BANTAM CLASSIC

On Liberty & Utilitarianism

John Stuart Mill

With an Introduction by Alan M. Dershowitz

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JOHN STUART MILL was a child of radicalism, born in 1806 into a rarefied realm of philosophic discourse. His father, who with Jeremy Bentham was a founding member of the utilitarian movement, was responsible for his son's education and saw to it that he was trained in the classics at an extraordinarily early age. In 1823 Mill gave up a career in law to become a clerk at the East India Company, where his father worked. Like his father, he rose to the position of chief examiner, which he held until he retired from the company in 1858.

While still in his teens, Mill began publishing articles and essays in various publications and became editor of the *London and Westminster Review* in 1835. In 1843 he published *System of Logic,* followed by *Principles of Political Economy* in 1848. Other important works include *On Liberty* (1859), *Utilitarianism* (1863), *The Subjection of Women* (written 1861, published 1869), and *Autobiography* (published posthumously in 1873).

Mill married Harriet Hardy Taylor in 1851, and her influence on his thinking and writing has been widely cited. The couple worked together on *On Liberty,* and the essay is dedicated to her memory—she died in 1858. After serving as a member of Parliament from 1865 to 1868, Mill retired to France and died at Avignon in 1873.

It took scholars several decades before they fully examined John Stuart Mill's unique and systematic contributions to ethical and logical traditions. For today's students of economics, philosophy, and politics, he remains a vibrant and preeminent figure.

MILL, ON LIBERTY

by Alan M. Dershowitz

THE PRINCIPLE

FEW PRINCIPLES of civic morality have had so profound an intellectual influence within Western democracies as John Stuart Mill's "one very simple principle." The principle, governing the proper allocation of state power and individual liberty, was articulated by Mill in his 1859 essay entitled "On Liberty." In Mill's own words:

> That principle is, that 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. 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 opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in

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> case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Mill made it clear that his principle applied only to "human beings in the maturity of their faculties" and granted to the state the power to determine, within reason, the age "of manhood and womanhood." The explicit inclusion of womanhood reflected more than syntactical completeness; Mill was a genuine feminist who wrote eloquently in favor of women's equality in the home, at the ballot box, and in the world at large.[1]

While support for women's rights was uncharacteristic of his circle during the mid-nineteenth century, Mill's implicit acceptance of colonialism was all too typical. He exempted from his principle "those backward states of society in which the race itself may be considered as in its nonage." For such "barbarians," Mill paternalistically concluded, benevolent "despotism is a legitimate form of government," since liberty has no application "to any state of things anterior to the time when mankind may have become capable of being improved by free and equal discussion."

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[1] Mill wrote: "This obligation [to respect the liberty of each person] is almost entirely disregarded in the case of the family relations, a case, in its direct influence on human happiness, more important than all others taken together. The almost despotic power of husbands over wives needs not be enlarged upon here, because nothing more is needed for the complete removal of the evil, than that wives should have the same rights, and should receive that protection of law in the same manner, as all other persons." p. 116.

But neither his progressive inclusion of women nor his regressive exclusion of "backward" people is central to Mill's principle and its remarkable influence on Western society. Like other profoundly influential principles such as the Bible's "Thou shalt love thy neighbor like thyself" and Kant's "So act, that the rule on which thou actest would admit of being adopted as a law by all rational beings," the principle itself is as simple as it is eloquent (at least in conception—Mill was the first to acknowledge its difficulties in application, leaving that to a sketchy final chapter that is among the weakest in an otherwise persuasive essay). The power of the state may not be used to compel a reasoning adult to do or not do anything solely because such action or inaction would be better for that adult.

It is interesting that this principle was, for Mill, based entirely on utilitarian considerations: "It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right [since] I regard utility as the ultimate appeal on all ethical questions." There are, however, persuasive utilitarian arguments in favor of compelling adults to do certain things that would make them happier and better people. Indeed, if a truly benevolent despot really knew the secret of maximizing happiness for everyone, there would surely be many utilitarians who would feel compelled to grant him the power to do what no democracy has thus far succeeded in doing: namely, producing a universally happy society.

In the end, however, Mill is not at his best in attempting to justify his principle solely on conventional utilitarian grounds. Though Mill himself eschews all advantage to his argument from "abstract right," that does not necessarily mean that those who reject utilitarianism and accept abstract rights must reject Mill's principle. Even as an

abstract right or as part of a rights-based system, Mill's principle has much to commend it. This is an instance where the power of the principle transcends the strength of the underlying justification offered by its proponent. I think it is true today that a considerable number of nonutilitarians do, in fact, accept Mill's basic principle with as few or as many variations as orthodox utilitarians who accept it.

Indeed, it is fair to say that the fundamentals of Mill's principle have become almost a conventional wisdom of Western society, at least among its intellectuals. It is generally taken for granted as a premise of debate concerning the proper allocation of state power and individual freedom. To be sure, there are some state paternalists, especially among the religious ultra-right, who still believe that it is the proper function of government to compel adults to do what is deemed best for them. But the vast majority of contemporary Western thinkers—whatever their philosophical bent—seem to accept the basic Millian principle that it is not the proper function of government to compel conduct solely in order to improve the life of an adult who does not necessarily want his or her life so improved.

Many philosophers reject the rigidity with which Mill stated his thesis. Others have greater difficulty than even he had in clearly distinguishing between actions that affect only the actor and those that have a discernible impact on others. But it is not easy to find many who categorically reject the core concept central to Mill's principle, and who would grant the state the power to make reasoning adults take nontrivial actions that they have knowingly chosen not to take but which the state believes they should take in order to better themselves or make them happier. This is especially true in a nation as diverse and heterogeneous as the United States, where it would be difficult to reach a consen-

sus on what constitutes the kind of betterment of happiness that could properly be imposed. But even in more homogeneous democratic nations, Mill's core principle has become the conventional wisdom, at least in theory.

The best evidence of how influential Mill's principle has become—indeed how it is presumed by most thinkers—may be the repeated efforts of those who would compel a given action against protesting individuals to *rationalize* such force by reference to the rights of *others* rather than by reference to the good of the compelled individual. Examples abound, but one will suffice to make the general point. A distinguished colleague of mine would seek to justify mandatory seat belt laws by rejecting the argument that "only the belt-wearer's own welfare [is] at risk." He argues instead that "we [should] recognize that:

> refusing to buckle up endangers innocent third-parties—not only the dependent children of those who insist on not buckling, and not only those who end up paying higher insurance premiums and higher taxes so that others may enjoy the 'freedom' not to buckle, but also those who end up being injured or even killed in avoidable collisions when unbuckled drivers lost control of their cars. Quite simply, the seat-belt law prevents people from becoming loose objects when a car skids or veers into a tree or another vehicle; a belted driver is less likely to become a helpless spectator as his car is turned into an unguided missile. Surely that is a legitimate exercise of society's power to protect the innocent, not the entering wedge of tyranny."[2]

[2] Tribe, Lawrence, "The Seat-Belt Law Does Not Intrude on Freedom," *The Boston Globe,* March 22, 1986, p. 11.

While these observations may all have some small validity, they miss the big picture, namely, that seat belt laws have as their primary object the mandatory protection of the adult belt wearer. I, too, favor mandatory seat belt laws, but I recognize that support for such paternalistic legislation requires a compromise with Mill's principle. And it is a compromise I am prepared to make explicitly rather than uncomfortably try to squeeze seat belt laws into Mill's principle by invoking flying people and convoluted logic.

My compromise would establish two significant exceptions to Mill's principle. The first I call the "light pinky of the law" exception. The second I call the "thanks, I needed that" exception.

The "light pinky of the law" is at the opposite end of the continuum from the "heavy thumb of the law." It refers to regulations carrying minor financial penalties that are calculated to influence the behavior of people who really have no ideological objection to doing something that will help them but who don't care enough to take the step without some gentle nudging from the law. Seat belt laws are a perfect example. Most Americans will wear seat belts if the law requires them to, and will not wear them if the law does not require them to. That may seem silly to any believer in rational, cost-benefit analysis. Why, after all, should a $50 fine work when the compelling statistical and clinical evidence that safety belts save lives does not work? The answer lies in the indisputable fact that most people do not rationally calculate the costs and benefits of their actions, particularly when the benefit is hypothetical, long term, and statistically quite unlikely to come about. That is so even if the cost is as trivial as buckling up.

For a variety of reasons, the law often works where rational calculation does not. People do not generally want to be perceived—by themselves or others—as lawbreak-

ers even when the penalty is quite trivial. The law does have some kind of moral imperative that moves people to action and inaction more powerfully than the mere economic cost attached to violation. To be sure, if the law is overused, or is used immorally or foolishly, much of that moral imperative may be diluted. But as of now, for most citizens of Western democracies, the law does work, at least in situations where it is used to nudge people into doing something relatively cost-free that promises some potential benefit.

That is why I favor mandatory seat belt laws and other simple self-helping safety rules that are enforced with no more than small fines. But the "light pinky of the law" exception to Mill's principle should not, in my view, be expended beyond the narrow areas in which it is appropriate. To make my point, I will argue that mandatory motorcycle helmet laws—though similar in many respects to seat belt laws—may exceed the narrow bounds of my exception. The distinction may be subtle, but it is real: Most car drivers who would not wear seat belts if the law were silent are not conscientiously opposed either to seat belts or to the legal requirement that they be worn; they are simply lazy, forgetful, or unconcerned; they will do whatever the law nudges them to do. Most motorcycle riders who would not wear helmets in the absence of a law seem to be conscientiously opposed both to helmets and to the legal requirement that they wear them. If I am right about that difference, then mandatory helmet laws are really different from mandatory seat belt laws—at least for these cyclists who care deeply about their freedom to maim and kill themselves. For the conscientiously opposed cyclist—as distinguished from the car driver who couldn't care less whether he buckles up or doesn't—the legal requirement that he wear a helmet will be *perceived* as a fundamental denial of freedom rather than as

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a trivial nudge from the state. He will feel the "heavy thumb of the law" upon him rather than the "light pinky" which will be felt by the typical car driver who would not buckle up if he did not "have to."

But what about those few car drivers who feel as strongly about seat belt laws as the helmet-free cycle fanatics feel about the helmet laws? There are two ways of dealing with this minority: If we lived in a totally honest society where all defendants always told the truth about why they violated the law, there could be an exception written into the seat belt law for conscientious objectors who could show that they had thought through the issue and had come to an ideological position against buckling up (or against being compelled to buckle up). But because many people who were caught unbuckled would falsely claim that they were conscientious objectors when they were merely lazy, the exception might swallow up the rule. The other way of dealing with the small number of conscientious objectors is simply to regard the $50 fine as a tax or an insurance surcharge for engaging in behavior that is dangerous to themselves but for which society in general will have to pay. In other words, society would be telling these people that they are not *forbidden* from driving unbuckled; they must simply pay a small price for doing so.[3]

In no case, under the "light pinky of the law" exception, would I ever put a dissenter in prison—or punish him or her harshly—for refusing to take an action that would benefit only him or her. I would reserve serious penalties for those who squarely fit within Mill's principle.

This brings us to the second exception which, in my view, sometimes justifies mandatory seat belt laws designed to prevent injuries to those who would not other-

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[3] See *infra,* pp. 24–26.

wise buckle up, as well as some other limited state force designed to help only the compelled individual. The "thanks, I needed that" exception derives from the typical scene in old grade-B movies in which one character is out of control and the other character slaps him in the face to restore his control. The slapped character invariably says "Thanks, I needed that," thus demonstrating his after-the-fact appreciation of his friend's paternalistic assault. Even Mill would permit state compulsion to prevent the mentally ill—those not capable of rational thought—from harming themselves. But my exception would, perhaps, go a bit further. I would justify state compulsion to prevent—at least *temporarily*—a distraught but rational adult from killing (or otherwise inflicting irreversible serious harm on) himself or herself. I would regard it as morally permissible—indeed perhaps morally imperative—to try to prevent such self-inflicted harm if I could do so without unreasonable risk to myself or others. I would do so in the expectation that after the person calmed down and thought it through, he would thank me—perhaps not literally, but in his own mind. If I were wrong in a particular case, I would still not regret what I did, because the person has an eternity to be dead, and I would not regard myself as having denied him much if I deprived him of several additional hours or even days of death. If, on the other hand, I were to err on the side of not preventing the suicide of a person who would indeed have thanked me for doing so, then I would have contributed to denying him the rest of his life.

As with the motorcycle helmet example, I would not apply the "thank you" exception to rational adults who have carefully thought through the issue of suicide over a substantial period of time and have decided to end their lives.

It is somewhat more questionable whether seat belt laws fit comfortably within the "thank you" exception as well. The vast majority of car drivers who grumble over buckling up would certainly say thank you if they were involved in an accident in which their lives (or limbs) were saved by wearing the seat belt they would not have worn but for the law. But would they thank you after each car trip during which they were required to buckle up, or only when—and if—they were involved in an accident?

There is a considerable danger in expanding the "thank you" exception to a point where it could swallow up much of Mill's basic principle. A large number of hypothetical paternalistic compulsions—for example, those directed against smoking, overeating, or not exercising—could be justified by reference to a mirror-image version of the "thank you" exception. I can easily imagine angry people on their deathbeds complaining about the lack of compulsion that allowed them to smoke, eat, and couch-potato themselves to death. "Why didn't you *make* me stop smoking? I would be *thanking* you today if you had!" Well, one response to that hypothetical conversation is: "No, you wouldn't be thanking me if you were up and around and healthy, because you wouldn't appreciate—as you now do—the importance of not smoking. It required you to come face-to-face with death for you to understand why you should not have smoked, and now it is too late." The more persuasive answer is that there is a crucial difference between a brief one-shot act of compulsion such as preventing the distraught person from jumping out the window or taking poison, and a long-term, life-style-changing compulsion such as that required to make a person stop smoking, overeating, or not exercising. The state should be far more reticent about enforcing long-term, life-style-

changing compulsions on unwilling adults than it should be to risk not being thanked for a brief one-shot interference with an adult's liberty that may well be appreciated in retrospect.

I offer these two limited exceptions to Mill's principle to suggest that it is far better to argue about the limits of the principle itself than to accept it as an almost biblical (or constitutional) rule of action and then try to find ways to squeeze what are really exceptions into the parameters of the principle.

We live today in a far more interdependent society than the one in which Mill lived. Even in Mill's time and before, there were those who believed that "No man is an island, entire of itself."[4] Mill recognized, of course, that actions that cause harm to the actor often create ripples which touch others.[5] As we shall see later, however, Mill is not at his best in dealing with such matters of degree. Nor is it clear how Mill would have applied his principle to somewhat more complex and multifaceted problems than those he discussed.

Consider, for example, some current controversies on which Mill's principle may bear differently in today's America than it appeared to bear in Mill's England. Mill may or may not have known that smoking harms the lungs and heart of the smoker. But even had he known that fact, he would still not countenance legislation banning smoking. He might, perhaps, have approved of labeling laws designed to give the smoker information necessary to decide whether the present pleasure of the

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[4] John Donne, "Meditation XVII," in *The Norton Anthology of English Literature,* Vol. I (New York: M. H. Abrams, 1979), p. 1108.

[5] See *infra,* pp. 24–25.

puff was worth the possible pain of the future. Today we know that smoking hurts not only the lungs and hearts of smokers, but also the health of nonsmokers. That might well have led Mill to conclude that adults have the right to *inhale* but not to *exhale*—at least not in the presence of nonconsenting adults or children. Just as your right to swing your fist ends at the tip of my nose, so, too, your right to puff on a cigarette ends at the edge of my nostrils.

In Mill's day—indeed until quite recently—pornography and obscenity were regarded as "moral" issues akin to masturbation. Both were thought to be bad for the soul, the psyche, and the sexuality of the viewer or reader. As such, Mill would find no basis for preventing adults from indulging in smut in the privacy of their bedrooms. Now, however, we are told by some feminists that those who view or read pornography will be more likely to engage in violent actions against non-consenting women. This is not the place to rehearse the *empirical* debate over whether pornography causes rape or other violence toward women. The issue here is a *normative* one: If it could be shown that pornography did cause harm not only to its consumers but also to others who do not consent to its availability, may the state properly prevent its consumption even in private?[6]

A similar controversy, but with an interesting twist, surrounds the state regulation of addictive drugs, especially heroin. By criminalizing heroin—a chemical that harms the user but does not itself make him or her more prone to

[6] Mill addressed "offenses against decency" (pages 108–109), but he contented himself with the conventional distinction between indecent acts done in public and in private.

violence—the state increases the cost of obtaining the highly addictive drug. The "market" cost of heroin would be quite low if it were available by medical prescription. But because it is illegal, its cost is many times higher. This increased cost causes most heroin addicts to commit many more acquisitive and predatory crimes against innocent people than they might otherwise commit. (I say "otherwise," because many heroin addicts have long criminal backgrounds.) Accordingly, the criminalization of heroin violates Mill's principle in two ways: First, it employs the power of society to compel (or at least try to compel) the adult user to forbear from doing something because not doing it would be better for him or her; second, by doing so, it causes harm to others.

This may sound like a simplistic analysis since the causes of crime and the effects of addiction are so complex and varied. Moreover, this analysis is not as clearly applicable to other drugs, such as crack cocaine, which may itself make the user more prone to violence. But the heroin example makes an important point about the misuses of the criminal sanction.

Mill spoke indirectly to this issue in the context of prostitution and gambling. He concluded that "fornication" and "gambling" must be tolerated, but then he asked whether a person should "be free to be a pimp, or to keep a gambling-house?" He would probably have come to the same conclusion and asked the same question about the drug user (at least those who retain the power of rational thought) and the drug seller. Mill regarded the question of such professional accessories as "one of these which lie on the exact boundary line." It was clear to him, as it remains clear today to most civil libertarians—though not to all feminists—that the case for criminalizing the professional

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