

1 Questions of risk and liberty

In discussing drug control and freedom, it still makes sense to start with John Stuart Mill's essay *On Liberty* (1859), for all its flaws "the clearest, most candid, most persuasive and most moving exposition of the point of view of those who desire an open and tolerant society" (Berlin 1959, p. 50). Mill's basic principle is that the freedom of adults to live their own lives in their own way should be abridged only to protect others. No people who are "in the maturity of their faculties" and capable of "being guided to their own improvement by conviction or persuasion" (Mill 1859, chap. 1) should be forced to do anything just because it would be good for them, or forcibly prevented from doing anything just because it would be bad for them. Drug control was an important political issue at the time when *On Liberty* was published, and Mill had it very much in mind while writing the essay. In the name of the liberty of the Chinese opium smoker, he defended the opium trade between British India and China, which was under constant attack by reformers. He opposed laws requiring a doctor's prescription to buy certain drugs, including opiates. It goes without saying that he was against the alcohol prohibition laws passed in several U.S. states in the 1850s. In fact, he opposed most legal controls on alcohol, including penalties for drunkenness and taxes designed to keep consumption down (he did not object to taxation solely for revenue). Obviously he would have regarded almost all present drug laws as violations of his principle.

The libertarianism of Mill's essay, exemplified by his classic defense of freedom of speech, was regarded as radical in his own time. But his views on drug control, odd as they seem today, were largely in accord with established policies that reformers were only beginning to challenge. Today, Mill's views on free speech are considered prophetic, and his suspicion of paternalism is still attractive to many people. But only a few libertarian theorists like Thomas Szasz and Robert Nozick agree with him about drug control, and they are regarded as a radical fringe. Some study of history is ultimately needed to understand this change in attitude, but

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to see why there is any disagreement at all about the legitimacy and the basis of drug controls, we must first explore Mill's reasoning and the objections to it. The question is where and how Mill's principle can properly be applied, and what exceptions and qualifications have to be introduced to make it workable.

Mill was taught in the school of utilitarianism by his father James and by Jeremy Bentham, but *On Liberty* represents a partial break with the ideas of that school. Bentham had no objection to the exercise of paternalistic authority. He did not regard liberty as a good in itself, but only as a political instrument that was of value wherever it helped to achieve the overriding goal of the greatest happiness for the greatest number. He did not hesitate to recommend laws to prevent self-inflicted injury and punishment for what he called "self-regarding crimes." Mill does not abandon the principle of greatest happiness – he says he will "forgo any advantage which could be derived . . . from the idea of abstract right" (Mill 1849, chap. 1), but he insists that the principle itself demands that we treat certain liberties as inviolable. (It is doubtful whether any such case can be made on purely utilitarian grounds, but that is not the issue here.)

Mill thinks that three kinds of activity should be covered by the rule against paternalistic state coercion. Speech and opinion should be absolutely free; even harm to others should not be taken into account. "Combination," or joining with others to act in concert, should also be free as long as it harms no immediately identifiable innocent third parties. Finally, "tastes and pursuits," including the use of drugs and alcohol, should almost always be allowed free cultivation without government interference. Each person is the guardian of his or her own health and morals. The prohibition movement employs doctrines that "ascribe to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard." Of this idea he says that "there is no violation of liberty which it would not justify" (Mill 1859, chap. 4). Drug and alcohol laws, he believes, treat the people as though they were savages or children and punish all for the intemperance of a few.

Mill has to consider whether the issue of paternalism can be avoided. It might be said that no harmful act of any significance hurts only the actor; other people must be affected too. To justify a law this way is more attractive than telling protesting adults that something will be forced on them for their own good. In fact, indirect and long-term harm to others has always been the main justification given for suppressing individual drug use. The situations are familiar. Overdoses, accidents, and physical or mental illness caused by drugs may require the use of public medical

resources; society may be damaged by crimes committed under the influence of drugs; drug users may neglect their families, who will require public support, or they may become unproductive and dependent on others because of chronic drug abuse.

Other devices can be used to avoid the question of paternalism. For example, to justify the helmet requirement for motorcycle riders, it has been proposed that we regard the cyclist who blithely refuses to put on a helmet as actually harming another person – the repentant cyclist after the accident. Presumably the same judgment could be made on the beginning drug user who gives no thought to the addict he or she may become some day. The problem is to stop the division into multiple personalities at some point before each of us is treated as a different person at each moment; without some persisting self, there can be no responsibility and no freedom.

Mill fears that indiscriminate state intervention in the name of protecting the public would reduce his antipaternalistic principle to a verbal scruple. So he insists that harm to others justifies state coercion only if it has actually occurred or is at least a definite risk. Indirect, remote, or merely possible harm is not enough. In one place he even suggests that the state should intervene only in cases of force, fraud, or treachery. Elsewhere he allows it more authority; for example, he says that drunkenness itself should not be punishable, but that a soldier should be punished for being drunk on duty. Still, he regards an activity as none of the state's business so long as it "neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual" (Mill 1859, chap. 4). You may educate and persuade people not to misuse drugs (or not to use them at all), and you may punish them for actual harm to others produced by their use of drugs, but it is a clear violation of the antipaternalistic principle to prevent them by law from using drugs in the first place.

By setting narrow limits on the kinds of harm the law can take into account, Mill avoids such difficult issues as how much productivity society has a right to demand from an individual, or how great a probability of serious harm to others constitutes a reason for state intervention. He acknowledges that some health and safety standards may be necessary to protect consumers, but otherwise he is devoted to free trade; at any rate, he believes that no one should be restrained from selling drugs, alcohol, or any other commodity to a willing buyer as long as the transaction is not fraudulent. Anything can be misused or used in excess, but the state should interfere only when the misuse hurts an innocent third party.

Mill wants to limit the numbers and kinds of acts that are described as directly harming other people. By implication, his principle also requires

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limits on the numbers and kinds of acts that are described as involuntary or forced. An act that is not voluntary is, in a sense, not a true act, and therefore is not protected by the rule against paternalism. Prohibiting it only prevents an internal or external force from harming the apparent actor, who is unfree and not responsible. But Mill hardly considers this question, because he takes it for granted that adults are responsible for almost all of their acts. Even the most obvious ignorance or foolishness is no justification for treating an act as if it is involuntary. He does not discuss extreme psychological and social pressures (for example, what is now vaguely called “brainwashing”), but in any case it is questionable to describe that way the conditions that produce most drug and alcohol abuse. He does admit that people might need restraint to prevent them from exposing themselves to danger while “in some state of excitement or absorption incompatible with the full use of the reflecting faculty” (Mill 1859, chap. 5), but he understands this to be a special, rare, and temporary condition; today we tend to treat it as a persistent and recurrent one. For example, the legal theorist H. L. A. Hart, a successor in Mill’s liberal tradition, criticizes him for using his principle to disallow restraints on self-inflicted injury caused by inadequate reflection, transitory impulses, weak will, and other subtle pressures (Hart 1963). But few actions are entirely free of all these defects, so taking them into account might in effect nullify the prohibition on paternalism. That is what drug laws, like consumer protection regulations, are designed to do.

Certainly we are much less inclined than Mill to treat drug use as the free, rational act of an autonomous person. It is usually considered a product of ignorance, impulsiveness, or, worst of all, addiction – conditions in which the drug user’s freedom becomes a minor concern. For example, almost every heroin addict is introduced to the drug by friends who use it but are not addicted and never become addicted. But we do not want to believe that anyone takes this drug out of free will and with full knowledge: The user must be mentally disturbed, a child victim of evil adults, or, finally, a slave to addiction. So we have developed the myth of the pusher who lures innocent children with free samples. An addict who began to use heroin as a child can never have been free to choose whether or not to use it.

The easiest way to limit Mill’s principle, then, is to accept it but at the same time to insist on taking into account many external causes and consequences that Mill himself would have considered politically and legally irrelevant. Acts that Mill would have regarded as free are treated as in some way socially or psychologically compelled; effects on other people that Mill would have considered too remote, indirect, secondary,

or uncertain to require government intervention are treated as good reasons to pass preventive laws. Contemporary drug laws are readily justified in this way without appealing to paternalism in the strict sense.

Maybe it is true that the whole concept of paternalism is otiose in this case, because drug use is intrinsically less free than most other acts, or because the extent and severity of the drug problem give us good reasons to take into account consequences of an individual act that would otherwise be considered too remote or uncertain. We will eventually explore these questions. Meanwhile, let us assume what seems intuitively plausible to Mill – that some laws, including many drug laws, are truly paternalistic, directed mainly at self-injury.

These laws can still be defended, but only if Mill's two strong arguments against paternalism are rejected. The first one is that people in general are the best judges of their own interests. The opinion of others about what would benefit me is likely to be wrong when it conflicts with my own opinion; when authority tries to force me to do what is good for me, it is likely to interfere in the wrong place, at the wrong time, in the wrong way. Even when someone seems to be mistaken, it is best to educate and persuade rather than to use coercion, and resorting to force discredits those better means. Mill's second objection to paternalistic coercion is that it prevents people from making "experiments of living" (Mill 1859, chap. 3) that encourage the realization of individual potentialities, development of human faculties, variety of character, and richness of experience. By prejudging the value of the individual's desires and ends, paternalism imposes a conformity that limits human possibilities.

Almost no one rejects these arguments outright, but many people insist that the exceptions are much more numerous and, above all, more easily identified than Mill thinks. They believe that they can clearly define situations in which some external authority is able to judge a person's interests better than he or she can. They also claim to identify experiments in living that do not encourage individuality, diversity, and the fulfillment of human capacities. In some of these situations, education and persuasion alone are inadequate, because there is not enough time for them to work before serious harm occurs or simply not enough chance that they will ever work. Recreational drug use is usually put in that class.

Childhood is the most important situation in which we universally recognize some paternalistic discipline as necessary. Children are not assumed to be the best judges of their own interests, and restricting the experiments in living they are allowed to undertake is thought to promote rather than hinder their self-realization and the development of their individuality. The very word "paternalism" implies that the paradigm of

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coercing a person for his or her own good is the biologically natural authority of adults over children. That is why Mill insists that his principle applies only to people in the maturity of their faculties. Most of the reasons given for paternalistic coercion of adults are related to this model of childhood. They all assume that beneficiaries of paternal discipline are in some way incomplete – not, or not yet, fully developed human beings who must be granted the right to determine the course of their own lives. Even a writer who calls himself an anarchist can criticize “absolute tolerance” by comparing it to permissive child rearing (Wolff 1965). One common assumption is that whole societies and peoples can be historically immature, as a child is biologically immature; they require paternal government to realize their full historical potential. For this reason, Mill is willing to allow paternalism in the societies he calls “savage” and “barbarian”; in fact, one of his objections to alcohol control laws is that they treat the English laborer like a savage. Mill assumes a special status for nineteenth-century industrial society, but there is no need to follow him. Marxists, for example, insist that every class society is historically immature. We will cease to be barbarians only when humanity comes to its self-realization under communism. Until then, at least, Mill’s worries about paternalism are beside the point.

But liberals generally refuse to treat every existing imperfection in individuals and societies as analogous to the biological immaturity that makes a parent’s authority necessary. They require another principle to decide when individuals are so imperfect or incompetent that the state must protect them from themselves. One idea is that the state should be allowed to intervene whenever the situation is one in which a reasonable person would choose to be protected from the consequences of doing what he or she wants. The unreasonable person in the actual situation – ignorant, incompetent, foolish, impulsive, driven by forces beyond individual control – is placed under the authority of a hypothetical reasonable self whose agent is the state insofar as its laws are just and sensible. In effect, the coercive external authority is referred back to an individual taking prudent precautions for self-protection. And, as Mill insists, persons are usually the best judge of their own interests.

Gerald Dworkin has represented this situation in its simplest form by reference to the myth of Ulysses and the Sirens. Ulysses wants to hear the Sirens sing, but he fears being lured to death by drowning. So he has himself lashed to the mast of his ship and orders his men (who will be protected from the Sirens by wax in their ears) to ignore the anguished demands for release that he knows he will make when he hears the seductive and deadly song. When the sailors refuse to untie Ulysses, it

could be said that they are exercising paternalistic authority over him; and yet, from another, more obvious point of view, it is they who are recognizing his authority. No moral or political problem arises here, and it is certain that when he comes to his senses Ulysses will approve of the sailors' actions (Dworkin 1971). The alcoholic writer Jack London is said to have proclaimed that he favored women's suffrage because the women would enact prohibition laws and save him from himself. This anecdote suggests a modern political version of the Ulysses story.

Unfortunately, in politics the command of the reasonable self is rarely so explicit, and a person who has not explicitly asked for the restraints is not nearly so certain to approve of them afterward. For that matter, in practice it is not easy to tell which self is the reasonable one. John Rawls touches on the problem with his theory of the original position in which individuals meet to frame a social contract behind a veil of ignorance. Each fictive person in this imaginary situation is conceived as fully devoted to rational self-interest but completely ignorant of his or her personal characteristics and social circumstances in any real world. Rawls believes that paternalistic coercion or restraint is appropriate whenever someone in the original position would judge it necessary to ensure against the possibility of undeveloped powers or self-destructive impulses. In a way, this person is the solicitous parent of the empirical self – a child with whom he or she is truly one flesh. No one could be a better judge of the interests of this imperfect real person or a better guide to that person's self-development and self-realization, so both of Mill's arguments against paternalism are eliminated. Judgment on what constitutes self-destructiveness or undeveloped powers is left first to the individual's rational, settled preferences. If we cannot say what these preferences are in a given situation, we must introduce a theory of "primary goods" – a notion of what is good for people in general (Rawls 1971, pp. 248 ff).

This takes us a long way from Ulysses' command and an even longer way from Mill's principle. Mill mistrusts paternalism because he believes that no conceptions of what is desirable for human beings are so fixed and certain that they need only be applied by a wise authority. But Rawls's abstract person in the original position, the creator of the social contract, is made out to be just that kind of authority on the good. The proper exercise of liberty in effect becomes identified with choosing rightly or rationally by a standard that has nothing to do with the individual's actual desires. The effect is a broad license for paternalistic restraint, ostensibly to promote genuine freedom.

Suppose that Ulysses forgets to order his men to ignore later commands given under the influence of the Sirens. Still, few would object if they

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denied his wishes for his own good. By refusing to untie him, they would be obeying the orders that an ideal Ulysses would have given, and the actual Ulysses will thank them for it later. Rawls might call this deference to his rational settled preferences, but he also might call it an application of the theory of primary goods. In this case, life is the primary good that would be chosen by the rational person in the original position. Even if the sailors do not know their captain's rational settled preferences – even if they imagine that later he might tell them that he would rather have died a blissful death – they should rely on the notion of primary goods and treat him as though they were obeying the command of a man in the original position.

A more practical example is legislation setting maximum hours and minimum wages for labor. In effect, the individual worker's freedom of contract, such as it is, is limited for the collective benefit of all workers. Workers actually fight for this ostensible limitation on their individual freedom, and they certainly do not regard it as paternalistic. Nor does Mill; he insists that such laws actually grant rather than deny power to the people affected by them. But this is ostensibly a case of paternalism, since the law is being used to protect workers against temptation. A worker who votes for a law or signs a union contract setting maximum hours and minimum wages is in somewhat the same position as Ulysses commanding that certain wishes he might later express should be denied. But these laws and contracts are also enforced against (or in favor of) workers who have not agreed to them and may even object to them. Ulysses neglecting to give his command was not in the same situation. There the sailors could assume an oversight, because refusing to untie him served not only his own rational preferences but also a primary good recognized by everyone. Mill would certainly have judged Ulysses to be in a state "incompatible with the use of the reflecting faculty," but even here some extreme libertarian might defend letting him go. In most cases it is less clear what the person under restraint would prefer if he or she were reasonable, and in many cases it is not obvious to everyone that a primary good is being served. For workers to believe that wage and hour limitations do them more harm than good is not obviously irrational, although it may be wrong. So a few individualist libertarians would allow maximum hour and minimum wage restraints to be applied not to workers in general but only to those who have actually contracted for them.

The larger issue here is which self-injurious actions are compatible with rationality and therefore with freedom. If free acts, however wrong or mistaken, are in some sense products of a fully developed rational capacity, it is hard to see how Mill can dispense with some conception

of human nature or the meaning of human life that gives content to the idea of rationality. He actually alludes to this in the epigraph of his essay, where he quotes Wilhelm von Humboldt as saying that the aim of government is human development in its richest diversity. Mill objects to paternalism partly because it assumes the existence of primary goods or rational preferences so obvious that they can be imposed on people against their will. But to speak of rich human development implies some conception of fulfillment appropriate to human beings and therefore some idea of rationality as a rule directing action toward such a fulfillment. By that standard some acts must be irrational and, if there is no freedom without rationality, possibly unfree. And maybe such acts should be prevented by paternalistic coercion.

Mill himself hardly considers the matter further after making exceptions for children (and “savages”) and for acts performed in a state of “excitement or absorption.” But promoting the highest development of human powers could easily require much more work by government. The tension is inherent in Mill’s conception of the individual; he is uncertain which of our characteristics demand that freedom should be defended against paternalistic coercion. He is concerned about developing and exercising the capacity to conceive our own ends, shape the meaning and course of our own lives, and maintain our own conceptions of happiness, so he emphasizes the value of the individuality and diversity that result from such choices. But it is easy to think of acts (including some kinds of drug abuse) that are free by Mill’s definition, yet actually seem to destroy the capacity to shape our lives and therefore reduce individuality and diversity. The shaping of my life should be guided by what is significant for me, but I am not always the best judge of that. And even when I do know what is really important for me, I may be the victim of other desires that prevent me from attaining it – desires I wish I did not have. Alcohol and drug dependence are the paradigms. A life dominated by impulse, drift, or restricting habits is not free. Mill himself actually writes in *Logic* that “none but a person of confirmed virtue is completely free” (Himmelfarb 1974, p. 108). This conception of freedom is obviously not the same as the political one of *On Liberty*.

The trouble is that to justify paternalism by distinguishing meaningfully free acts from those produced by impulse, drift, and compulsive habit would be to smuggle in the idea of obvious primary goods and universal rational preferences that he has already rejected by denying that there is any fixed human nature capable of serving as a political standard. From another point of view, the distinction implies that a more or less balanced, fully developed character is required for politically protected free action.

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But once we introduce that criterion, it is hard to know where to stop short of identifying free acts with rational and virtuous acts as defined by a standard independent of the individual's will. And Mill fears the political implications of doing that.

The requirement of wholeness, integrity, consistency, and ultimately rationality as conditions for freedom can be extended beyond the individual. No one is self-sufficient; no one is even himself or herself outside of a context created by other people in families and societies. Mill's distinction between harm to oneself and harm to others becomes unimportant in this perspective. Any injury done anywhere affects both individual interests and the common good at once, and the freedom of a whole person is also the good of a whole society. These ideas are worked out most clearly in the theory of positive liberty. Mill's contemporary, T. H. Green, used the term as a contrast to negative liberty, permission to do what you want, which is central to Mill's conception of political freedom. The distinction has been analyzed by Isaiah Berlin (Berlin 1969). Advocates of positive liberty insist that a free individual must be a whole person, and no genuinely whole person can exist outside of a free society, that is, one which allows the full development and self-realization of each person. As long as social arrangements are imperfect, all individuals are unrealized, incomplete, and to that extent, at least, like children. In the terminology of Hegelian idealism, the empirical will, which exercises the dubious freedom Mill defends, is distinct from the real or essential will, which is in total harmony with reason and can have full effect only within a society that is also totally reasonable. In Marxist terminology, people in a class society are alienated, estranged from their true natures. They are in a socially transitional stage; alienation will end only when the human species comes to full maturity under communism. In either view, freedom is best conceived not as the exercise of an imperfect individual's will but as the product of a good life in a reasonable society. What Mill regards as paternalism may be one of the ways to attain that freedom.

The idea of positive liberty goes back in Western thought at least to the remark of Socrates that no one willingly errs. Montesquieu characterized this concept succinctly in his statement that liberty consists of being able to do what you ought to want to do. In this tradition, persons who consider themselves free may be slaves to impulses that destroy the capacity for meaningful, rational choice. All action opposed to the common good is unfree in the deepest sense, and it may be necessary to coerce people for an end they are too depraved or foolish to recognize – as Rousseau put it, to force them to be free. Green (1895) defines natural rights as the