

PHIL 168: Philosophy of Law  
Winter 2008; David O. Brink  
Handout #7: Millian Principles

The liberal tradition in moral and political philosophy recognizes individual rights against the state and other individuals. In this sense of liberalism, we (those in Western liberal democracies) are all liberals. John Stuart Mill (1806-73) has exerted an enormous influence on our understanding of liberalism and, in particular, our understanding of the moral limits of the state and the criminal law. Mill's On Liberty (1859) is the most influential statement of his liberal principles.

Mill begins by distinguishing old and new threats to liberty. The old threat to liberty is found in traditional societies in which there is rule by one (a monarchy) or a few (an aristocracy). Though one could be worried about restrictions on liberty by benevolent monarchs or aristocrats, the traditional worry is that when rulers are politically unaccountable to the governed they will rule in their own interests, rather than the interests of the governed. In particular, they will restrict the liberties of their subjects in ways that benefit the rulers, rather than the ruled. It was these traditional threats to liberty that the democratic reforms of the Philosophical Radicals were meant to address. But Mill thinks that these traditional threats to liberty are not the only ones to worry about. He makes clear that democracies contain their own threats to liberty – this is the tyranny, not of the one or the few, but of the majority (i 1-5). Mill sets out to articulate the principles that should regulate how governments and societies, whether democratic or not, can restrict individual liberties (i 6).

### **MILLIAN PRINCIPLES**

In an early and famous passage Mill offers one formulation of his basic principles concerning liberties.

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. 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 case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone 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 [i 9].

Notice that Mill is concerned with articulating principles to apply to restrictions on liberty in various contexts. He is perhaps most interested in cases where the state uses civil or criminal law to forbid conduct and applies sanctions for noncompliance. But he is also interested in other sorts of case – including those in which social groups use the threat of condemnation and ostracism to limit liberty and ensure conformity and those in which one individual restricts the liberty of another. Having noted these complexities, let's focus, for the time being, on the central case of legal prohibition by the state.

In this passage, Mill distinguishes paternalistic and moralistic restrictions of liberty from restrictions of liberty based upon the harm principle.

- A's restriction of B's liberty is **paternalistic** if it is done for B's own benefit.
- A's restriction of B's liberty is **moralistic** if it is done to ensure that B acts morally or not immorally.
- A's restriction of B's liberty is an application of the **harm principle** if A restrict B's liberty in order to prevent harm to someone other than B.

Here, Mill seems to say that a restriction on someone's liberty is legitimate if and only if it satisfies the harm principle (cf. iv 1-4, 6 v 2). Later, he distinguishes between genuine harm and **mere offense**. In order to satisfy the harm principle, an action must actually violate or threaten imminent violation of those important interests of others in which they have a right (i 12; iii 1; iv 3, 10, 12; v 5). So he seems to be saying that the harm principle is always a good reason for restricting liberty, but that mere appeals to morality, paternalism, or offense are never good reasons for restricting liberty.

### MILL'S CATEGORICAL APPROACH

As this recounting of Mill's principles suggests, his defense of individual liberties appears to be part of what might be called a **categorical approach**. To decide whether an individual's liberty ought to be protected, we must ascertain to which category the potential restriction of liberty belongs. The main categories for potential restrictions are as follows.

- Offense (mere offense)
- Moralism (mere moralism)
- Paternalism (mere paternalism)
- Harm Principle

The potential restriction is permissible if and only if it is an application of the harm principle; if not, the restriction is impermissible and the liberty must be protected.

Sometimes Mill suggests that the harm principle is equivalent to letting society restrict other-regarding conduct (i 11; iv 2). On this view, conduct can be divided into self-regarding and other-regarding conduct. Regulation of the former is paternalistic, and regulation of the latter is an application of the harm principle. So on this view it is never permissible to regulate purely self-regarding conduct and always permissible to regulate other-regarding conflict. But this is over-simple. Some other-regarding conduct causes mere offense, not genuine harm (iv 3, 12). So Mill cannot equate harmful behavior and other-regarding behavior and cannot think that all other-regarding behavior may be regulated.

It is generally thought that by applying this categorical approach to liberty and its permissible restrictions Mill is led to offer a fairly extensive defense of individual liberties against interference by the state and society. In particular, it is sometimes thought that Mill recognizes a large sphere of self-regarding conduct which it is impermissible for the state to regulate. We might characterize this sphere of protected liberties as Mill's conception of **liberal rights**. On this reading, Mill is deriving his conception of liberal rights from a prior commitment to the categorical approach and, in particular, to the harm principle.

### **MILL'S ANTI-PATERNALISM**

Why the blanket prohibition on paternalism? Mill offers two explicit arguments against paternalism.

First, state power is liable to abuse. Politicians are corruptible and will use a paternalistic license to limit the freedom of citizens in ways that promote their own interests and not those of the citizens whose liberty they restrict (v 20-3).

Second, even well intentioned rulers will misidentify the good of citizens. Because an agent is a more reliable judge of his own good, even well intentioned rulers will promote the good of the citizens less well than would the citizens themselves (iv 4, 12).

These arguments provide no **principled** objection to paternalism -- no objection to **successful** paternalistic restrictions on B's liberty that do benefit B.

Though these are Mill's explicit arguments against paternalism, he has the resources for another, stronger argument. These resources are clearest in his defense of free speech. Indeed, Mill thinks that there is general agreement on the importance of free speech and that, once the grounds for free speech are understood, this agreement can be exploited to support a more general defense of individual liberties (i 16; iii 1).

### **MILLIAN PRINCIPLES AND FREEDOM OF EXPRESSION**

Mill's discussion of censorship in Chapter ii focuses on censorship whose aim is to suppress false or immoral opinion (ii 1-2). He mentions four reasons for maintaining free speech and opposing censorship.

1. A censored opinion might be true (ii 1-20, 41).
2. Even if literally false, a censored opinion might contain part of the truth (ii 34-39, 42).
3. Even if wholly false, a censored opinion would prevent true opinions from becoming dogma (ii 1-2, 6, 7, 22-23, 43).
4. As a dogma, an unchallenged opinion will lose its meaning (ii 26, 43).

The first two claims represent freedom of expression as instrumentally valuable; it is valuable, not in itself, but as the most reliable means of producing something else that Mill assumes is valuable (either extrinsically or intrinsically), namely, true belief. Of course, the most reliable means of promoting true belief would be to believe everything. But that would bring a great deal of false belief along too. A more plausible goal to promote would be something like the ratio of true belief to false belief. Freedom of expression might then be defended as a more reliable policy for promoting the ratio of true belief to false belief than a policy of censorship. This rationale for freedom of expression is echoed by Justice Holmes in his famous dissent in Abrams v. United States when he claims that the best test of truth is free trade in the marketplace of ideas.

But this rationale for freedom of expression is pretty weak. We would be on good ground in censoring flat-earthers. In any case, if, even if only contrary to fact, we had extremely knowledgeable and reliable censors who censored all and only false beliefs, this rationale for freedom of expression would provide no argument against censorship. We might say that this rationale for freedom of expression provides no objection to **successful** or **competent** censorship.

However, Mill also suggests that freedom of expression is needed to keep true beliefs from becoming dogmatic. In this suggestion, I think, lie the resources for a more robust defense of freedom of expression, in part because it is intended to rebut the case for censorship even on the assumption that all and only false beliefs would be censored (ii 2, 21). Mill's argument is that freedoms of thought and discussion are necessary conditions for fulfilling our natures as progressive beings (ii 20). Here Mill is appealing to his perfectionist assumptions about happiness to defend expressive liberties. In On Liberty Mill claims that his defense of liberty relies on claims about the happiness of people as progressive beings.

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being [i 11].

Mill thinks that it is our deliberative capacities, especially our capacities for practical deliberation, that mark us as progressive creatures and that, as a result, the principal ingredient of our happiness or well-being must exercise these deliberative capacities. At its most general, practical deliberation involves reflective decision-making. In On Liberty Mill thinks of practical deliberation in terms of capacities to form, assess, choose, and implement projects and goals.

He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being [iii 4]?

Mill makes similar claims about the role of deliberative capacities in the happiness of progressive beings in his discussion of higher pleasures in ch. ii of Utilitarianism; there he contrasts the examined life Socrates led and the life of a contented swine and accords the former incomparably greater value (U: ii 6).

Even if we agree that these deliberative capacities are unique to humans or that humans possess them to a higher degree than other creatures, we might wonder in what way their possession marks us as progressive beings or their exercise is important to human happiness. Mill thinks an account of human happiness ought to reflect the kinds of beings we are or what is valuable about human nature. Though he is not as clear about this as one might like, his discussion of responsibility in A System of Logic ("Of Liberty and Necessity") suggests that he thinks that

humans are responsible agents and that this is what marks us as progressive beings. There he claims that capacities for practical deliberation are necessary for responsibility. In particular, he claims that moral responsibility involves a kind of self-mastery or self-governance in which one can distinguish between the strength of one's desires and their suitability or authority and in which one's actions reflect one's deliberations about what is suitable or right to do (SL: VI, ii, 3). Non-responsible agents, such as brutes or small children, appear to act on their strongest desires or, if they deliberate, to deliberate only about the instrumental means to the satisfaction of their strongest desires. By contrast, responsible agents must be able to deliberate about the appropriateness of their desires and regulate their actions according to these deliberations. If this is right, then Mill can claim that possession and use of our deliberative capacities mark us as progressive beings and constitute the principal ingredient in human happiness.

This puts us in a position to explain Mill's claim that the value of freedom of expression lies in keeping true beliefs from becoming dogmatic. This claim reflects Mill's view that freedoms of thought and discussion are necessary conditions for fulfilling our natures as progressive beings (ii 20). We can see Mill appealing to a familiar distinction between **true belief**, on the one hand, and **knowledge** or **justified true belief**, on the other hand. Progressive beings seek knowledge or justified true belief, and not simply true belief. Whereas the mere possession of true beliefs need not exercise one's deliberative capacities, because they might be the product of indoctrination, their justification would; one exercises deliberative capacities in the justification of one's beliefs and actions that is required for theoretical and practical knowledge. This is because justification involves comparison of, and deliberation among, alternatives (ii 6, 7, 8, 22-23, 43). Freedoms of thought and discussion are essential to the justification of one's beliefs and actions, because individuals are not cognitively self-sufficient (ii 38, 39; iii 1). Sharing thought and discussion with others, especially about important matters, improves one's deliberations. It enlarges the menu of options, by identifying new options worth consideration, and helps one better assess the merits of these options, by forcing on one's attention new considerations and arguments about the comparative merits of the options. In these ways, open and vigorous discussion with diverse interlocutors improves the quality of one's deliberations. If so, censorship, even of false belief, can rob both those whose speech is suppressed and their audience of resources that they need to justify their beliefs and actions (ii 1).

It is important not to overstate the significance of this argument against censorship. Deliberative values do not always speak in favor of expanding one's option set. Cognitively limited agents cannot consider all logically possible options, and careful consideration of many options -- especially irrelevant options and options known to have failed -- is likely to retard, rather than advance, their deliberations. More options are not always better than fewer. Nonetheless, it is enough for present purposes to note that Mill's appeal to deliberative values explains why it is often wrong to censor even false beliefs without implying that censorship is always wrong.

## **THE PERFECTIONIST DEFENSE OF BASIC LIBERTIES**

Though important in its own right, Mill's defense of freedom of thought and discussion provides the resources for an argument for various basic liberties. The deliberative rationale for freedoms of thought and discussion is a special case of a more general defense of basic liberties of thought and action that Mill offers in ch. iii of *On Liberty*. A good human life is one that exercises one's higher capacities (i 11; ii 20; iii 1-10); a person's higher capacities include her deliberative capacities, in particular, capacities to form, revise, assess, select, and implement her own plan of life. This kind of self-government requires both positive and negative conditions. Among the

positive conditions it requires is an education that develops deliberative competence (v 12-15). Among the negative conditions that self-government requires are various liberties of thought and action. If the choice and pursuit of projects and plans is to be deliberate, it must be informed as to the alternatives and their grounds, and this requires intellectual freedoms of speech, association, and press. If there is to be choice and implementation of choices, there must be liberties of action such as freedom of association, freedom of worship, and freedom to choose one's occupation.

Indeed, liberties of thought and action are importantly related. Mill values diversity and experimentation in life-styles not only insofar as they are expressions of self-government but also insofar as they enhance self-government. For experimentation and diversity of life-style expand the deliberative menu and bring out more clearly the nature and merits of options on the menu (ii 23, 38; iii 1). But diversity and experimentation presuppose liberties of action, and in this way liberties of action, as well as thought and discussion, are essential to the full exercise of deliberative capacities.

This interpretation provides Mill with a robust rationale for various liberties of thought and action; they are important as necessary conditions for exercising our deliberative capacities and so for producing the chief ingredients of human happiness.

### LIMITS ON LIBERTY

But it is also important to see that Mill is not treating liberty as an intrinsic good or endorsing an unqualified right to liberty.

First, he can distinguish the importance of different liberties in terms of their role in practical deliberation. Some liberties are **more central** to the exercise of deliberative capacities than others. It seems plausible that liberties of speech, association, worship, and choice of profession are more important than liberties not to wear seat belts or to dispose of one's gross income as one pleases, because restrictions on the former interfere more than restrictions on the latter with deliberations about what sort of person to be. If so, Millian principles, properly understood, defend rights to **basic liberties**, rather than a right to liberty per se.

Second, even the exercise of basic liberties is limited by the harm principle, which justifies restricting liberty to engage in actions that cause harm or threaten imminent harm to others.

Third, notice how Mill values basic liberties. To account for the robust character of the argument, it is tempting to suppose that Mill thinks these basic liberties are themselves important intrinsic goods. But limitations in the scope of Mill's argument show that this cannot be right.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. ... Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion [i 10].

These restrictions make no sense if basic liberties are dominant intrinsic goods, for then it should always be valuable to accord people liberties -- a claim that Mill here denies. These restrictions make perfect sense if the liberties in question, though not intrinsically valuable, are necessary conditions to realizing dominant goods, for then there will be, or need be, no value to liberty where, as in these circumstances, other necessary conditions for the realization of these higher values -- in particular, sufficient rational development -- are absent.