. Carritt's example gains plausibility by its indefiniteness and by its concentration on the particular case. His argument will only hold if it can be shown that there are utilitarian arguments which justify an institution whose publicly ascertainable offices and powers are such as to permit officials to exercise that kind of discretion in particular cases. But the requirement of having to build the arbitrary features of the particular decision into the institutional practice makes the justification much less likely to go through.

II

I shall now consider the question of promises. The objection to utilitarianism in connection with promises seems to be this: it is believed that on the utilitarian view when a person makes a promise the only ground upon which he should keep it, if he should keep it, is that by keeping it he will realize the most good on the whole. So that if one asks the question "Why should I keep *my* promise?" the utilitarian answer is understood to be that doing so in *this* case will have the best consequences. And this answer is said, quite rightly, to conflict with the way in which the obligation to keep promises is regarded.

Now of course critics of utilitarianism are not unaware that one defense sometimes attributed to utilitarians is the consideration involving the practice of promise-keeping.¹⁵ In this connec-

with the order of penalties according to severity. Also the absolute level of penalties will be as low as possible. This follows from the assumption that people are rational (i.e., that they are able to take into account the "prices" the state puts on actions), the utilitarian rule that a penal system should provide a motive for preferring the less serious offense, and the principle that punishment as such is an evil. All this was carefully worked out by Bentham in *The Principles of Morals and Legislation*, chs. xiii-xv.

¹⁵ Ross, *The Right and the Good*, pp. 37-39, and *Foundations of Ethics* (Oxford, 1939), pp. 92-94. I know of no utilitarian who has used this argument except W. A. Pickard-Cambridge in "Two Problems about Duty," *Mind*, n.s., XLI (April, 1932), 153-157, although the argument goes with G. E. Moore's version of utilitarianism in *Principia Ethica* (Cambridge, 1903). To my knowledge it does not appear in the classical utilitarians; and if one interprets their view correctly this is no accident.

tion they are supposed to argue something like this: it must be admitted that we feel strictly about keeping promises, more strictly than it might seem our view can account for. But when we consider the matter carefully it is always necessary to take into account the effect which our action will have on the practice of making promises. The promisor must weigh, not only the effects of breaking his promise on the particular case, but also the effect which his breaking his promise will have on the practice itself. Since the practice is of great utilitarian value, and since breaking one's promise always seriously damages it, one will seldom be justified in breaking one's promise. If we view our individual promises in the wider context of the practice of promising itself we can account for the strictness of the obligation to keep promises. There is always one very strong utilitarian consideration in favor of keeping them, and this will insure that when the question arises as to whether or not to keep a promise it will usually turn out that one should, even where the facts of the particular case taken by itself would seem to justify one's breaking it. In this way the strictness with which we view the obligation to keep promises is accounted for.

Ross has criticized this defense as follows:¹⁶ however great the value of the practice of promising, on utilitarian grounds, there must be some value which is greater, and one can imagine it to be obtainable by breaking a promise. Therefore there might be a case where the promisor could argue that breaking his promise was justified as leading to a better state of affairs on the whole. And the promisor could argue in this way no matter how slight the advantage won by breaking the promise. If one were to challenge the promisor his defense would be that what he did was best on the whole in view of all the utilitarian considerations, which in this case *include* the importance of the practice. Ross feels that such a defense would be unacceptable. I think he is right insofar as he is protesting against the appeal to consequences in general and without further explanation. Yet it is extremely difficult to weigh the force of Ross's argument. The kind of case imagined seems unrealistic and one feels that it needs to be described. One is inclined to think that it would

¹⁶ Ross, *The Right and the Good*, pp. 38-39.

either turn out that such a case came under an exception defined by the practice itself, in which case there would not be an appeal to consequences in general on the particular case, or it would happen that the circumstances were so peculiar that the conditions which the practice presupposes no longer obtained. But certainly Ross is right in thinking that it strikes us as wrong for a person to defend breaking a promise by a general appeal to consequences. For a general utilitarian defense is not open to the promisor: it is not one of the defenses allowed by the practice of making promises.

Ross gives two further counterarguments:¹⁷ First, he holds that it overestimates the damage done to the practice of promising by a failure to keep a promise. One who breaks a promise harms his own name certainly, but it isn't clear that a broken promise always damages the practice itself sufficiently to account for the strictness of the obligation. Second, and more important, I think, he raises the question of what one is to say of a promise which isn't known to have been made except to the promisor and the promisee, as in the case of a promise a son makes to his dying father concerning the handling of the estate.¹⁸ In this sort of case the consideration relating to the practice doesn't weigh on the promisor at all, and yet one feels that this sort of promise is as binding as other promises. The question of the effect which breaking it has on the practice seems irrelevant. The only consequence seems to be that one can break the promise without running any risk of being censured; but the obligation itself seems not the least weakened. Hence it is doubtful whether the effect on the practice ever weighs in the particular case; certainly it cannot account for the strictness of the obligation where

¹⁷ Ross, *ibid.*, p. 39. The case of the nonpublic promise is discussed again in *Foundations of Ethics*, pp. 95-96, 104-105. It occurs also in Mabbott, "Punishment," *op. cit.*, pp. 155-157, and in A. I. Melden, "Two Comments on Utilitarianism," *Philosophical Review*, LX (October, 1951), 519-523, which discusses Carritt's example in *Ethical and Political Thinking*, p. 64.

¹⁸ Ross's example is described simply as that of two men dying alone where one makes a promise to the other. Carritt's example (cf. n. 17 *supra*) is that of two men at the North Pole. The example in the text is more realistic and is similar to Mabbott's. Another example is that of being told something in confidence by one who subsequently dies. Such cases need not be "desert-island arguments" as Nowell-Smith seems to believe (cf. his *Ethics*, pp. 239-244).

it fails to obtain. It seems to follow that a utilitarian account of the obligation to keep promises cannot be successfully carried out.

From what I have said in connection with punishment, one can foresee what I am going to say about these arguments and counterarguments. They fail to make the distinction between the justification of a practice and the justification of a particular action falling under it, and therefore they fall into the mistake of taking it for granted that the promisor, like Carritt's official, is entitled without restriction to bring utilitarian considerations to bear in deciding whether to keep *his* promise. But if one considers what the practice of promising is one will see, I think, that it is such as not to allow this sort of general discretion to the promisor. Indeed, the point of the practice is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance. There are obvious utilitarian advantages in having a practice which denies to the promisor, as a defense, any general appeal to the utilitarian principle in accordance with which the practice itself may be justified. There is nothing contradictory, or surprising, in this: utilitarian (or aesthetic) reasons might properly be given in arguing that the game of chess, or baseball, is satisfactory just as it is, or in arguing that it should be changed in various respects, but a player in a game cannot properly appeal to such considerations as reasons for his making one move rather than another. It is a mistake to think that if the practice is justified on utilitarian grounds then the promisor must have complete liberty to use utilitarian arguments to decide whether or not to keep his promise. The practice forbids this general defense; and it is a purpose of the practice to do this. Therefore what the above arguments presuppose—the idea that if the utilitarian view is accepted then the promisor is bound if, and only if, the application of the utilitarian principle to his own case shows that keeping it is best on the whole—is false. The promisor is bound because he promised: weighing the case on its merits is not open to him.¹⁹

¹⁹ What I have said in this paragraph seems to me to coincide with Hume's important discussion in the *Treatise of Human Nature*, bk. III, pt. II, sec. 5; and also sec. 6, par. 8.

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Is this to say that in particular cases one cannot deliberate whether or not to keep one's promise? Of course not. But to do so is to deliberate whether the various excuses, exceptions and defenses, which are understood by, and which constitute an important part of, the practice, apply to one's own case.²⁰ Various defenses for not keeping one's promise are allowed, but among them there isn't the one that, on general utilitarian grounds, the promisor (truly) thought his action best on the whole, even though there may be the defense that the consequences of keeping one's promise would have been *extremely* severe. While there are too many complexities here to consider all the necessary details, one can see that the general defense isn't allowed if one asks the following question: what would one say of someone who, when asked why he broke his promise, replied simply that breaking it was best on the whole? Assuming that his reply is sincere, and that his belief was reasonable (i.e., one need not consider the possibility that he was mistaken), I think that one would question whether or not he knows what it means to say "I promise" (in the appropriate circumstances). It would be said of someone who used this excuse without further explanation that he didn't understand what defenses the practice, which defines a promise, allows to him. If a child were to use this excuse one would correct him; for it is part of the way one is taught the concept of a promise to be corrected if one uses this excuse. The point of having the practice would be lost if the practice did allow this excuse.

It is no doubt part of the utilitarian view that every practice should admit the defense that the consequences of abiding by it would have been extremely severe; and utilitarians would be inclined to hold that some reliance on people's good sense and some concession to hard cases is necessary. They would hold that a practice is justified by serving the interests of those who take part in it; and as with any set of rules there is understood a background of circumstances under which it is expected to be applied and which need not—indeed which cannot—be fully stated. Should these circumstances change, then even if

²⁰ For a discussion of these, see H. Sidgwick, *The Methods of Ethics* (6th ed.; London, 1901), bk. III, ch. vi.

there is no rule which provides for the case, it may still be in accordance with the practice that one be released from one's obligation. But this sort of defense allowed by a practice must not be confused with the general option to weigh each particular case on utilitarian grounds which critics of utilitarianism have thought it necessarily to involve.

The concern which utilitarianism raises by its justification of punishment is that it may justify too much. The question in connection with promises is different: it is how utilitarianism can account for the obligation to keep promises at all. One feels that the recognized obligation to keep one's promise and utilitarianism are incompatible. And to be sure, they are incompatible if one interprets the utilitarian view as necessarily holding that each person has complete liberty to weigh every particular action on general utilitarian grounds. But must one interpret utilitarianism in this way? I hope to show that, in the sorts of cases I have discussed, one cannot interpret it in this way.

III

So far I have tried to show the importance of the distinction between the justification of a practice and the justification of a particular action falling under it by indicating how this distinction might be used to defend utilitarianism against two longstanding objections. One might be tempted to close the discussion at this point by saying that utilitarian considerations should be understood as applying to practices in the first instance and not to particular actions falling under them except insofar as the practices admit of it. One might say that in this modified form it is a better account of our considered moral opinions and let it go at that. But to stop here would be to neglect the interesting question as to how one can fail to appreciate the significance of this rather obvious distinction and can take it for granted that utilitarianism has the consequence that particular cases may always be decided on general utilitarian grounds.²¹ I want to

²¹ So far as I can see it is not until Moore that the doctrine is expressly stated in this way. See, for example, *Principia Ethica*, p. 147, where it is said that the statement "I am morally bound to perform this action" is identical with the statement "This action will produce the greatest possible amount of good in

argue that this mistake may be connected with misconceiving the logical status of the rules of practices; and to show this I am going to examine two conceptions of rules, two ways of placing them within the utilitarian theory.

The conception which conceals from us the significance of the distinction I am going to call the summary view. It regards rules in the following way: one supposes that each person decides what he shall do in particular cases by applying the utilitarian principle; one supposes further that different people will decide the same particular case in the same way and that there will be recurrences of cases similar to those previously decided. Thus it will happen that in cases of certain kinds the same decision will be made either by the same person at different times or by different persons at the same time. If a case occurs frequently enough one supposes that a rule is formulated to cover that sort of case. I have called this conception the summary view because rules are pictured as summaries of past decisions arrived at by the *direct* application of the utilitarian principle to particular cases. Rules are regarded as reports that cases of a certain sort have been found on *other* grounds to be properly decided in a certain way (although, of course, they do not *say* this).

There are several things to notice about this way of placing rules within the utilitarian theory.²²

the Universe" (my italics). It is important to remember that those whom I have called the classical utilitarians were largely interested in social institutions. They were among the leading economists and political theorists of their day, and they were not infrequently reformers interested in practical affairs. Utilitarianism historically goes together with a coherent view of society, and is not simply an ethical theory, much less an attempt at philosophical analysis in the modern sense. The utilitarian principle was quite naturally thought of, and used, as a criterion for judging social institutions (practices) and as a basis for urging reforms. It is not clear, therefore, how far it is necessary to amend utilitarianism in its classical form. For a discussion of utilitarianism as an integral part of a theory of society, see L. Robbins, *The Theory of Economic Policy in English Classical Political Economy* (London, 1952).

²² This footnote should be read after sec. 3 and presupposes what I have said there. It provides a few references to statements by leading utilitarians of the summary conception. In general it appears that when they discussed the logical features of rules the summary conception prevailed and that it was typical of the way they talked about moral rules. I cite a rather lengthy group of passages from Austin as a full illustration.

John Austin in his *Lectures on Jurisprudence* meets the objection that deciding

in accordance with the utilitarian principle case by case is impractical by saying that this is a misinterpretation of utilitarianism. According to the utilitarian view ". . . our conduct would conform to *rules* inferred from the tendencies of actions, but would not be determined by a direct resort to the principle of general utility. Utility would be the test of our conduct, ultimately, but not immediately: the immediate test of the rules to which our conduct would conform, but not the immediate test of specific or individual actions. Our rules would be fashioned on utility; our conduct, on our rules" (vol. I, p. 116). As to how one decides on the tendency of an action he says: "If we would try the tendency of a specific or individual act, we must not contemplate the act as if it were single and insulated, but most look at the class of acts to which it belongs. We must suppose that acts of the class were generally done or omitted, and consider the probable effect upon the general happiness or good. We must guess the consequences which would follow, if the class of acts were general; and also the consequences which would follow, if they were generally omitted. We must then compare the consequences on the positive and negative sides, and determine on which of the two the *balance* of advantage lies. . . . If we truly try the tendency of a specific or individual act, we try the tendency of the class to which that act belongs. The *particular* conclusion which we draw, with regard to the single act, implies a *general* conclusion embracing all similar acts. . . . To the rules thus inferred, and lodged in the memory, our conduct would conform *immediately* if it were truly adjusted to utility" (*ibid.*, p. 117). One might think that Austin meets the objection by stating the practice conception of rules; and perhaps he did intend to. But it is not clear that he has stated this conception. Is the generality he refers to of the statistical sort? This is suggested by the notion of tendency. Or does he refer to the utility of setting up a practice? I don't know; but what suggests the summary view is his subsequent remarks. He says: "To consider the specific consequences of single or individual acts, would *seldom* [my italics] consist with that ultimate principle" (*ibid.*, p. 117). But would one ever do this? He continues: ". . . this being admitted, the necessity of pausing and calculating, which the objection in question supposes, is an imagined necessity. To preface each act or forbearance by a conjecture and comparison of consequences, were clearly *superfluous* [my italics] and mischievous. It were clearly superfluous, inasmuch as the *result of that process* [my italics] would be embodied in a known *rule*. It were clearly mischievous, inasmuch as the *true* result would be expressed by that rule, whilst the process would probably be faulty, if it were done on the spur of the occasion" (*ibid.*, pp. 117-118). He goes on: "If our experience and observation of particulars were not *generalized*, our experience and observation of particulars would seldom avail us in *practice*. . . . The inferences suggested to our minds by repeated experience and observation are, therefore, drawn into *principles*, or compressed into *maxims*. These we carry about us ready for use, and apply to individual cases promptly . . . without reverting to the process by which they were obtained; or without recalling, and arraying before our minds, the numerous and intricate considerations of which they are *handy abridgments* [my italics]. . . . True theory is a *compendium* of particular truths. . . . Speaking then, generally, human conduct is inevitably *guided* [my italics] by *rules*, or by *principles* or *maxims*" (*ibid.*, pp. 117-118). I need not trouble to show how all these remarks incline to the summary view. Further, when Austin comes to deal with

cases "of comparatively rare occurrence" he holds that specific considerations may outweigh the general. "Looking at the reasons from which we had inferred the rule, it were absurd to think it inflexible. We should therefore dismiss the *rule*; resort directly to the *principle* upon which our rules were fashioned; and calculate *specific* consequences to the best of our knowledge and ability" (*ibid.*, pp. 120-121). Austin's view is interesting because it shows how one may come close to the practice conception and then slide away from it.

In *A System of Logic*, bk. VI, ch. xii, par. 2, Mill distinguishes clearly between the position of judge and legislator and in doing so suggests the distinction between the two concepts of rules. However, he distinguishes the two positions to illustrate the difference between cases where one is to apply a rule already established and cases where one must formulate a rule to govern subsequent conduct. It's the latter case that interests him and he takes the "maxim of policy" of a legislator as typical of rules. In par. 3 the summary conception is very clearly stated. For example, he says of rules of conduct that they should be taken provisionally, as they are made for the most numerous cases. He says that they "point out" the manner in which it is least perilous to act; they serve as an "admonition" that a certain mode of conduct has been found suited to the most common occurrences. In *Utilitarianism*, ch. ii, par. 24, the summary conception appears in Mill's answer to the same objection Austin considered. Here he speaks of rules as "corollaries" from the principle of utility; these "secondary" rules are compared to "landmarks" and "direction-posts." They are based on long experience and so make it unnecessary to apply the utilitarian principle to each case. In par. 25 Mill refers to the task of the utilitarian principle in adjudicating between competing moral rules. He talks here as if one then applies the utilitarian principle directly to the particular case. On the practice view one would rather use the principle to decide which of the ways that make the practice consistent is the best. It should be noted that while in par. 10 Mill's definition of utilitarianism makes the utilitarian principle apply to morality, i.e., to the rules and precepts of human conduct, the definition in par. 2 uses the phrase "actions are right in *proportion* as they *tend* to promote happiness" [my italics] and this inclines towards the summary view. In the last paragraph of the essay "On the Definition of Political Economy," *Westminster Review* (October, 1836), Mill says that it is only in art, as distinguished from science, that one can properly speak of exceptions. In a question of practice, if something is fit to be done "in the majority of cases" then it is made the rule. "We may . . . in talking of art *unobjectionably* speak of the *rule* and the *exception*, meaning by the rule the cases in which there exists a preponderance . . . of inducements for acting in a particular way; and by the exception, the cases in which the preponderance is on the contrary side." These remarks, too, suggest the summary view.

In Moore's *Principia Ethica*, ch. v, there is a complicated and difficult discussion of moral rules. I will not examine it here except to express my suspicion that the summary conception prevails. To be sure, Moore speaks frequently of the utility of rules as generally followed, and of actions as generally practiced, but it is possible that these passages fit the statistical notion of generality which the summary conception allows. This conception is suggested by Moore's taking the utilitarian principle as applying directly to particular actions (pp. 147-148) and by his notion of a rule as something indicating which

1. 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. If similar cases didn't recur, one would be required to apply the utilitarian principle directly, case by case, and rules reporting past decisions would be of no use.

2. The decisions made on particular cases are logically prior to rules. Since rules gain their point from the need to apply the utilitarian principle to many similar cases, it follows that a particular case (or several cases similar to it) may exist whether or not there is a rule covering that case. We are pictured as recognizing particular cases prior to there being a rule which covers them, for it is only if we meet with a number of cases of a certain sort that we formulate a rule. Thus we are able to describe a particular case as a particular case of the requisite sort whether there is a rule regarding *that* sort of case or not. Put another way: what the *A*'s and the *B*'s refer to in rules of the form 'Whenever *A* do *B*' may be described as *A*'s and *B*'s whether or not there is the rule 'Whenever *A* do *B*', or whether or not there is any body of rules which make up a practice of which that rule is a part.

To illustrate this consider a rule, or maxim, which could arise in this way: suppose that a person is trying to decide whether to tell someone who is fatally ill what his illness is when he has been asked to do so. Suppose the person to reflect and then decide, on utilitarian grounds, that he should not answer truthfully; and suppose that on the basis of this and other like occasions he formulates a rule to the effect that when asked by someone fatally ill what his illness is, one should not tell him. 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. This is

of the few alternatives likely to occur to anyone will generally produce a greater total good in the immediate future (p. 154). He talks of an "ethical law" as a prediction, and as a generalization (pp. 146, 155). The summary conception is also suggested by his discussion of exceptions (pp. 162-163) and of the force of examples of breaching a rule (pp. 163-164).

what is meant by saying that on the summary view particular cases are logically prior to rules.

3. Each person is in principle always entitled to reconsider the correctness of a rule and to question whether or not it is proper to follow it in a particular case. As rules are guides and aids, one may ask whether in past decisions there might not have been a mistake in applying the utilitarian principle to get the rule in question, and wonder whether or not it is best in this case. The reason for rules is that people are not able to apply the utilitarian principle effortlessly and flawlessly; there is need to save time and to post a guide. On this view a society of rational utilitarians would be a society without rules in which each person applied the utilitarian principle directly and smoothly, and without error, case by case. On the other hand, ours is a society in which rules are formulated to serve as aids in reaching these ideally rational decisions on particular cases, guides which have been built up and tested by the experience of generations. If one applies this view to rules, one is interpreting them as maxims, as "rules of thumb"; and it is doubtful that anything to which the summary conception did apply would be called a *rule*. Arguing as if one regarded rules in this way is a mistake one makes while doing philosophy.

4. The concept of a *general* rule takes the following form. One is pictured as estimating on what percentage of the cases likely to arise a given rule may be relied upon to express the correct decision, that is, the decision that would be arrived at if one were to correctly apply the utilitarian principle case by case. If one estimates that by and large the rule will give the correct decision, or if one estimates that the likelihood of making a mistake by applying the utilitarian principle directly on one's own is greater than the likelihood of making a mistake by following the rule, and if these considerations held of persons generally, then one would be justified in urging its adoption as a general rule. In this way *general* rules might be accounted for on the summary view. It will still make sense, however, to speak of applying the utilitarian principle case by case, for it was by trying to foresee the results of doing this that one got the initial estimates upon which acceptance of the rule depends. That one is

taking a rule in accordance with the summary conception will show itself in the naturalness with which one speaks of the rule as a guide, or as a maxim, or as a generalization from experience, and as something to be laid aside in extraordinary cases where there is no assurance that the generalization will hold and the case must therefore be treated on its merits. Thus there goes with this conception the notion of a particular exception which renders a rule suspect on a particular occasion.

The other conception of rules I will call the practice conception. On this view rules are pictured as defining a practice. Practices are set up for various reasons, but one of them is that in many areas of conduct each person's deciding what to do on utilitarian grounds case by case leads to confusion, and that the attempt to coordinate behavior by trying to foresee how others will act is bound to fail. As an alternative one realizes that what is required is the establishment of a practice, the specification of a new form of activity; and from this one sees that a practice necessarily involves the abdication of full liberty to act on utilitarian and prudential grounds. It is the mark of a practice that being taught how to engage in it involves being instructed in the rules which define it, and that appeal is made to those rules to correct the behavior of those engaged in it. Those engaged in a practice recognize the rules as defining it. The rules cannot be taken as simply describing how those engaged in the practice in fact behave: it is not simply that they act as if they were obeying the rules. Thus it is essential to the notion of a practice that the rules are publicly known and understood as definitive; and it is essential also that the rules of a practice can be taught and can be acted upon to yield a coherent practice. On this conception, then, rules are not generalizations from the decisions of individuals applying the utilitarian principle directly and independently to recurrent particular cases. On the contrary, rules define a practice and are themselves the subject of the utilitarian principle.

To show the important differences between this way of fitting rules into the utilitarian theory and the previous way, I shall consider the differences between the two conceptions on the points previously discussed.

1. In contrast with the summary view, the rules of practices are logically prior to particular cases. This is so because there cannot be a particular case of an action falling under a rule of a practice unless there is the practice. This can be made clearer as follows: in a practice there are rules setting up offices, specifying certain forms of action appropriate to various offices, establishing penalties for the breach of rules, and so on. We may think of the rules of a practice as defining offices, moves, and offenses. Now what is meant by saying that the practice is logically prior to particular cases is this: given any rule which specifies a form of action (a move), a particular action which would be taken as falling under this rule given that there is the practice would not be *described as* that sort of action unless there was the practice. In the case of actions specified by practices it is logically impossible to perform them outside the stage-setting provided by those practices, for unless there is the practice, and unless the requisite proprieties are fulfilled, whatever one does, whatever movements one makes, will fail to count as a form of action which the practice specifies. What one does will be described in some *other way*.

One may illustrate this point from the game of baseball. Many of the actions one performs in a game of baseball one can do by oneself or with others whether there is the game or not. For example, one can throw a ball, run, or swing a peculiarly shaped piece of wood. But one cannot steal base, or strike out, or draw a walk, or make an error, or balk; although one can do certain things which appear to resemble these actions such as sliding into a bag, missing a grounder and so on. Striking out, stealing a base, balking, etc., are all actions which can only happen in a game. No matter what a person did, what he did would not be described as stealing a base or striking out or drawing a walk unless he could also be described as playing baseball, and for him to be doing this presupposes the rule-like practice which constitutes the game. The practice is logically prior to particular cases: unless there is the practice the terms referring to actions specified by it lack a sense.²³

²³ One might feel that it is a mistake to say that a practice is logically prior to the forms of action it specifies on the grounds that if there were never any

2. The practice view leads to an entirely different conception of the authority which each person has to decide on the propriety of following a rule in particular cases. To engage in a practice, to perform those actions specified by a practice, means to follow the appropriate rules. If one wants to do an action which a certain practice specifies then there is no way to do it except to follow the rules which define it. Therefore, it doesn't make sense for a person to raise the question whether or not a rule of a practice correctly applies to *his* case where the action he contemplates is a form of action defined by a practice. If someone were to raise such a question, he would simply show that he didn't understand the situation in which he was acting. If one wants to perform an action specified by a practice, the only legitimate question concerns the nature of the practice itself ("How do I go about making a will?").

This point is illustrated by the behavior expected of a player in games. If one wants to play a game, one doesn't treat the rules of the game as guides as to what is best in particular cases. In a game of baseball if a batter were to ask "Can I have four strikes?" it would be assumed that he was asking what the rule was; and if, when told what the rule was, he were to say that he meant that on this occasion he thought it would be best on the whole for him to have four strikes rather than three, this would be most kindly taken as a joke. One might contend that baseball would be a better game if four strikes were allowed instead of three; but one cannot picture the rules as guides to what is best on the whole in particular cases, and question their applicability to particular cases as particular cases.

3 and 4. To complete the four points of comparison with the summary conception, it is clear from what has been said that

instances of actions falling under a practice then we should be strongly inclined to say that there wasn't the practice either. Blue-prints for a practice do not make a practice. That there is a practice entails that there are instances of people having been engaged and now being engaged in it (with suitable qualifications). This is correct, but it doesn't hurt the claim that any given particular instance of a form of action specified by a practice presupposes the practice. This isn't so on the summary picture, as each instance must be "there" prior to the rules, so to speak, as something from which one gets the rule by applying the utilitarian principle to it directly.

rules of practices are not guides to help one decide particular cases correctly as judged by some higher ethical principle. And neither the quasi-statistical notion of generality, nor the notion of a particular exception, can apply to the rules of practices. A more or less general rule of a practice must be a rule which according to the structure of the practice applies to more or fewer of the kinds of cases arising under it; or it must be a rule which is more or less basic to the understanding of the practice. Again, a particular case cannot be an exception to a rule of a practice. An exception is rather a qualification or a further specification of the rule.

If follows from what we have said about the practice conception of rules that if a person is engaged in a practice, and if he is asked why *he* does what *he* does, or if he is asked to defend what he does, then his explanation, or defense, lies in referring the questioner to the practice. He cannot say of *his* action, if it is an action specified by a practice, that he does it rather than some other because he thinks it is best on the whole.²⁴ When a man engaged in a practice is queried about his action he must assume that the questioner either doesn't know that he is engaged in it ("Why are you in a hurry to pay him?" "I promised to pay him today") or doesn't know what the practice is. One doesn't so much justify one's particular action as explain, or show, that it is in accordance with the practice. The reason for this is that it is only against the stage-setting of the practice that one's particular action is described as it is. Only by reference to the practice can one *say* what one is doing. To explain or to defend one's own action, as a particular action, one fits it into the practice which defines it. If this is not accepted it's a sign that a different question is being raised as to whether one is justified in accepting the practice, or in tolerating it. When the challenge is to the practice, citing the rules (saying what the practice is) is naturally to no avail. But when the challenge is to the particular action defined by the practice, there is nothing one can do but refer to the rules. Concerning particular actions

²⁴ A philosophical joke (in the mouth of Jeremy Bentham): "When I run to the other wicket after my partner has struck a good ball I do so because it is best on the whole."

there is only a question for one who isn't clear as to what the practice is, or who doesn't know that it is being engaged in. This is to be contrasted with the case of a maxim which may be taken as pointing to the correct decision on the case as decided on *other* grounds, and so giving a challenge on the case a sense by having it question whether these other grounds really support the decision on this case.

If one compares the two conceptions of rules I have discussed, one can see how the summary conception misses the significance of the distinction between justifying a practice and justifying actions falling under it. On this view rules are regarded as guides whose purpose it is to indicate the ideally rational decision on the given particular case which the flawless application of the utilitarian principle would yield. One has, in principle, full option to use the guides or to discard them as the situation warrants without one's moral office being altered in any way: whether one discards the rules or not, one always holds the office of a rational person seeking case by case to realize the best on the whole. But on the practice conception, if one holds an office defined by a practice then questions regarding one's actions in this office are settled by reference to the rules which define the practice. If one seeks to question these rules, then one's office undergoes a fundamental change: one then assumes the office of one empowered to change and criticize the rules, or the office of a reformer, and so on. The summary conception does away with the distinction of offices and the various forms of argument appropriate to each. On that conception there is one office and so no offices at all. It therefore obscures the fact that the utilitarian principle must, in the case of actions and offices defined by a practice, apply to the practice, so that general utilitarian arguments are not available to those who act in offices so defined.²⁵

²⁵ How do these remarks apply to the case of the promise known only to father and son? Well, at first sight the son certainly holds the office of promisor, and so he isn't allowed by the practice to weigh the particular case on general utilitarian grounds. Suppose instead that he wishes to consider himself in the office of one empowered to criticize and change the practice, leaving aside the question as to his right to move from his previously assumed office to another. Then he may consider utilitarian arguments as applied to the practice; but

Some qualifications are necessary in what I have said. First, I may have talked of the summary and the practice conceptions of rules as if only one of them could be true of rules, and if true of any rules, then necessarily true of *all* rules. I do not, of course, mean this. (It is the critics of utilitarianism who make this mistake insofar as their arguments against utilitarianism presuppose a summary conception of the rules of practices.) Some rules will fit one conception, some rules the other; and so there are rules of practices (rules in the strict sense), and maxims and "rules of thumb."

Secondly, there are further distinctions that can be made in classifying rules, distinctions which should be made if one were considering other questions. The distinctions which I have drawn are those most relevant for the rather special matter I have discussed, and are not intended to be exhaustive.

Finally, there will be many border-line cases about which it will be difficult, if not impossible, to decide which conception of rules is applicable. One expects border-line cases with any concept, and they are especially likely in connection with such involved concepts as those of a practice, institution, game, rule, and so on. Wittgenstein has shown how fluid these notions are.²⁶ What I have done is to emphasize and sharpen two conceptions for the limited purpose of this paper.

IV

What I have tried to show by distinguishing between two conceptions of rules is that there is a way of regarding rules which allows the option to consider particular cases on general utilitarian grounds; whereas there is another conception which does not admit of such discretion except insofar as the rules themselves authorize it. I want to suggest that the tendency while doing philosophy to picture rules in accordance with the sum-

once he does this he will see that there are such arguments for not allowing a general utilitarian defense in the practice for this sort of case. For to do so would make it impossible to ask for and to give a kind of promise which one often wants to be able to ask for and to give. Therefore he will not want to change the practice, and so as a promisor he has no option but to keep his promise.

²⁶ *Philosophical Investigations* (Oxford, 1953), I, pars. 65-71, for example.

mary conception is what may have blinded moral philosophers to the significance of the distinction between justifying a practice and justifying a particular action falling under it; and it does so by misrepresenting the logical force of the reference to the rules in the case of a challenge to a particular action falling under a practice, and by obscuring the fact that where there is a practice, it is the practice itself that must be the subject of the utilitarian principle.

It is surely no accident that two of the traditional test cases of utilitarianism, punishment and promises, are clear cases of practices. Under the influence of the summary conception it is natural to suppose that the officials of a penal system, and one who has made a promise, may decide what to do in particular cases on utilitarian grounds. One fails to see that a general discretion to decide particular cases on utilitarian grounds is incompatible with the concept of a practice; and that what discretion one does have is itself defined by the practice (e.g., a judge may have discretion to determine the penalty within certain limits). The traditional objections to utilitarianism which I have discussed presuppose the attribution to judges, and to those who have made promises, of a plenitude of moral authority to decide particular cases on utilitarian grounds. But once one fits utilitarianism together with the notion of a practice, and notes that punishment and promising are practices, then one sees that this attribution is logically precluded.

That punishment and promising are practices is beyond question. In the case of promising this is shown by the fact that the form of words "I promise" is a performative utterance which presupposes the stage-setting of the practice and the proprieties defined by it. Saying the words "I promise" will only be promising given the existence of the practice. It would be absurd to interpret the rules about promising in accordance with the summary conception. It is absurd to say, for example, that the rule that promises should be kept could have arisen from its being found in past cases to be best on the whole to keep one's promise; for unless there were already the understanding that one keeps one's promises as part of the practice itself there couldn't have been any cases of promising.

It must, of course, be granted that the rules defining promising

are not codified, and that one's conception of what they are necessarily depends on one's moral training. Therefore it is likely that there is considerable variation in the way people understand the practice, and room for argument as to how it is best set up. For example, differences as to how strictly various defenses are to be taken, or just what defenses are available, are likely to arise amongst persons with different backgrounds. But irrespective of these variations it belongs to the concept of the practice of promising that the general utilitarian defense is not available to the promisor. That this is so accounts for the force of the traditional objection which I have discussed. And the point I wish to make is that when one fits the utilitarian view together with the practice conception of rules, as one must in the appropriate cases, then there is nothing in that view which entails that there must be such a defense, either in the practice of promising, or in any other practice.

Punishment is also a clear case. There are many actions in the sequence of events which constitute someone's being punished which presuppose a practice. One can see this by considering the definition of punishment which I gave when discussing Carritt's criticism of utilitarianism. The definition there stated refers to such things as the normal rights of a citizen, rules of law, due process of law, trials and courts of law, statutes, etc., none of which can exist outside the elaborate stage-setting of a legal system. It is also the case that many of the actions for which people are punished presuppose practices. For example, one is punished for stealing, for trespassing, and the like, which presuppose the institution of property. It is impossible to say what punishment is, or to describe a particular instance of it, without referring to offices, actions, and offenses specified by practices. Punishment is a move in an elaborate legal game and presupposes the complex of practices which make up the legal order. The same thing is true of the less formal sorts of punishment: a parent or guardian or someone in proper authority may punish a child, but no one else can.

There is one mistaken interpretation of what I have been saying which it is worthwhile to warn against. One might think that the use I am making of the distinction between justifying a practice and justifying the particular actions falling under it in-

volves one in a definite social and political attitude in that it leads to a kind of conservatism. It might seem that I am saying that for each person the social practices of his society provide the standard of justification for his actions; therefore let each person abide by them and his conduct will be justified.

This interpretation is entirely wrong. The point I have been making is rather a logical point. To be sure, it has consequences in matters of ethical theory; but in itself it leads to no particular social or political attitude. It is simply that where a form of action is specified by a practice there is no justification possible of the particular action of a particular person save by reference to the practice. In such cases the action is what it is in virtue of the practice and to explain it is to refer to the practice. There is no inference whatsoever to be drawn with respect to whether or not one should accept the practices of one's society. One can be as radical as one likes but in the case of actions specified by practices the objects of one's radicalism must be the social practices and people's acceptance of them.

I have tried to show that when we fit the utilitarian view together with the practice conception of rules, where this conception is appropriate,²⁷ we can formulate it in a way which saves it from several traditional objections. I have further tried to show how the logical force of the distinction between justifying a practice and justifying an action falling under it is connected with the practice conception of rules and cannot be understood as long as one regards the rules of practices in accordance with the summary view. Why, when doing philosophy, one may be inclined to so regard them, I have not discussed. The reasons for this are evidently very deep and would require another paper.

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²⁷ As I have already stated, it is not always easy to say where the conception is appropriate. Nor do I care to discuss at this point the general sorts of cases to which it does apply except to say that one should not take it for granted that it applies to many so-called "moral rules." It is my feeling that relatively few actions of the moral life are defined by practices and that the practice conception is more relevant to understanding legal and legal-like arguments than it is to the more complex sort of moral arguments. Utilitarianism must be fitted to different conceptions of rules depending on the case, and no doubt the failure to do this has been one source of difficulty in interpreting it correctly.