

THE PARADOX OF JOHN STUART MILL

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I. THE “MILL PROBLEM”

It is only the individuals or thinkers one loves who truly break one’s heart. In the case of those thinkers, who has broken more hearts than John Stuart Mill? For defenders of individual rights—those who value the self-sovereignty of the individual in those actions that concern only the individual directly—*On Liberty* (1859) stands as a singular work, whatever its apparent and diversely perceived problems and flaws. For some, it fails to address the problems of social order sufficiently. For some, while it rightly limits governmental direction of individual lives, it gives too much power to social judgment and the coercion of public obloquy. For some, its final chapters, on “Applications,” give too much power to the state—for example, the ability to tax rather than ban what the public deems vices. Most of these problems arise when readers seek to apply Mill as a blueprint or (worse yet as a category mistake) a constitution. Mill establishes two poles—first, an individual’s freedom of choice about what is best for him or her in the domain of self-regarding beliefs and activities, and second, the molding and coercing of adult individuals by society itself—and he believes that it is in our individual and our communal interest to move, where possible, toward the former pole.

On Liberty is Mill’s celebration of individuality, personal responsibility, freedom of speech and expression, human diversity in belief and in ways of life, and, indeed, the utility and, he stresses, the loveliness of self-defined lives. It is a work that occupies a remarkable place in the canon of the literature of liberty. In generation after generation, students of all ages fall in love with its author. Then they discover the other lives of Mill. The thinker one loves has had relationships with others. Between the Mill of individual liberty and of limits on power that allow a voluntary, uncoerced civilization in matters of belief, expression, association, and lifestyle, on the one hand, and the Mill of political economy, on the other, there falls the shadow. He has been living a double life. To put the matter directly and without metaphor, he is the critical transitional figure between the ideas of the liberalism of limited government and the values of the liberalism of the active public-welfare state.

II. THE SATISFACTIONS OF *ON LIBERTY*

Every sympathetic reader of *On Liberty* has experienced moments in the text or in discussions with others—Could public support of virtue be

dangerous? Do his “Applications” betray his principles? Is he consistent about the coercive dangers of public opinion?—that have raised doubts, large or small, about Mill’s commitment to liberty taken in the sense that the reader first admired. These doubts, however, should not cloud the unparalleled defense of liberty one encounters there.

Mill carved out, in the endless debate between rights theorists and utilitarians, a strong and luminous position: individual rights were of ultimate utility to the human species. Where his mentor, Jeremy Bentham, notoriously declared “natural rights” to be “nonsense on stilts” in his *A Critical Examination of the Declaration of Rights*,¹ Mill found rights that were protected from state and social action to be indispensable to utilitarian theory itself. Absent those rights, the human species would suffer and stagnate. Mill indeed famously refused any advantage that might accrue to his argument for expansive individual liberty—if consistent with the preservation of society and with preventing direct harm to others—from claims of abstract natural rights. He would rest his case on utility.

Nonetheless, unlike Bentham (the most celebrated English utilitarian of the prior generation), Mill rejected the traditional utilitarian formula of “the greatest happiness of the greatest number,” which Bentham had taken from the Milanese Enlightenment legal reformer Cesare Beccaria’s *On Crimes and Punishments* (1764) and from the French Enlightenment philosopher Claude-Adrien Helvétius’s *De l’Esprit* (1758). For Mill, short-term or even intermediate-term calculations of happiness were a wholly inadequate means of making moral judgments about human governance and about intervention in the life of the individual. Rather, he insisted, his own criterion of utility would be “utility in the largest sense, grounded on the permanent interests of man as a progressive being.”²

In that “largest sense,” for Mill, the present and, more importantly, the future needed individuals who had experienced self-sovereignty and responsibility. From that perspective, what mattered above all was not the positive things men accomplished in any particular frame of time, but, rather, “what manner of men” accomplished them, because only free individuals, responsible (absent *direct* harm to others) for their thoughts, expressions, choices, behaviors, and associations, could learn from trial and error and thus be agents of human adaptation and improvement.³ Mill was concerned that “harm to others” could be taken too broadly, justifying a great amount of public intervention, so he propounded his doctrine narrowly: “The liberty of the individual must be thus far limited;

¹ This essay was first published in 1843, in a collection entitled *Anarchical Fallacies*. See Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh: William Tait, 1838–43), vol. II, *A Critical Examination of the Declaration of Rights*, “Preliminary Observations,” art. II.

² John Stuart Mill, *On Liberty*, in Mill, *On Liberty with The Subjection of Women and Chapters on Socialism*, ed. Stefan Collini (Cambridge and New York: Cambridge University Press, 1989), 14.

³ *Ibid.*, 59–60.

he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.”⁴ Later, Mill will ask society always to err on the side of self-sovereignty in deciding between direct and indirect harm: “But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.”⁵

For Mill, individual liberty and responsibility formed a *mode*—a manner, or form—of being human, and utility resided in that mode, not in any particular outcome. By analogy (mine, not Mill’s), people might find a rightful outcome and satisfaction in frontier justice meted out to some miscreant. We preserve the more valuable form of justice, however—the civilized and civilizing mode of due process—in order to achieve a far greater good. Providing due process is a mode of administering justice that both elevates us and serves humanity deeply in the long run.

For Mill, such beneficial freedom ultimately was the unrestrained ability to act or abstain in all matters that did not affect others immediately and directly, however much Mill formally dissociated himself from any talk of theoretical right. In Mill’s view, with respect to the part of conduct that does not directly harm others, a man’s “independence is, *of right*, absolute.”⁶ Over things affecting only himself directly, “the individual is sovereign.”⁷ Neither government nor society could appropriately deny such liberty to the individual. As Mill revealingly phrased it, certain individual interests “*ought to be considered as rights*,” a conclusion justified by long-term utility.⁸ Individual self-government, individual choice, and individual responsibility for one’s actions created better human beings, and better human beings, over time, created better societies. Paternalism might achieve its short-term goals, but it would kill the very spirit and dynamic that made for decent individuals and progressive societies. By analogy, to capture Mill’s meaning, one well might achieve short-term happiness or avoidance of pain for one’s children by means of frontal lobotomies, but their future intelligence, creativity, and self-fulfillment would be ruined. Thus, Mill offered a modal, long-term, utilitarian argument for individual rights in matters of belief, expression, association, and self-regarding behaviors.

⁴ *Ibid.*, 56–57.

⁵ *Ibid.*, 82.

⁶ *Ibid.*, 13 (emphasis added).

⁷ *Ibid.*

⁸ *Ibid.*, 75 (emphasis added).

In *On Liberty*, Mill appreciated the necessity and value of the advance made by “democratic” theory and practice to restrict and overturn the despotic rule of the few over the many. Like the liberal French political theorist, historian, and political figure Alexis de Tocqueville, whose *Democracy in America* (1835–40) he read with admiration, Mill saw dangers in democratic governance that had been obscured by the positive struggle against tyrannies. Democracy was not self-government in the sense of each individual now governing his own life. Instead, it was the rule of all by those who democratically had assumed the agencies of power in society. This created an insidious danger, because individual or group despotism was generally visible to all, but democratic tyranny easily hid itself under the cloak of a people’s “self-governance,” even though there could be a vast discrepancy between the interests of the governors qua governors and the interests of the governed. Further, that cloak might allow for yet more tyranny to be exercised over an individual who sought to define himself and to live by his own voluntary choices.⁹ In the midst of that danger, Mill called for a society of mutual forbearance in all matters that did not represent a direct threat to the lives, liberty, property, and peaceful enjoyment by others of the fruits of their labor. Men, in the long term, flourished by living in a society of voluntary choices, but they stagnated or regressed by making those choices, however wisely, for others. For Mill, “Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.”¹⁰ Indeed, “The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.”¹¹

Mill, in fact, worried that both the tyranny of public opinion and the tyranny of government might wage war on the enjoyment of property and the fruits of one’s labor:

We have only further to suppose a considerable diffusion of Socialist opinions, and it may become infamous in the eyes of the majority to possess more property than some very small amount, or any income not earned by manual labour. Opinions similar in principle to these, already prevail widely among the artisan class, and weigh oppressively on those who are amenable to the opinion chiefly of that class, namely, its own members. It is known that the bad workmen who form the majority of the operatives in many branches of industry, are decidedly of opinion that bad workmen ought to receive the same wages as good, and that no one ought to be allowed, through piece-

⁹ Ibid., 5–9.

¹⁰ Ibid., 16.

¹¹ Ibid.

work or otherwise, to earn by superior skill or industry more than others can without it. And they employ a moral police, which occasionally becomes a physical one, to deter skilful workmen from receiving, and employers from giving, a larger remuneration for a more useful service. If the public have any jurisdiction over private concerns, I cannot see that these people are in fault, or that any individual's particular public can be blamed for asserting the same authority over his individual conduct, which the general public asserts over people in general.¹²

Self-sovereignty, property, and enjoyment of the superior fruits of one's labor all depended upon private concerns remaining private and immune from public interference, suppositions that led Mill to his most celebrated principle for drawing the proper line between the individual's autonomy and the claims of social intervention:

[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.¹³

Indeed, in Mill's judgment, when society does intervene in the voluntary choices of an individual, it almost invariably does so "wrongly."¹⁴ Again, it is critical to a rightful judgment of Mill to understand that he is not attempting to provide a blueprint or utopian constitution in *On Liberty*, but, rather, defining the pole toward which he would have society move, however gradually, and with whatever compromises. When weighing alternatives, for Mill, we should move closer, whenever possible, to adherence to the harm principle as the only criterion for intervention and interference consistent with a limited government that permits the most dignity, peace, decency, moral freedom, responsibility, individual rights, safety, and security of rights of a civilized society. Intervention, in his view, not only was usually wrong in any particular case, but, above all, had the long-term effect of changing the manner of human beings we were—dulling, not improving, our moral senses.

For Mill, the best illustration of his central argument was seen in the protection of freedom of speech and expression.¹⁵ Because of that, *On Liberty* is widely used and often read as primarily a work about that

¹² Ibid., 87–88.

¹³ Ibid., 13.

¹⁴ Ibid., 83–84.

¹⁵ Ibid., 19–55.

particular freedom. In fact, of course, Mill meant his defense of inward and expressive belief to be the hardest case he had to prove in order to win the case for his general principles, since so many of his contemporaries were convinced that the freedom to attack belief in God or religion would undermine the very foundations of society. As Mill explicitly argued, every argument on behalf of freedom of belief and expression applied also to the freedom to choose one's way of life, one's preferences, one's use of one's time, and one's voluntary associations. Provided that individuals did not directly harm others and that they assumed themselves the full consequences of their own behaviors—"their own risk and peril"—society had no coercive claims upon them. In Mill's words, "the same reasons that show that opinion should be free, prove also that he [the individual] should be allowed, without molestation, to carry his opinions into practice at his own cost."¹⁶

It is noteworthy how appealing Mill has been to American courts, and how deeply Mill's harm principle and his defense of freedom of expression as an instance of that principle have penetrated American jurisprudence, most explicitly at the state level. (The spirit of Mill might inform federal justices, but they almost never cite him specifically, let alone dispositively.) In *Patricia E. Brophy v. New England Sinai Hospital, Inc.* (1986), the Supreme Court of Massachusetts upheld the right of a patient to refuse medical treatment precisely on the basis of *On Liberty*, citing Mill as if he were part of the foundation of American law: "The right of self-determination and individual autonomy has its roots deep in our history. John Stuart Mill stated the concept succinctly: '[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.' Mill, *On Liberty*." The court stated freely that its decision was based upon the "recognition of these fundamental principles of individual autonomy," which required a shift in emphasis "away from a paternalistic view of what is 'best' for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved."¹⁷

In *Armstrong v. The State of Montana* (1999), the Supreme Court of Montana struck down a statute limiting the performance of abortions to physicians and granted to all in Montana the right to choose the medical care

¹⁶ *Ibid.*, 56-57.

¹⁷ *Patricia E. Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986). References to Mill in court decisions can be found by a simple Google search of "Mill + Court." The decision here is relatively brief, and the online version (<http://homepages.undayton.edu/~ulrichlp/brophy.htm>) does not have page numbers. A search for "Mill" within the document leads directly to the material cited.

of their choice, in this case (though the issue was decided more broadly) to choose to have an abortion performed by a certified physician-assistant. After citing federal and U.S. Supreme Court decisions, the court wrote of “modern legal notions” that governed the case, whose roots could be traced back to John Locke and the Founders, and that found expression in John Stuart Mill, the only author explicitly cited. In the court’s words, “John Stuart Mill recognized this fundamental right of self-determination and personal autonomy as both a limitation on the power of the government and as a principle of preeminent deference to the individual.” Correcting (with a “*sic*”) Mill’s British spelling, it then quoted the full text of Mill’s harm principle, “[T]he only purpose for which power can be rightfully exercised over any member of a civilised [*sic*] community, against his will, is to prevent harm to others,” and so on to the end.¹⁸

In Mill’s famous formula, stating the liberty of the individual with regard to free speech, “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” That sentiment, verbatim, also has found a place in American legal opinion. Thus, the Rhode Island Supreme Court, in *Cullen v. Auclair* (2002), ruled that statements based upon nondefamatory facts enjoyed the fullest protection. It cited the First and Fourteenth Amendments to the United States Constitution, and *On Liberty*: “This principle is eloquently illustrated by John Stuart Mill, who stated: ‘If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.’ . . . Thus, such opinions are not actionable however dishonest the speaker may be in publishing that opinion.”¹⁹

A central part of Mill’s argument for freedom of expression was that we could not assume our own infallibility, and thus we could never be certain that an opinion was wholly false. Even if it were, Mill argued, society would lose greatly by its suppression, given the value to truth of the clash of opinions. In 2000, the Rhode Island Supreme Court, in *Beattie v. Fleet National Bank*, refused to allow a jury to “correct” a derogatory opinion and punish those who aided in the dissemination of it. The court granted summary judgment, quoting directly from *On Liberty*: “We decline to do so, however, because this type of communication constituted an opinion based upon disclosed, nondefamatory facts, mindful that, in such circum-

¹⁸ *Armstrong v. The State of Montana*, 989 P.2d 365 (Mont. 1999). The online version of the decision does not have page numbers, but a search for “Mill” within the document leads directly to the material cited: <http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003726845>.

¹⁹ *Cullen v. Auclair*, 809 A.2d 1107, 1110, p. 5 (R.I. 2002). The opinion is online at the website of the Rhode Island Supreme Court: <http://www.courts.state.ri.us/supreme/pdf-files/01-588.pdf>.

stances, '[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion; and even if we were sure, stifling it would be an evil still.'" The Rhode Island Supreme Court's conclusion has one footnote—Mill's *On Liberty*.²⁰

Yale law professor Akhil Reed Amar analyzed Mill's view as indicative of a shift profoundly affecting American thought about government, law, and individual rights by the time of the Civil War, when fear of majoritarian tyranny at last overrode the understanding of liberty as majoritarian self-government, "as reflected in the publication in 1859 of John Stuart Mill's classic tract, *On Liberty*—on individual liberty."²¹ In the opinion of some, U.S. Supreme Court decisions on privacy and personal choice have reflected more of Mill's thought than of American jurisprudence. Thus, Judge Henry J. Friendly and Judge A. Raymond Randolph, two distinguished American jurists, felt obliged to note that the authors of the Fourteenth Amendment (whose due process clause gradually led the Court to apply the First Amendment—prohibiting, among other things, laws that limited freedom of speech—to the states themselves) did not actually incorporate John Stuart Mill into the Constitution of the United States.²²

Mill's influence is great, perhaps, not only because of the eloquence of his celebrations of individual liberty and autonomy, but because *On Liberty* can be appropriated both by casual rights theorists—individual sovereignty over one's life has a ring to it—and by casual utilitarians—Mill's stated goal is the long-term well-being of mankind as a species. What surely appears as a weakness to more philosophically minded moral and political theorists—a possible conflation of utility and rights—probably functions as a great source of Mill's enduring appeal.

For the philosophically ambivalent or skeptical, there seems to be something odd in a utilitarianism that can place no limits on what may be done to human beings if it increases future human happiness, raising the specter of Stalin's and Mao's use of the present, in theory, to secure the happiness of the future. One need not embrace the Golden Rule or Kant's celebrated categorical imperative—"Act only according to that maxim whereby you can at the same time will that it should become a universal law"—to have difficulty with that sort of utilitarianism. Equally, there seems to be something odd in a rights theory that ignores consequences,

²⁰ *Beattie v. Fleet National Bank*, 746 A.2d 717, p. 20 (R.I. 2000). The opinion is online at the website of the Rhode Island Supreme Court: <http://www.courts.state.ri.us/supreme/pdf-files/98-338.pdf>.

²¹ Akhil Reed Amar, *The Bill of Rights* (New Haven, CT: Yale University Press, 1998).

²² A. Raymond Randolph, "Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion," *Harvard Journal of Law and Public Policy* 29, no. 3 (2006). Friendly's opinion of Mill and the Constitution was disclosed by Randolph (who had clerked for Friendly) in Friendly's unpublished papers, in the possession of Harvard Law School. Randolph's article was an extension of a talk that he had given to the Federalist Society in 2005: http://www.fed-soc.org/publications/pubID.368/pub_detail.asp.

that disregards human well-being as a criterion, that proclaims, in effect, *Let justice be done though the world perish*. That, also, appears to entail a coldness and detachment from ordinary human lives that few share.

The extremes of rights without utility and of utility without rights seem troubling to most of us, and few writers venture to either extreme without trying somehow to reassure us. Thus, in one defense of free enterprise and a voluntary society, philosopher and novelist Ayn Rand's *Atlas Shrugged*—a work enthusiastically received by a legion of American admirers (though much less well known abroad)—Rand pointedly, for whatever purposes, shows readers a world of suffering, want, and unhappiness in her portrait of the dystopia produced by “the looters.” Nonetheless, John Galt, the hero of the work, speaking for Rand, declares “utilitarianism” to be the philosophy of “prostitutes” and rebukes all notions of altruistic obligations to the well-being of others. The freedom to craft one's own life, to pursue one's own goals, and to enjoy the fruits and satisfactions of one's own efforts—if one grants that same freedom to all others—arises from human nature and objective reality themselves. Utility plays no part in it. Nonetheless, Rand portrays an immoral world whose consequence is indeed a world of pain and deprivation.²³

In another defense of free enterprise and a voluntary society, the eminent Austrian economist and political philosopher Ludwig von Mises, like Bentham before him, dismisses all talk of “rights” and individual autonomy as the stuff of “muddleheaded babblers” who may therefore argue interminably over whether all men are destined for freedom. There is only one compelling objection to slavery itself: “namely, that free labor is incomparably more productive than slave labor.” For Mises, “Only free labor can accomplish what must be demanded of the modern industrial worker.” “What we [classical liberals] maintain,” he insisted, “is only that a system based on freedom for all workers warrants the greatest productivity of human labor and is therefore in the interest of all the inhabitants of the earth.” If freedom were not the most productive system, in terms of the goods and services it calls forth, there would be no argument for it. Nonetheless, Mises reassuringly informs us, it would be impossible for slavery to be as productive as freedom.²⁴

For Rand, Mises, and those who find one or the other compelling, there are no problems with each respective position. For Rand (and her admirers), the issue is an individual's rights, and it makes perfect sense that a world based on a false understanding of those rights would be dysfunctional and dystopian. One decides issues, however, on the basis of rights, and one concludes on behalf of a free and voluntary society. For Mises

²³ Ayn Rand, *Atlas Shrugged* (1957), 35th anniversary edition (New York: Signet Classic, 1996). For Galt on “the greatest good of the greatest number” as the moral standard of a “prostitute,” see p. 943. For Rand on “rights,” see pp. 972–73.

²⁴ Ludwig von Mises, *Liberalism: The Classical Tradition* (Indianapolis, IN: Liberty Fund, Inc., 2005), chap. 1, sec. 2.

(and his admirers), it is patently obvious that a world in which individuals were not free to work for their own well-being would be unproductive and immeasurably less satisfying in its outcomes. One decides issues, however, on the basis of utilitarian calculations of productivity, and one comes down on the side of a free and voluntary society. For the less consistent among us, it seems, at the very least, difficult both to dismiss consequentialist arguments about the effect of social organization upon the lives of our fellow creatures, and to dismiss the notion that there are no limits on what one human being may do to another—slavery, for goodness sake!—except in terms of productive efficiency.

Mill appears to resolve these tensions by embracing his modal justification of freedom and rights. For Mill, living under freedom and the recognition of rights is *a way of being human* that enhances our lives, now and in the future, in multiple ways. In his view, liberty and rights are indispensable to the progress of humanity, both in terms of “what manner of men” liberty produces and in terms of our future well-being. The species cannot know its future, but if it allows individual self-sovereignty, it has chosen the only path to innovation, to learning from experience, and to an exercise of intellectual and moral faculties that produces human beings capable of adaptation and progress. Mill argues, in a language that sounds neither utilitarian nor rights-based, but that can appeal to both camps (philosophers excluded), that the cultivation of individuality, limited only by “the rights and interests of others” in not being directly harmed, can make of human beings something different and higher than what we today might imagine: “Among the works of man,” he writes, “which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself.” If liberty prevails, the men and women of today’s civilized world “assuredly are but starved specimens of what nature can and will produce.”²⁵

Mill offers us liberty, individualism, progress, human well-being, an end to tyranny, and both men and women free to develop in ways now unimaginable. Utility is there. Rights are there. Something ineffably beyond them both is there. One falls in love with Mill.

III. UTILITY, JUSTICE, AND ECONOMIC FREEDOM

Mill’s *On the Subjection of Women* (1869) makes the confusion or symbiosis (take your choice) of his moral criteria all the more apparent. He offers a stream of utilitarian justifications of the legal and political emancipation of women: more competition and productivity in the workplace; the benefits from interaction that flow to all from the intellectual and professional emancipation of women; fewer unhappy women; better marriages; the full energies, available to society, of half of the human popu-

²⁵ Mill, *On Liberty*, 59–63.