

MILL'S "VERY SIMPLE PRINCIPLE":

LIBERTY, UTILITARIANISM AND SOCIALISM

M I C H A E L G R E N F E L L

submitted for degree of Ph.D.

London School of Economics and Political Science

UMI Number: U048607

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U048607

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

THESES

F

6815

x211118590

ABSTRACT OF THESIS

MILL'S "VERY SIMPLE PRINCIPLE": LIBERTY, UTILITARIANISM AND SOCIALISM

- 1 The thesis aims to examine the political consequences of applying J.S. Mill's "very simple principle" of liberty in practice: whether the result would be free-market liberalism or socialism, and to what extent a society governed in accordance with the principle would be free.
- 2 Contrary to Mill's claims for the principle, it fails to provide a clear or coherent answer to this "practical question". This is largely because of three essential ambiguities in Mill's formulation of the principle, examined in turn in the three chapters of the thesis.
- 3 First, Mill is ambivalent about whether liberty is to be promoted for its intrinsic value, or because it is instrumental to the achievement of other objectives, principally the utilitarian objective of "general welfare". The possibility that he might mean the latter implies that, because liberty and utilitarian objectives are at least potentially incompatible, application of the principle does not preclude the sacrifice of individual liberty in the pursuit of general welfare, and therefore does not preclude paternalistic (and illiberal) state socialism.
- 4 Arguments advanced by commentators, notably Gray, to suggest that there is no inconsistency between the liberal and utilitarian objectives in Mill's writing, are not sustainable.
- 5 Secondly, the principle's criterion for sanctioning interference in liberty - the prevention of "harm to others" - is so vague and elastic as to be compatible with almost any degree of interventionism and indeed totalitarianism. Because of the interdependence of men in society, there is virtually no limit to the classes of activity which can be said to cause harm to others, and hence no limits to the interference sanctioned by Mill's principle. Thus the principle does not preclude the suppression of legitimate economic activity by a socialist state committed to preventing economic "harm".
- 6 Attempts by commentators such as Rees and Ten to show that Mill's use of "harm" is narrower and more specific, are not supported by either textual or logical analysis.
- 7 Thirdly, Mill's principle fails to make clear whether "liberty" should be understood to mean classical ("negative") liberty or some form of "positive liberty" such as ability/power. It therefore does not preclude the adoption of socialist measures to promote "ability". On examination, "ability" can be seen to be an entirely different phenomenon from liberty. The promotion of "ability" (attainable through central allocation of material resources) can only be undertaken at the expense of liberty, particularly economic liberty. The justification for safeguarding economic liberty lies in respect for private property rights, the absence of which entails enslavement and inhumanity.
- 8 If a principle were to be framed avoiding these three ambiguities, it could serve as a firmer foundation for the protection and promotion of liberty.

C O N T E N T S

GUIDE TO SOURCE LISTS

A NOTE ON TERMINOLOGY: LIBERTY, LIBERALISM AND LAISSEZ-FAIRE

INTRODUCTION

CHAPTER ONE - WHY FREEDOM?

CHAPTER TWO - PREVENTING HARM TO OTHERS

CHAPTER THREE - THE REAL MEANING OF "LIBERTY"

CONCLUSION

BIBLIOGRAPHY

GUIDE TO SOURCE LISTS

The published sources consulted in writing this thesis are listed in two ways.

First, at the back of the thesis, there is a full bibliography of all works consulted, arranged in alphabetical order according to author.

Secondly, each chapter of the thesis (together with the introduction and conclusion) is followed by a list of the citations in that chapter, with numerical cross-referencing to the text of the chapter.

The following points should be noted about the method of citation in each list.

- (a) Full citations appear in the following way:
author (surname italicised); followed by title of work (italicised if more than one work by the same author is cited in the list); followed by, in parentheses, publisher, date of publication and (if different) date when the work was first published; followed by page number.
Thus:
Thomas *Hobbes*; *Leviathan*; Everyman (London 1914/1651); page 66.
- (b) Where only the name of the author (perhaps with the title of the work) and the page number are given, the full citation appears earlier in the list.
- (c) Where *only* a page number is given, the work cited is:
John Stuart *Mill*; *On Liberty*; Penguin (Harmondsworth 1974/1859).

A NOTE ON TERMINOLOGY
LIBERTY, LIBERALISM AND LAISSEZ-FAIRE

I always think it's comical
 How Nature does contrive
That every boy and every gal
 That's born into the world alive
Is either a little Liberal
 Or else a little Conservative.

W.S. Gilbert, *Iolanthe*.

Anyone who attempts to write about political liberty, which is the subject of this thesis, finds his task compounded by a terminological difficulty. Not only are the issues themselves a matter of controversy, but so too is the very language in which the issues are debated. For one reason or another, various crucial words in this area have come to be used by some people to mean things quite different from - or even the exact opposite of - what they mean when used by other people. This is particularly true of the words "liberalism", "laissez-faire" and "liberty".

First, "liberalism". Not everyone likes to call himself a "liberal". Ronald Reagan, when President of the United States, spoke disparagingly of liberalism as "the L-word"^a. For him, and generally in modern American parlance, "liberalism" is identified with a "progressivist" reformist position which holds that liberty, and particularly economic liberty ("market forces") should be tempered with elements borrowed from socialism and social-democracy: government interventionism to promote social objectives such as equality and welfare. It is this definition of liberalism, widely used in British political discourse as well, which enables Senator Edward Kennedy in America and *The Guardian* newspaper in London to be described (by friend and foe) as "liberal"^b and Mr Peter Walker to have been characterised as one of the more "liberal" members of Mrs Margaret Thatcher's governments - by comparison with, say, Sir Keith Joseph or Mrs Thatcher herself.

However in this thesis the terms "liberalism" and "liberal" will be taken to mean something altogether different, indeed virtually the opposite of "*Guardian* liberalism". The thesis will use "liberalism" in the traditional, classical sense - meaning a set of beliefs tending towards the promotion of political arrangements which recognise individual liberty as the supreme political value, not to be subordinated to the pursuit of "social" objectives like welfare or equality. Liberalism in *this* sense holds that the range of functions of the state ought accordingly to be limited. It insists,

moreover, that individual liberty must extend to the economic sphere, so that free enterprise, the operation of markets, and capitalism, are preferred to state ownership and *dirigisme*. It will be appreciated that on this definition the political approach of President Reagan, summed up in his own words as being that "government is not the solution to our problem; government is the problem"^e, was a lot more liberal than that of Senator Kennedy, while in Britain what is called "Thatcherism" is thoroughly infused with the tenets of liberalism. This is what Lord Harris of High Cross, a Thatcherite sympathiser, meant when he said on BBC radio in 1984 that Mrs Thatcher was "held back by the conservative element in the Tory Party, because in my view she is the liberal element"^d.

The point is perhaps most strikingly demonstrated in the thought of, and in the contemporary reactions to, Friedrich von Hayek, surely the twentieth century's foremost exponent of liberalism (on the definition adopted by this thesis). He himself has bemoaned the way that the term "liberalism", as it "in the past was widely and correctly understood", has "as a supreme but unintended compliment been appropriated by opponents of this ideal"^e. Hayek is self-avowedly a liberal. At the same time he once recommended "another 20 years of Mrs Thatcher" in Britain and acknowledged that she "agrees with my basic concepts"^f. The compliment was mutual, and Mrs Thatcher was always been happy to associate herself with Hayek's thought^g. So too Ronald Reagan who, when President, was known to admire Hayek, and cited with approval Hayek's political tract *The road to serfdom*^h. All this in spite of Mr Reagan's professed hostility to "the L-word" and his eagerness to identify himself with conservatism; in spite, also, of Mrs Thatcher having been leader of Britain's Conservative Party. To Hayek the liberal what they called themselves did not matter; their "basic concepts" and his were the same; *ergo* Reaganism and Thatcherism were, properly speaking, liberal programmes. And here lies the explanation for Lord Harris's remark that Mrs Thatcher was "held back by the conservative element". For conservatism, by its nature hostile to any doctrinal commitment, sits uneasily with the doctrinal commitment to liberty, free markets and limited government which is implicit in Hayekian - and hence Thatcherite - liberalism. In its respect for tradition tempered by organic change, conservatism rejects the promotion of abstract ideas such as freedom. This is what Hayek means when he describes conservatism as "contentless" and when he explains "why I am not a conservative"ⁱ.

It is easy to trace the historical reasons for the term liberalism coming to be appropriated, as Hayek puts it, by opponents of the free market/limited government ideal. In the United States, as S.M. Lipset has said, "the term 'liberal', first used to describe the ideology of the American Revolution, changed its meaning when it became associated with the New Deal and became the American variant of social democracy"^j. In Britain the

terminological change can be attributed to the evolution of the Liberal Party from its Gladstonian days of free trade and "retrenchment", through Lord Rosebery's 1903 Cheltenham speech calling for a "clean slate" for the Party*, to the welfarist "New Liberalism" of Lloyd George and his People's Budget - and, eventually, in its death throes to electoral alliance in the 1980s with a self-proclaimed social-democratic party.*

Would it not be better, then, to avoid the terminological confusion and abandon the term liberal in its free market/limited government sense? The answer must be no, for two main reasons. One is that the New/social-democratic/*Guardian* "liberals" do not deserve to have ceded to them a noble name which, to repeat Hayek's point, they have illegitimately appropriated. The other, more practical, reason is simply that no other term will do. Some people like to describe the free-market version of liberalism as "nineteenth-century liberalism", reflecting its Gladstonian connotations. But doing so can have the unfortunate effect (fortunate to some) of conjuring up images of workhouses, squalor and children down the mines - the less attractive side of pre-welfarist Victorian Britain. It also enables it to be derided as outdated and hence irrelevant to modern times, whereas many liberals (in the free-market sense) regard their philosophical ideals of liberty as timeless and universal. (By the same token, one might just as well call socialism "nineteenth-century socialism", on account of its provenance from the teachings of Marx, Robert Owen and so on.) Consequently, "nineteenth-century liberalism" is not a particularly happy expression. Equally unfortunate is the use of the term "libertarianism" for the free-market version of liberalism. "Libertarianism" is actually the term which some free-market liberals themselves prefer - Robert Nozick for instance² - since they are unwilling to associate themselves with the dreaded "L-word". However it is actually an inaccurate use of the word. Libertarianism, properly speaking, entails opposition not just to legal coercion but to *moral* constraints as well^m, thus confusing liberty with licence (as to which see chapter one, section 3.1 of this thesis).

* But as early as 1884 Herbert Spencer had detected a trend by which, whereas "in past times Liberalism habitually stood for individual freedom versus State coercion... Liberalism, getting more and more into power, has grown more and more coercive". He noted that a Conservative organisation was adopting the motto "Individualism versus Socialism", and predicted (with remarkable insight) that "if the present drift of things continues, it may by and by really happen that the Tories will be the defenders of liberties which the Liberals, in pursuit of what they think popular welfare, trample under foot". (Herbert *Spencer*; *The man versus the state*; Penguin (Harmondsworth 1969/1884); pages 66 and 81.)

So what remain are the terms liberalism and liberal. And in this thesis *"liberalism" will be used to mean a commitment to individual liberty, free markets and limited government ("Thatcherite" liberalism rather than "Guardian" liberalism), and "liberals" to mean those who advocate this view.*

The second terminological problem is with "laissez-faire". "Laissez-faire" is often associated with crude, and easily caricatured, economic theory. As Hayek notes, it "never provided a criterion by which one could decide what were the proper foundations of government" and the expression "laissez-faire" is "more popular with the enemies than with the defenders of a free system"^o. For these reasons it would be preferable for this thesis to avoid it altogether, and certainly not to use it as synonymous with liberalism. The trouble is that several major writers on Mill do use "laissez-faire" in this sense, including John Gray^a, C.L. Ten^o and Gertrude Himmelfarb^p. Perhaps more importantly, Mill himself uses the term, with approval, to define the proper scope of governmental interference^a, and indeed has been credited with being one of the first English theorists to do so^r. On account of this, but with reluctance, *this thesis will use the term "laissez-faire" occasionally when what is really meant is liberalism.*

There remains the third terminological problem, what is meant by the word "liberty". This, however, is not merely a matter of semantics, but of substance. It is a question which requires a great deal more consideration than there is space for in this Note. Chapter three of the thesis will be devoted to such a consideration.

SOURCES

- a Various reports in *The Times* (London), 7th September 1988 (page 12), 14th October 1988 (page 11) and 29th October 1988 (page 7).
- b See, respectively, *Now!* magazine (London), 6th June 1980 (page 34) and 4th July 1980 (page 32).
- c *Time* magazine, Atlantic edition (Amsterdam/New York), 30th January 1989 (page 11).
- d Hugo Young and Anne Sloman; *The Thatcher phenomenon*; BBC (London 1986); page 136; first broadcast on BBC Radio 4, 9th June 1985.
- e F.A. Hayek; *Rules and order*; page 62 - in: F.A. Hayek; *Law, legislation and liberty*; Routledge and Kegan Paul (London 1982/1973).
- f "Sage of the free-thinking world" in *The Times* (London), 9th May 1985.
- g Madsen Pirie; "Why F.A. Hayek is a conservative" - in: Eamonn Butler and Madsen Pirie (editors); *Hayek on the fabric of human society*; Adam Smith Institute (London 1987); page 147.
- h *Time* magazine, Atlantic edition (Amsterdam/New York), 23rd January 1989 (page 26).
- i F.A. Hayek; "Postscript: why I am not a conservative" - in: F.A. Hayek; *The constitution of liberty*; Routledge (London 1960).
- j *The Times* (London), 29th October 1988 (page 7).
- k H.V. Emy; *Liberals, radicals and social politics - 1892 to 1914*; Cambridge University Press (Cambridge); page 138.
- l Robert Nozick; *Anarchy, state and utopia*; Basil Blackwell (Oxford 1974); page 33.
- m Roger Scruton; *A dictionary of political thought*; Pan Books/Macmillan (London 1983); page 271.
- n John Gray; *Mill on liberty: a defence*; Routledge and Kegan Paul (London 1983); page 17.
- o C.L. Ten; *Mill on liberty*; Clarendon Press (Oxford 1980); page 60.
- p Gertrude Himmelfarb; "Editor's introduction" - in: J.S. Mill; *On Liberty*; Penguin (Harmondsworth 1974); page 47.

- q John Stuart *Mill*; Principles of Political Economy,
book V, chapter 11, section vii; Penguin
(Harmondsworth 1970/1848); page 314.
- r Abram L. *Harris*; Economics and social reform;
Harper (New York 1958); page 32.

INTRODUCTION

INTRODUCTION

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.

John Stuart Mill, *On Liberty*¹.

Mill's principle of liberty is not "very simple" at all. The terse, emphatic maxim quoted above, upon which the whole political philosophy of *On Liberty* is supposed to rest, in fact conceals a host of complexities and ambiguities. This ought not to be wondered at, for Mill's project in formulating the principle was highly ambitious. It was an attempt to supply a coherent criterion for determining in practice whether, and when, an individual's freedom might legitimately be restrained. In any given situation, the principle was to furnish a ready-made answer to the "practical question" of "where to place the limit between individual independence and social control"². It thus aimed to define and delineate the proper scope of human freedoms and, Mill insisted,

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified.³

Unfortunately, however, the nature of the "free society" which Mill envisages is far from clear. In order to "illustrate" his principle and bring it into "greater

clearness"⁴, Mill offers some examples of how it might be applied in practice. Yet, if anything, these examples seem to obscure the vision more than they clarify it. Mill's free society, he tells the reader, would be one where smoking⁵, gambling and fornication⁶ were permitted, while heavy taxation was levied on alcohol consumption to discourage drunkenness⁷. There would be few nationalised industries - Mill opposes state ownership of railways, for example⁸ - and there would be no state schools, although the education of children would be compulsory, and the government would give grants to parents who could not afford school fees⁹. People might "rightfully be compelled" to perform "certain acts of individual beneficence", including "interposing to protect the defenceless against ill usage"¹⁰. Sunday trading would generally be forbidden¹¹; and free trade would on the whole be encouraged, although "on grounds different from, though equally solid with, the principle of individual liberty asserted in this essay"¹².

A selection of modern responses to Mill bears witness to this lack of clarity. According to Geraint Williams, Mill's attitude to "the socialist alternative" was, in 1848, "sympathetic if critical"¹³; and John Gray has written of Mill's "vision of a decentralised market socialism" such as "has been attempted... in Yugoslavia"¹⁴. Yet Mill has also been cited with apparent approbation by Mrs Margaret Thatcher who, speaking more than ten years before she became prime minister, declared Mill's views on "choice of way of life" to be "as relevant as ever"¹⁵. John Gray insists that Mill's principle "contains no commitment to any principle of laissez-faire"¹⁵ and C.L. Ten claims to see "no necessary connection" between Mill's views and "a doctrine of economic laissez-faire"^{16A}. Gertrude Himmelfarb, on the other hand, contends that "Mill, after all, was a laissez-fairist"¹⁷.

The object of this thesis will be to try to disentangle all the confusion, and so to discern the real character of what is being prescribed by Mill's principle of liberty. The principle is intended to have practical effect: it is, in Mill's words, a response to a "practical question"²; and the whole of the last chapter of *On Liberty* is devoted to the "applications" of the principle^{17A}. This thesis will endeavour to ascertain what are the consequences of applying Mill's principle in practice. Mill claims that applying the principle results in a "free society"³. This thesis will examine whether, and to what extent, a society governed in accordance with the principle would, indeed, be free.

Before proceeding any further, a minor caveat ought perhaps to be inserted. Mill's principle, of course, addresses itself to two distinct issues regarding the "dealings of society with the individual". One is what it describes as coercion "in the form of legal penalties": that is, interference with individual liberty by the state, the government and the law. This might be termed the "political" aspect of the principle. The other aspect relates rather to the individual's subjection to, and independence from, more general "social" pressures, the "moral coercion of public opinion", an issue which does not really have a bearing on the sort of political arrangements which are to obtain in society. At least one commentator has seen this latter aspect as the *main* concern of Mill's principle, which (he writes) was not chiefly directed towards limiting the acts of public authorities¹⁸, while Mill himself describes the tyranny of social pressures as being "more formidable than many kinds of political oppression"². However, this thesis is to be a study in political theory, and it is concerned primarily with Mill's attitude to political liberty. Accordingly, it will deal almost exclusively with the former, political, aspect of the principle; and the latter,

"social", aspect will be largely outside its ambit (except insofar as it may help shed light on the political issue).

It is, then, the nature of Mill's political vision which is under scrutiny. Is it a prescription for liberalism and "laissez-faire"*, for socialism, or for what? In examining this, the thesis will concentrate in particular on three ambiguities arising from the very simple principle. These are: first, the extent to which liberty is to be promoted for its intrinsic value, or is rather to be seen merely as instrumental to some other, ulterior "end"; secondly, the meaning of the limitation on liberty which the principle proposes, expressed by the words "to prevent harm to others"; and, thirdly, the meaning of "liberty" itself as envisaged by the principle.

The first of these, the question of liberty as an intrinsic or an instrumental value, will have to be explored in order to understand clearly how effective Mill's principle would be in safeguarding liberty (and, therefore, just how "free" would be the society which it prescribes). For if individual liberty is to be protected simply as a means to another, prior objective, then there would be absolutely no reason not to jettison liberty the moment a more effective way of attaining that same objective were found. The point is thus one of fundamental importance, and yet within just two paragraphs after enunciating his apparently simple principle, Mill muddies the waters. Having declared that the principle of liberty is intended to "govern absolutely"¹, and that an individual's independence "is, of right, absolute"², he then sows confusion by adding that he repudiates the idea of liberty as an "abstract right... a thing independent of utility"³. In other words, he seems to add the qualification that liberty is to govern only if, and insofar as, it promotes a further value, utility - the

* as to which terms, see the Note on Terminology at the beginning of the thesis.

objective, or at least a variant of the objective, sought by the utilitarian movement. Some critics have chosen to ignore this qualification altogether²⁰, while others have seen it as negating almost entirely the principle's tendency to promote liberty²¹. The picture is further obscured by the way that Mill elsewhere seems to justify liberty not for its own sake, nor yet as instrumental in promoting the utilitarian ideal, but on other grounds, such as its unique ability to preserve peace between men²², or (incongruously with other elements of his writing) as a function of scepticism in Mill²³. It will be necessary to consider which, if any, of these reasons for liberty is pre-eminent. Chapter one of this thesis attempts to do this.

The second source of confusion in understanding the sort of society proposed by Mill lies in the apparently innocuous phrase "to prevent harm to others"¹. This is offered as the justification for legitimate restraints of an individual's freedom and, consequently, the scope of such freedom will be directly and inversely proportionate to how widely "harm" is interpreted. In some ways, this point relates to the earlier question of whether liberty is dependent on an ulterior, utilitarian goal; for the overriding objective (overriding and pre-eminent over liberty) of preventing harm is of a similar nature to that of promoting happiness, the essence of utilitarianism. And once again it is possible to interpret the qualification on liberty as entirely negating liberty, in that, as Mill himself acknowledges, no man is entirely isolated* and therefore "it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them"²⁴. In that case, if every "self-regarding" harmful action also causes harm to others, and freedom is to be restricted to prevent this,

* or, in Donne's celebrated expression, "no man is an island".

then this contradicts Mill's original assertion (in the paragraph where the principle is set out) that an individual's "own good, either physical or moral, is not a sufficient warrant"¹ for interfering in his liberty. Moreover, many *beneficial* self-regarding actions can have a harmful impact on others: for instance, when someone sells a lot of shares in a company on the stock exchange in order to secure a profit for himself, this can depress the price of all that company's shares, causing losses to other people who continue to hold them. If all these actions (which, one way or another, cause harm to others) are to be restricted, it is evident that not very much will be left of liberty! The nature of the "free society" therefore depends on defining more precisely than the simple words of the principle, what *kind* of harm is to be prevented by restraint. This point will be explored in chapter two of the thesis.

Thirdly, and finally, there is the question of what kind of "liberty" is meant. It has been argued by some that the promotion of liberty requires not merely "protection... from deliberate restriction but also opportunities and resources for its exercise"^{25*}, necessitating large-scale state interventionism to "redistribute" wealth, guarantee employment, and so on. Other commentators have, with some textual justification²⁷, understood Mill to be concerned with protecting an individual's freedom to choose according to his "real" desires, which may differ from his expressed desires if he is not (economically) "in control of his situation": for example, the car driver who has not been provided with seat belts by the manufacturers, or the employee who accepts a low wage¹⁷. This too entails state interference (to compel the manufacturer to supply seat belts, to impose a minimum wage, and so on), and again Mill's principle is invoked to justify such paternalism.

* This is the classic equation of liberty with "ability" or "power" criticised more than three centuries ago by Hobbes²⁶.

By contrast, as has been seen, Himmelfarb understands the principle to imply laissez-faire and non-intervention¹⁷. These very different interpretations of the concept of liberty, which will be the subject of chapter three, imply very different types of political arrangement. Without further explanation or amplification, Mill's "very simple" principle can give precious little guidance as to which one is to be adopted.

Some of the ambiguities and contradictions in Mill are perhaps no more than might be expected of someone whose works spanned over half a century. A thinker is not like an abstract theory, which is required to maintain stringent standards of consistency and internal coherence. He is a human being who, as he grows older, matures, reflects, reconsiders, changes his mind. In Mill's case, there is said to be a considerable "biographical" impact on his writings; and in particular much has been made of the "mental crisis" which he suffered at the age of twenty and which supposedly produced in him a modification of, or even a revulsion against, his utilitarian upbringing²⁸.

Not everything can be explained away in these terms, however. (The "mental crisis", which occurred in 1826, cannot for instance account for the allegedly fundamental discrepancies between *On Liberty*, published in 1859, and *Utilitarianism*, published two years later^{20*}.) It will be the contention of this thesis that the confusion about how exactly to apply Mill's principle arises chiefly from the ambiguous formulation of the principle itself: ambiguity about the reasons for liberty, about the type of "harm" to be prevented, and about the type of "liberty" to be promoted. These three points will be examined in turn in chapters one, two and three of the thesis. Lastly, in the conclusion, consideration will be given to whether such

* They were both written between 1854 and 1859²⁰.

ambiguities are inevitable, given the ambitiousness of Mill's project (which amounts to saying that any attempt to formulate a coherent principle of liberty is bound, by its nature, to fail); or whether, on the contrary, it *is* possible to devise a simple criterion for delineating the scope of individual liberty and the limits of state power, which, more precisely than Mill's, could determine the nature of a free society.

SOURCES: INTRODUCTION

All page numbers are, unless otherwise indicated, references to:

John Stuart *Mill*; *On Liberty*; Penguin (Harmondsworth 1974/1859).

- 1 Page 68.
- 2 Page 63.
- 3 Page 71.
- 4 Page 163.
- 5 Page 133.
- 6 Page 169.
- 7 Page 171.
- 8 Page 182.
- 9 Page 176.
- 10 Page 70.
- 11 Page 158.
- 12 Page 164.
- 13 Geraint L. *Williams*; "Introduction" - in: Geraint L. Williams (editor); *John Stuart Mill on politics and society*; Collins/Fontana (Glasgow 1976); page 45.
- 14 John Gray; "*John Stuart Mill: the crisis of liberalism*" - in: Brian Redhead (editor); *Political thought from Plato to NATO*; BBC (London 1984); page 156.
- 15 John Gray; *Mill on liberty: a defence*; Routledge and Kegan Paul (London 1983); page 17.
- 16 Margaret *Thatcher*; Lecture to Conservative Political Centre, Blackpool, 10th October 1968 - in: Nicholas Wapshott and George Brock; *Thatcher*; Futura (London 1983); page 278.
- 16A C.L. *Ten*; *Mill on liberty*; Clarendon Press (Oxford 1980); page 60.

- 17 Gertrude *Himmelfarb*; "Editor's introduction" - in: John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974); page 47.
- 17A Page 163.
- 18 J.W.N. *Watkins*; "John Stuart Mill and the liberty of the individual" - in: David Thomson; *Political ideas*; Penguin (Harmondsworth 1969); page 155.
See also: Alan *Ryan*; *The philosophy of John Stuart Mill*, second edition; Macmillan (London 1987); pages 234 and 236.
- 19 Page 69.
- 20 *Himmelfarb*; page 30.
- 21 Maurice *Cowling*; *Mill and liberalism*; Cambridge University Press (Cambridge 1963); page xii.
- 22 John Stuart *Mill*; "*Utilitarianism*" - in: J.S. Mill and Jeremy Bentham; *Utilitarianism and other essays*; Penguin (Harmondsworth 1987/1861); page 333.
- 23 Page 151.
- 24 Page 146.
- 25 H.L.A. *Hart*; *Between utility and rights*; 79 *Columbia Law Review*; page 835.
- 26 Thomas *Hobbes*; *Leviathan*; *Everyman* (1914/1651); page 110.
- 27 Page 166.
- 28 *Himmelfarb*; pages 14 to 16.
Williams; page 30.
- 29 *Gray*; *Mill on liberty: a defence*; page 14.

CHAPTER ONE - WHY FREEDOM?

CHAPTER ONE WHY FREEDOM?

1. LIBERTY AS INTRINSIC OR INSTRUMENTAL?
 - 1.1. A free society: government interference versus individual liberty
 - 1.2. An intrinsic value?
 - 1.3. An instrumental value?
 - 1.3.1. Scepticism
 - 1.3.2. Hobbesian social cohesion
 - 1.3.3. Utilitarianism
 - 1.4. A middle way?

2. TRYING TO EXPLAIN THE INCONSISTENCY
 - 2.1. "Two Mills"
 - 2.2. "No inconsistency"
 - 2.2.1. Gray's first pillar
 - 2.2.2. Gray's second pillar

3. WHY DOES IT MATTER?
 - 3.1. Liberty as ethically neutral
 - 3.2. Liberty, utilitarianism and act-consequentialism
 - 3.3. Liberty, utilitarianism and rule-consequentialism
 - 3.3.1. The *real* problem with *instrumental* values: contingency
 - 3.3.2. The *alleged* problem with *intrinsic* values: "self-evident" truths
 - 3.3.3. The *specific* problems with liberty being contingent on utilitarianism:
 - 3.3.3.A: Overriding individualism
 - 3.3.3.B: Paternalism and the socialist state
 - 3.4. Mill's gamble

CHAPTER ONE - WHY FREEDOM?

1. LIBERTY AS INTRINSIC OR INSTRUMENTAL?

The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.

These words are not Mill's, but Wilhelm von Humboldt's; and by "these pages" von Humboldt meant a work of his entitled *Spheres and Duties of Government*. Nevertheless Mill saw fit to quote the sentence on the cover page of *On Liberty*, clearly intending it to be seen as equally applicable to his own essay. What is striking about this, of course, is that the sentence says something rather different from the very simple principle which is the subject of this thesis.

Mill spells out the very simple principle less than a dozen pages after citing von Humboldt's sentence. Yet whereas the very simple principle stresses the central importance of liberty from coercion - the individual's "independence" is stated to be "absolute"¹ - von Humboldt's formulation asserts the "absolute and essential importance" of human "development". The former is stated to be "one" principle, "entitled to govern absolutely"²; the latter claims to be "the grand, leading principle". The former constitutes "the object of this essay" [*On Liberty*]²; the latter is "the point at which every argument unfolded in these pages [*Spheres and Duties* - but, by unavoidable implication, *On Liberty*] converges".

So which of these positions is, for Mill, paramount? Is liberty really "absolute"? Is it to be promoted and

protected for its own sake, because liberty is right in itself, as an intrinsic value? Or rather because it produces certain beneficial outcomes and ulterior ends, and is instrumental towards achieving some other "grand, leading principle"?

Answering these questions, about the intrinsicity or instrumentality of liberty, is fundamental to an understanding of the political implications of Mill's principle. As was mentioned in the introduction, the very simple principle is not *only* concerned with political liberty and the relationship of government with the individual. Some commentators have gone further and said that this issue was not even Mill's *chief* concern in devising the principle³; and, indeed, that the principle is "silent about the proper limits of state activity"⁴. This last claim at least is belied by Mill's citation of von Humboldt on the cover page of *On Liberty*: the work being quoted is about the "spheres and duties of government". Moreover, in the paragraph immediately preceding the one where the principle is first asserted, Mill writes of the need for a "recognized principle by which the propriety or impropriety of government interference is customarily tested"⁵; and, when he actually spells out the principle, he says that it is applicable, *inter alia*, to the issue of coercion by means of "legal penalties"².

1.1. A free society: government interference versus individual liberty

In short, the very simple principle is *at least partly* concerned with the issue of political liberty and the limits of government power. The issue can perhaps best be approached by imagining two polar extremes of political arrangement, diametrically opposed conceptions of the way society should operate.

At one extreme, one can imagine an all-powerful government, in the control of a dictator or an oligarchy or simply administered according to some dominant conception or plan, which (for whatever reason) acted as though it were entitled to regulate and/or direct every aspect of human activity in society. There would be no inhibition or limitation on the range of functions accorded to the state, and no form of coercion of individuals which would be "beyond bounds" to the government, the state and the law. Accordingly there could not sensibly be said to be individual liberty in such a society, for there would be no field of activity in which the individual was entitled to direct his destiny by himself - no private sphere in which the individual was immune from governmental interference and, to use Mill's word, "sovereign". This would be absolute, totalitarian, tyranny (whether or not it is practically feasible is a different matter).

At the opposite extreme to all-powerful government, one can imagine anarchy or the "state of nature", where there would be no state, no government, no laws to prohibit murder or theft or assault - and where individuals would be entitled to do what they wanted to themselves and to each other, totally without coercive restraint by any public authority. In the latter kind of society, the sphere of individual activity would be as limitless as the sphere of governmental activity in the former.

Of course many political thinkers over the centuries have refused to recognise this kind of polarity, and have seen no tension between liberty on the one hand and the state and laws on the other. Rousseau, for instance, believed that the state and the law could embody freedom, through the collective expression of individuals' free wishes - the "general will" - such that "each, uniting

with all, nevertheless obeys only himself, and remains as free as before"⁶. This was so even if the law rode roughshod over the particular wishes and choices expressed by individuals, since those choices might not be for the best, whereas what people *really* wanted was "the best". In *The Social Contract* Rousseau wrote of "the general will, which is the law" and commented:

by themselves the people always want what is good,
but by themselves they do not always see it^{6A}.

That is to say, obedience to the state and its laws would supply the means by which people were enabled to "see" what they "*really*" wanted. In much the same way, Hegel depicted citizens of the modern state as identifying their individual interests with the collective common interest, such that they were each possessed of a "fundamental sense of order"⁷: their will embodied as restraint, their freedom expressed as obedience to the law.

These kinds of argument embody certain assumptions which bear further examination. Upon further examination, they turn out to contain much that is potentially inimical to liberty. Implicit in the notion that people's liberty can be fulfilled through the realisation of a "general will", is the presupposition that "people" (that is, individuals) are to be identified with "the people" as a collective entity, and that the wishes of each are best expressed as the will of the whole. The problem with this is that, since people - individual people - typically have different wishes and opinions from each other, it will not always be the case that each one can "unite with all" and at the same time "obey only himself"⁶. There will always be people, even if only minorities, whose interests and views do not coincide with the "general will". That being so, it *cannot* be assumed that governments (even governments representing the majority of an electorate) which act in the name of "the people" - or that laws which purport to express the "general will" - will never snuff out the freedoms of minorities and individuals. Of course

it all depends on how the "general will" expresses itself; but if, as Rousseau suggests, each individual "puts in common his person and his whole power under the supreme direction of the general will"⁶², that individual cannot be assured, in the absence of other safeguards*, that his liberty as an individual (to express heretical views, for example) will be respected. Political arrangements which attempt to realise the "general will", and the freedom of "the people" collectively, thus offer little ultimate protection of the freedom of people individually. Mill makes this point effectively in the opening paragraphs of *On Liberty*:

Such phrases as "self-government", and "the power of the people over themselves", do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people - the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number, and precautions are needed against this as against any other abuse of their power.⁶

No less potentially inimical to liberty are the implications of Rousseau's point that people "do not always see" what they want. This presupposes that people have "real" wishes and desires which are different from what they themselves perceive to be their wishes and desires, and hence different from their expressed wishes and desires. Accordingly people's expressed wishes can be ignored, and their actual free choices thereby overridden

* For example liberal constitutional arrangements reflecting some sort of liberty principle which, like Mill's, draws a boundary between the individual and the state.

- without, on this analysis, there being any negation of their "real" free choices. Moreover, this concept of "real" free choices, being choices other than what people think they want, carries with it the further implication that what a person wants is not a matter for self-assessment but rather something which can be deemed objectively, and hence externally to that person. Thus when Rousseau says that people really want "what is good", he means that they want what is *deemed to be* good for them: for instance, a "beneficial" or "rational" plan devised by the state. It follows that people's freedom may be realised by their conforming to a plan which the state imposes on them! In this way, tyranny can be (and often has been) advanced in the name of "liberty".

The view that there is no contradiction between liberty on the one hand, and the state and its laws on the other, has been propagated not only by Rousseau and Hegel but also, in varying forms, by Spinoza, Locke, Montesquieu, Kant and Burke⁹. From Hobbes, however, there is a different emphasis with the acknowledgement, in *Leviathan*, that civil laws are "artificial chains"¹⁰ and that rights (or liberty) and law are "in one and the same matter inconsistent"¹¹.

And Mill, too, recognises that there is such an "inconsistency": a tension between the operation of laws by the state and the exercise of freedom by the individual (or, as he puts it at the very beginning of *On Liberty*, a "struggle between liberty and authority"^{8A}). This tension attains its extremes in the polarity between tyranny and anarchy. Mill presupposes that neither extreme is acceptable as the basis for political society. In the former, with a limitless sphere of governmental activity, there is no liberty, which is dreadful. And in the latter, with a limitless sphere of individual activity, there is nothing to prevent murder, theft, assault, and so on, which is also dreadful. ("All that makes existence

valuable to anyone", Mill writes, "depends on the enforcement of restraints upon the actions of other people"¹³.) Moreover, when individuals cannot walk the streets without fear of being assailed by a murderer, thief, etc., they are not truly free. So a "free society", which is what Mill expressly states in *On Liberty* that he seeks*, is one which lies somewhere between the two extremes, which contains both a sphere of individual activity and a sphere of governmental activity, each one limiting the other. The question which this raises is, where ought the line properly to be drawn? Mill's position is that there should be a balance: with some, but not limitless, individual liberty, and some, but not limitless, governmental interference. But - putting the question in a different way - how much of each?

The "very simple principle" was an attempt by Mill to provide a simple criterion for answering this question. The criterion was to be applied in practice to any given situation where the issue arose as to whether or not the government ought to interfere in individual liberty. In Mill's words, the principle would answer

the practical question where to place the limit - how to make the fitting adjustment between individual independence and social control.¹³

If it were applied properly and consistently, Mill's vision of a "free society" would obtain.

The aim of this thesis, as stated in the introduction, is to understand the nature of the society which would in fact ensue if the principle were applied properly and consistently. Would the application of the principle really guarantee a truly free society? The first part of the answer to this lies in the question of

* "No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified."¹²

intrinsicity or instrumentality - in *why* freedom was to be promoted.

1.2. An intrinsic value?

Any textual analysis of *On Liberty*, let alone Mill's other works, can give rise to quite a number of different answers to this question, some perhaps surprising. Gertrude Himmelfarb is convinced that Mill sees liberty as an intrinsic value "not... subject to other more proximate purposes"¹⁴. Certainly the absolutist language in which the very simple principle itself is couched lends credence to this view. Mill says that the principle of liberty is entitled to govern "absolutely"²; that preventing harm to others is the "sole" end² and the "only purpose"² justifying restraint; that individual independence in self-regarding actions must be "absolute"¹; and, most compellingly, that such independence exists "of right"¹. In similar vein, a couple of pages earlier, Mill cites with approval

the great writers to whom the world owes what religious liberty it possesses [who] have mostly asserted freedom of conscience as an *indefeasible right* and denied *absolutely* that a human being is accountable to others for his religious belief^{15*}.

Accordingly, Himmelfarb concludes, Mill's view is that liberty and individuality are to be established "firmly and absolutely in and for themselves" and they are "necessary and sufficient ends"¹⁴. Likewise John Gray contends that in Mill's moral system "the right to liberty is accorded priority"^{16**}.

* Emphasis added.

** although, as will be seen, Gray does not regard this as inconsistent with the primacy of utilitarianism in Mill's theories.

1.3. An instrumental value?

However, one does not have to read very far from the assertion of the very simple principle before the "intrinsic" interpretation begins to look a bit unsteady. Within a page of Mill's assertion that an individual's absolute independence exists "of right", Mill warns:

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right...^{1*}

What follows, virtually throughout the rest of the book, is a series of instances of the ulterior benefits which liberty can produce. The suggestion, at least in some passages, seems to be that liberty's principal value lies in its being instrumental to achieving those benefits.

1.3.1. Scepticism

First, in chapter 4, entitled "Of the limits to the authority of society over the individual", Mill appears to say that scepticism about human conduct is the main reason for promoting liberty. This view, which has a long pedigree in the history of political thought, recognises that a central government or plan is no wiser and no more rational than the individual human beings who comprise or conceive it, and, human beings being fallible, the extent of its powers ought to be strictly circumscribed. This view has a central place in conservative thought, expressed for instance by Burke in his attack on the French revolution:

The science of government being... a matter of experience, and even more experience than any person can gain in his whole life, however

* But see below, section 2.2.2.

sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again...¹⁷

But it is also one of the chief justifications for liberty advanced by Friedrich von Hayek, who explicitly places himself outside the conservative tradition¹⁸. Hayek argues that liberty is necessary because individual human activity is so complex and varied that no central planner(s) can possibly know or understand the activity of the vast numbers of individuals who make up a society; consequently, any attempt to direct "society" will inevitably be based on a travesty of understanding and will thus be doomed to failure. He writes:

What we must ask the reader to keep constantly in mind... is the fact of the necessary and irremediable ignorance on everyone's part of most of the particular facts which determine the actions of all the several members of human society... [This] makes both our attempts to explain and our attempts to influence intelligently the processes of society very much more difficult, and... places severe limits on what we can say or do about them.¹⁹

In chapter 4 of *On Liberty* the "sceptical" view of liberty finds expression in the argument that, when "the public" interferes with individual conduct

the odds are that it interferes wrongly and in the wrong place... The opinion of... [an overruling] majority, imposed as a law on the minority, on questions of self-regarding conduct is quite as likely to be wrong as right, for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people.²⁰

In Mill's view, this is "the strongest of all the arguments" against interference in purely personal conduct²⁰.

1.3.2. Hobbesian social cohesion

In chapter 5 of *Utilitarianism*, however, Mill advances a second, altogether different, reason. He writes that respect for each individual's inviolable sphere of self-regarding activity - the essence of the very simple principle - is the necessary precondition for social cohesion, harmony and peace, and the principal safeguard against perpetual warfare:

The moral rules which forbid mankind to hurt one another (in which we must never forget to include *wrongful interference with each other's freedom**) are more vital to human well-being than any maxims, however important, which only point out the best mode of managing some department of human affairs.²¹

They are so "vital" because

It is their observance which alone preserves peace among human beings: if obedience were not the rule, and disobedience the exception, every one would see in every one else a probable enemy, against whom he must be perpetually guarding himself.²¹

This second view belongs to a rather different tradition from the first, and closely echoes Hobbes's justification for the role and scope of government in *Leviathan*:

It is manifest that during the time men live without a common Power to keep them all in awe, they are in a condition which is called war; and, such a war, as is of every man against every man...²² The final cause, end or design of men... in the introduction of that restraint upon themselves (in which we see them live in

* Emphasis added.

commonwealths) is the foresight... of getting themselves from that miserable condition of war, which is naturally consequent... to the natural passions of men.^{23*}

Moreover, it is significant that this second view, that respecting each other's independence is the only way out of war and into social harmony, not only supplies a theoretical justification for liberty, but also can claim to have some actual historical validity. It can be argued that this is how individual liberty was in fact first established in England and Europe: out of the horrific religious wars of the sixteenth and seventeenth centuries, there emerged a recognition that peace could only come through mutual religious tolerance, which meant respecting liberty of conscience. The point to note here is that Mill subscribes to this account of liberty's development, and indeed recounts it in the crucial opening paragraphs of *On Liberty* just before setting out the very simple principle. He writes that almost the only field in which individual liberty has been consistently respected in modern times has been on the question of "religious opinion", and he explains this by describing how, after the religious wars

when the heat of conflict was over, without giving a complete victory to any party... minorities, seeing they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert for permission to differ.²⁵

* In this context it is interesting to note that, in at least one published work, Mill actually quoted Hobbes's description, in *Leviathan*, of the miserable condition of war where man's life is "solitary, poor, nasty, brutish and short"²⁴.

1.3.3. Utilitarianism

So, in separate passages, Mill can be seen to draw on two distinct traditions to provide ulterior justifications for his very simple principle. First, there is the "sceptical" view of human capability which says that freedom is necessary *because* human beings are fallible and therefore ought not to have too much power. Secondly, there is the "Hobbesian" line that freedom is necessary *because* it preserves peace and, indeed, has actually brought peace out of (religious) warfare. Both of these "reasons" explain and justify liberty in terms ulterior to itself, suggesting that, in those terms, liberty's value is purely instrumental.

But the most common view of Mill, of course, is that he justifies liberty not by appealing to the "sceptical" or to the "Hobbesian" view, but in terms of another ulterior value - utilitarianism. (It is arguable that the sceptical analysis and the Hobbesian analysis are themselves instrumental means to the utilitarian end.) Himmelfarb strenuously denies this, claiming that "whatever Mill's intentions elsewhere... it was not his intention here, in *On Liberty*, to rest his case on utilitarian principles"²⁶.

However, this assertion flies in the face of plenty of textual evidence which is to be found in *On Liberty* itself. Just two paragraphs after he first asserts the very simple principle, at the point (already referred to) where he seems to deny* that he conceives liberty as an abstract right, Mill says that it is not "independent of utility"²⁷. He reaffirms his belief in utility as "the ultimate appeal on all ethical questions"²⁷.

* But see below, section 2.2.2.

After this, in the text, there is a semi-colon, and the next words are crucial:

but it must be utility in the largest sense²⁷.

It is utility "in the largest sense" that Mill advocates BOTH in *On Liberty* AND in his other works, such as *Utilitarianism*: a utilitarianism which inherits from his father James Mill and from Bentham the belief that the general happiness ought to be maximised, but which defines happiness in a "larger" (or more refined) way to encompass nobility, virtue, truth, beauty and individuality. In chapter 2 of *Utilitarianism*, Mill declares that

Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.²⁸

He reasserts moreover, crucially for the argument of this thesis, that pleasure and the absence of pain are "the only things desirable as ends"²⁸. But he says that this formulation does not answer everything, and "much more requires to be said; in particular, what things it includes in the ideas of pain and pleasure"²⁸. He answers his own question just a few pages later, contending that "utilitarianism... could only attain its end by the general cultivation of nobleness of character"²⁹.

This, then - the "general cultivation of nobleness of character" - is what Mill means by utility in the largest sense. And there is plenty in the text of *On Liberty* to suggest that he sees liberty as instrumental to achieving that (larger) utilitarian end.

In chapter 2, for instance, Mill argues the case for "the liberty of thought and discussion". His case is not that freedom of thought and discussion is good in itself. Instead he contends that freedom of thought and discussion is good *because it produces truth*. He portrays the world,

not unreasonably, as one where there is both truth and falsehood; and, confident that men's "errors are corrigible"³⁰, he argues that liberty of thought and discussion - free competition in ideas - is the most efficient corrective mechanism for enabling truth to prevail. Mill states that on any issue where there is a division of opinion, one of three situations must obtain. In each one, he contends, liberty is beneficial in producing truth. First, there is the situation where A's opinion is false and B's is true. In that case, it is self-evidently detrimental to the increase of truth if A, enjoying power, were to suppress B's freedom to assert his opinion³¹. Secondly, A's opinion may be true and B's false and, although it might be thought that nothing would then be lost by suppressing B's views, Mill believes that, without the stimulus of free debate, A's opinion would after a time lapse into the "deep slumber of a decided opinion" which is mouthed parrot-fashion but no longer understood. The truth of the opinion is lost, and it becomes an empty platitude³². Lastly - and, in Mill's estimation, most often - is the situation where each opinion is partially but not wholly true. The free interchange of ideas allows the parties to correct the respective shortcomings in their understandings, with the consequence that the two views are synthesised as a whole truth³³.

Freedom of thought and discussion is thus justified in chapter 2 of *On Liberty* as the means of attaining truth. Chapter 3, headed "Of individuality, as one of the elements of well-being", justifies freedom of *action* on almost identical grounds. Just as competition between different opinions will enable the truth to prevail, so too, Mill argues, competition between a wide variety of ways of life will lead to the general adoption of "more enlightened conduct"³⁴ and "better modes of action"³⁵. Moreover, when people choose their own ways of life rather than blindly following custom, they employ all their

faculties and so enhance their faculties³⁶. Even people who do not themselves practise a novel or unconventional way of life will benefit from the existence of those who do, for the whole tone of life throughout society will be stimulated by the "mere example of nonconformity"³⁷. And, because people are made happy in different ways, a wide choice of different "sources of pleasure" cannot but enhance the general sum of happiness³⁸.

The common strand running through all these arguments for liberty of thought, discussion and action is that they are all utilitarian arguments. Mill is apparently justifying freedom as the means to happiness, although of course he means happiness in the larger, more refined sense. The triumph of truth, more enlightened conduct, the enhancement of an individual's faculties and the stimulation of the tone of life throughout society all constitute that "general cultivation of nobleness of character" which, for Mill, is the essence of utilitarianism. At various points in chapters 2 and 3 Mill seems quite explicit about this. He says in chapter 2 that

the truth of an opinion is part of its utility³⁹ and he expresses the advantages of freedom of discussion in terms of their propensity to enhance character, well-being and (hence) happiness among humanity generally. Silencing the expression of an opinion, he says, has the effect of

robbing the human race, posterity as well as the existing generation⁴⁰.

The price to be paid is

the sacrifice of the entire moral courage of the human mind⁴¹.

By contrast, competition between ideas serves

to enable average human beings to attain the mental stature which they are capable of⁴².

Chapter 2 concludes with an assertion of the necessity to the mental well-being of mankind (*on which all their other well-being depends**) of freedom of opinion⁴³.

Likewise, in chapter 3, freedom of action is justified as a necessary part and condition of... civilization, instruction, education, culture⁴⁴;

and Mill cites with approval von Humboldt's argument that the development of an individual's powers to a complete and consistent whole is

"the end of man"... "towards which every human being must ceaselessly direct his efforts"⁴⁵.

The role of liberty seems to be simply instrumental towards attaining this "end":

for this there are two *requisites*, "freedom and variety of situations"^{45*}.

Elsewhere in *On Liberty*, when Mill argues in favour of other aspects of political liberty such as free trade, competitiveness and limited government, he likewise appears to base his arguments on the grounds that they will have beneficial *effects* rather than that they are intrinsically good. Free trade, for example, is to be commended because it means that "the cheapness and the good quality of commodities are most effectively provided for"⁴⁶, while competitiveness for admission to the professions and so on is "better for the general interest of mankind"⁴⁶. In chapter 5, entitled "Applications", Mill lists three "objections to government interference", which are: first, that things are usually "better done" by individuals (who have a vested interest in their consequences) than by governments; secondly, that individual action and initiative strengthen people's "active faculties"; and - the third and "most cogent

* Emphasis added.

* Emphasis added.

reason" - that government interference leads to a vast bureaucracy, with power concentrated in the hands of hangers-on who have no incentive to carry out reforms or improvements which might threaten their entrenched power⁴⁷.

Mill's attitude to socialism is obviously crucial to understanding the sort of free society which he envisages and (in particular) whether or not it is to be based on the principles of liberalism**. This will be explored in more depth later in the thesis. Socialism is mentioned by name only once in *On Liberty*, and then with antipathy:

We have only... 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... It is known that bad workmen who form the majority of the operatives in many branches of industry are decidedly of the opinion that bad workmen ought to receive the same wages as good... And they employ a moral police, which occasionally becomes a physical one, to deter skilled workmen from receiving... a larger remuneration for a more useful service⁴⁸.

In 1879 the *Fortnightly Review* posthumously published some writings by Mill in which he gives more comprehensive consideration to the subject of socialism. In these, he appears less hostile, arguing that, in assessing the merits of socialism,

the question to be considered is, whether [it]... is likely to be as efficient and successful as the managements of private industry by private capital⁴⁹***.

** What Himmelfarb, Gray and others call "laissez-faire". See the Note on Terminology at the beginning of this thesis.

*** This contradicts Geraint Williams's view that Mill's "attack on paternalism is not that it will not work but that it depends for its working on the servility of those who might benefit"⁵⁰.

The significant point about this attitude to socialism is that, once again, it is utilitarian *effect*, rather than intrinsic goodness, which is paramount. Socialism, Mill is saying, is to be judged in terms of its instrumentality, of what it brings.

So if instrumentality is Mill's criterion for judging socialism as a political arrangement, is instrumentality also the criterion by which all other types of political arrangement, including liberty, are to be measured? Perhaps the most convincing textual evidence to suggest that this is so, is to be found in chapter 3 of *On Liberty*, where Mill asks rhetorically:

what more or better can be said of any condition of human affairs than that it brings human beings themselves nearer to the best thing that they can be?⁵¹

1.4. A middle way?

There is, then, textual evidence to suggest that liberty is regarded by Mill as an intrinsic value, and that the very simple principle takes priority over anything else. On the other hand, as has been shown, there is also textual evidence to suggest the opposite: that the very simple principle is subject to ulterior "ends", and specifically utilitarianism. It is even possible to find, as C.L. Ten does, support in Mill's writings for a third interpretation, a "middle way". This is the view that Mill regards utilitarian considerations as irrelevant when addressing the question of the liberty to engage in "self-regarding" actions (where the very simple principle reigns supreme); but that, when "other-regarding" actions are at stake, utilitarianism becomes a prime criterion. Ten quotes Mill in *On Liberty*:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has

jurisdiction over it and the question whether the *general welfare* will or will not be promoted by liberty becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons beside himself... In all such cases there should be perfect freedom^{52*}.

The "perfect freedom" of self-regarding action is fully spelled out in the paragraph of *On Liberty* where the very simple principle itself appears:

[A man] cannot rightfully be compelled to do or forbear... because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise².

However, Ten's understanding of this sphere of self-regarding action as totally immune from utilitarian considerations is not borne out by the following passage in *Utilitarianism*:

...this distinction lies at the bottom of the notions of right and wrong; that we call any conduct wrong... according as we think that the person ought, or ought not, to be punished for it; and we say that it would be right to do so and so... according as we would wish to see the person whom it concerns, compelled, or only persuaded and exhorted, to act in that manner.⁵³

* Emphasis added.

2. TRYING TO EXPLAIN THE INCONSISTENCY

Professor Himmelfarb, confronted with textual evidence which contradicts her own interpretation of Mill's liberty as an intrinsic value, dismisses such evidence as rooted in readings of "isolated sentences of *On Liberty*"⁵⁴. The trouble is, of course, that her own evidence likewise consists in lifting "isolated sentences" from the text and ignoring the many passages which (as shown above) lend credence to alternative interpretations. The plain fact is that it is possible to find quotations in *On Liberty*, as well as in Mill's other writings, which support any and all of the three interpretations outlined here: the "intrinsic" view, the "instrumental" view, and Ten's middle way. Because of this it is clearly unhelpful for commentators to throw gobbets of text at each other to "prove" their particular interpretation when, self-evidently, doing so involves selecting suitable passages and wilfully turning a blind eye to unsuitable ones. When a view is taken of the *whole*, the inescapable conclusion is that Mill has failed to provide a clear, coherent, unambiguous answer to the question of whether he regards liberty as valuable intrinsically or only by virtue of its instrumental role in advancing utility. He has considered the question, and he has pronounced on it, but his pronouncements are hopelessly inconsistent.

How is this inconsistency to be explained?

2.1. "Two Mills"

One traditional explanation is a psychological/biographical one, based largely on the account in Mill's *Autobiography* of the "mental crisis" he supposedly suffered in 1826. The story, or at least its caricature,

is well-known: Mill, brought up according to the rigid utilitarian principles of his father James Mill and of Bentham, grows up an unquestioning, unimaginative child prodigy (plenty of reason and very little sentiment), burns himself out by the age of twenty, endures a nervous breakdown, and only recovers when he discovers that there is more to life than just calculating the greatest happiness of the greatest number. Encouraged by the poetry and the friendship of Wordsworth and Coleridge, he "awakens" to a less grey, Romantic world where feeling, nobility, virtue, the individuality of the human spirit - and, by extension, liberty - play an important part. The beauty of the story, for students of Mill, is that it offers a convenient explanation for the apparent inconsistencies in his work - the differences, for instance, between what Himmelfarb calls Mill's "intentions here, in *On Liberty*" and his "intentions elsewhere"²⁶. Thus, thanks to the caricature, the utilitarianism in Mill can be ascribed to his "pre-crisis" life as a Benthamite prodigy, and the espousal of liberty to his "post-crisis" awakening. On this account, the problem of whether Mill's commitment to liberty is merely instrumental to his commitment to utility can be neatly circumvented with the glib assertion that there were (psychologically) "two Mills", and that he thought utility paramount at some times, and liberty at others - notably in *On Liberty*, and the very simple principle in particular.

Of course, no modern commentator has put it *quite* as crudely as the above paragraph, but it is probably not an injustice to say that some have come fairly close. Thus Geraint Williams writes:

His mental crisis, beginning in 1826, shattered this simple confidence; the end which he had been pursuing so vigorously "ceased to charm"... The general good and its calculations no longer attracted him.⁵⁵

Himmelfarb insists that the mental crisis was the "decisive experience"⁵⁶ of Mill's life. *On Liberty*, moreover, was a "decisive rebuttal of his father"⁵⁷. Parts of it, she says, "read as if they had been written under the direct inspiration or the most vivid memory of this crisis"⁵⁷.

The trouble with the "two Mills" explanation is, quite simply, that it does not tally with the facts, either textual or biographical. It is certainly true that Mill's utilitarianism is recognisably different from his father's or Bentham's, and that (as has been seen) it is self-consciously "utility in the largest sense"²⁷, encompassing many of the ideals of nobility, virtue, truth, beauty and individuality which Mill may well have acquired under the influence of Wordsworth and Coleridge. It is, moreover, plausible to suggest that this represented a reaction against (and even a revulsion from) the narrow brand of utilitarianism in which Mill had been schooled from infancy, and indeed that the alleged mental crisis may have had a part to play here.

But none of this can satisfactorily account for the inconsistencies WITHIN *On Liberty* itself. There is no evident sharp contrast between Mill's "intentions here, in *On Liberty*" and his "intentions elsewhere". Himmelfarb instances Mill's book *Utilitarianism* as one of the works in which he seeks to "rest his case on utilitarian principles"²⁶. However, there are several passages in *On Liberty* where Mill likewise seeks to rest his case on utilitarian principles, not least when he describes utility as "the ultimate appeal on all ethical questions"²⁷. Of course, Mill is writing in *On Liberty* of the larger, more refined version - "utility in the largest sense"²⁷ - but this is no less the case in *Utilitarianism*, where Mill depicts utilitarianism as concerned with "the general cultivation of nobleness of character"²⁹.

More damaging for the "two Mills" explanation is the chronology of the thing. The mental crisis occurred, Mill claims, in 1826. He began to write *On Liberty* during 1855; it was not published until 1859 - that is, more than three decades after the crisis. Of course, as Himmelfarb notes, Mill's "vivid memory" of the crisis would have been resuscitated by his writing the *Autobiography* "during the same years" that he wrote *On Liberty*²². He wrote the first draft of the *Autobiography* in 1853, rewrote it during the late 1850s, and then began working on it again after 1861. It was not published until 1873, just before Mill died. If, as Himmelfarb claims, this was enough to inspire a non-utilitarian strain in *On Liberty*, it remains to be answered why it did not have the same effect on Mill in *Utilitarianism*. For *Utilitarianism* was published in 1861, and Mill was working on it at the same time as he was writing *On Liberty*²³. At this point, the usefulness of the mental crisis theory begins to appear rather limited.

2.2. "No inconsistency"

The inconsistency between the intrinsic and the utilitarian elements in Mill's attitude to liberty thus remains unresolved by these considerations. In recent years this question has been approached, or rather sidestepped, with the radical claim from some commentators that there is no inconsistency at all! For John C. Rees, in the development of Mill's thinking:

the way to *On Liberty* is a comprehensible growth and... the work is a part of his outlook - not at odds with it²⁴.

Here again reference is made to Mill's biographical history, and indeed to the celebrated "mental crisis" - with, it must be said, more plausibility than the "two Mills" explanation. The argument is that, in the aftermath of the crisis, psychologically torn between the

demands of loyalty to his father's doctrines and the appeal of new ideas, Mill did everything in his power to reconcile the two within the framework of a broad, all-embracing and *consistent* doctrine. Such an eclectic attitude certainly finds expression in Mill's description, in chapter 2 of *On Liberty*, of the way truth is attained (see section 1.3.3. above), by synthesising the partial truths of two opposing opinions into a whole truth³³. And in his *Autobiography* Mill writes that, after the mental crisis:

When I had taken in any new idea, I could not rest till I had adjusted its relation to my old opinions... I found the fabric of my old and taught opinions giving way in many fresh places, and I never allowed it to fall to pieces, but was incessantly occupied in wearing it anew.⁶⁰

But did Mill succeed in establishing such a consistent whole? John Gray is emphatic: *On Liberty*, he writes, is

consistent almost to a fault¹⁶.

In a major work, entitled *Mill on liberty: a defence*, Gray has put forward a set of highly ingenious arguments with the aim of refuting wholesale what he calls the "traditional view"⁶¹ and the "received view"⁶² of Mill's *On Liberty* - namely the view, to which this thesis subscribes, that Mill's apparent commitment to liberty as an intrinsic value cannot be reconciled with his assertions that liberty is subject to utilitarianism. Gray's arguments are worth examining in detail, not least because they identify the central issues in this debate.

Gray's arguments rest on two main pillars. The first is that there is no contradiction between the primacy, or absoluteness, of the liberty principle and the primacy of the utility principle - because they are, in Gray's words, principles of "a radically different kind"⁶³ and therefore cannot meaningfully be compared to each other on the same

scale (in much the same way, presumably, as a mother's love for her children cannot be compared with her love for her husband; they are of "a radically different kind" and the paramountcy of one does not conflict with the paramountcy of the other). Secondly, Gray contends that, in any case, there is not such a great distinction as is normally supposed between the essence of Mill's utilitarianism and the essence of his liberty principle... and, hence, no sharp contradiction between the absoluteness of liberty and its dependence on utilitarianism. This is because Mill's utility "in the largest sense" is centred on the notion of cultivating individual human character, while his concept of liberty is closely bound up with ideas of human autonomy and individual self-realisation: ideas which, if not quite synonymous, greatly overlap. Lest this paraphrase of the second pillar of Gray's case be thought to be an unfair travesty of his actual views, it should be said here that this thesis finds a great deal more sympathy for the second pillar than for the first.

2.2.1. Gray's first pillar

The first pillar, the claim that Mill's liberty principle is of "a radically different kind" from his utility principle, is - according to Gray - largely based on Mill's own attempt to classify and categorise various *kinds* of principle, in section vi of chapter 12 of book VI of his *System of Logic* (published in 1843)⁶⁴. In this, Mill writes about an all-embracing "Art of Life". The Art of Life, Mill says, can be divided into three compartments, each a different facet or type of principle. There is the aesthetic aspect of life, which Mill calls the "Beautiful" or the "Noble". Then there are prudential types of principle, which can be called "Prudence" or "Policy" or "Expediency". Lastly there is the moral aspect, "Morality", in which are to be found the principles that guide people as to how they *should* act.

Mill states, further, that the Art of Life, taken as a whole, can be regarded as a "Teleology", of which the end, or ultimate value, is the utility principle⁶⁵. Therefore, it could be deduced, the utility principle is not a part of morality, guiding people as to how they should act. Utility is, instead, an *axiological* value which underscores life as a whole.

Gray seizes on this to argue that, whereas Mill's liberty principle is a "practical" axiom, providing guidance as to how people ought to act, and thus involving a type of moral obligation or duty, Mill's utilitarianism (by contrast) imposes no moral obligation at all. In Gray's view, the liberty principle says, You should act in such a way that freedom is maximised (that is, you should refrain from interfering with anyone's freedom except to prevent harm to others). However, utility, which is an axiological principle, does not do this:

Those writers of the traditional school in Mill criticism are in error who suppose that the utility principle must impose a moral duty of utility-maximisation on agents⁶⁶.

In other words, utilitarianism does not say, You should act in such a way that utility is maximised (that is, you should promote happiness, pleasure and the absence of pain). Utilitarianism, indeed, does not say anything about what you should do; it merely states an ultimate value. There is thus a

sharp contrast between utility as an axiological principle and liberty as a practical (action-guiding) principle⁶⁷.

This is what Gray means when he says that they are "principles of a radically different kind". If the liberty principle tells you what you should do, and the utility principle does not say that you should do something else (indeed, is silent about what you should do), then surely - Gray argues - there is no inconsistency.

Gray props up this first pillar with both logical and textual analysis. He is convincing in neither. The logical analysis begins with a vivid example to "prove" that a statement of value or standard of value (an axiological principle) must be, of its nature, radically different from the kind of moral principle which states what you should do (a determinant of action) - and therefore that the liberty principle, as a determinant of action, logically cannot be subject to the utility principle, which is purely and simply axiological. Gray says that utility, being a standard of value rather than a determinant of action,

would enable us to judge a state of affairs in which a solitary wild animal dies slowly of a painful disease *a bad state of affairs*, though it is one that *no one's actions have produced or could alter*^{69*}.

From this example, it is true, one can infer that: standards of value are not *synonymous* with determinants of action. To say that the animal's pitiful death is bad is (of course) not the same as saying, You should do such-and-such to prevent this. However, it is *not* possible to infer from the example that: standards of value and determinants of action are so radically different that determinants of action (like the liberty principle) logically cannot be subject to standards of value (like utilitarianism). Gray has succeeded in proving that not all standards of value yield determinants of action. ("The animal's death is bad" does not yield "You should do such-and-such".) *But it does not follow from this that not all determinants of action are rooted in standards of value.* On the contrary, they must be. Although not every "bad state of affairs" is produced by people's actions, the question of whether people should act in one way or another is intimately connected with whether it

* Emphasis added.

will produce a bad state of affairs. Indeed, this is virtually the definition of what one "should" do. For example, the determinant of value which says that "You should not set fire to an old widow's cottage" is nothing unless it is rooted in standards of value such as "It is a 'bad state of affairs' when an old widow's cottage has been burned to the ground" (which themselves may be rooted in one or more other standards of value such as the inviolability of property, a person's right to shelter, respect for and care of the elderly, and so on). To sum up: *determinants of action can be - and, really, must be - subject to standards of value.*

That being so, it cannot be troublesome to assert that, if the utility principle is the ultimate value of the Teleology of life and thus the ultimate "good state of affairs" (which Mill asserts in *System of Logic* and which Gray readily acknowledges), then it follows that all actions should be determined according to whether they ultimately promote utility: in other words, it follows that all actions should be utility-maximising. The utility principle thus turns out to be a determinant of action just as the liberty principle is. They are not "radically different" kinds of principle. And if utility is the ultimate determinant of action, this is potentially inconsistent with liberty being the paramount determinant of action. Gray's logical analysis fails, in short, to support his first pillar.

The textual analysis is likewise flawed. Gray directs his readers' attention to one particular paragraph in chapter 5 of *Utilitarianism*, a chapter "whose saliency to *On Liberty*" (he says) "has long been neglected"⁶⁹. The crucial passage from *Utilitarianism* is this:-

We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by

opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency.⁷⁰

Gray interprets this to mean:

Mill contends that questions of value must be distinguished from questions of right and wrong... In Mill's own conception of morality, indeed, in which it is necessarily connected with punishability, Utility cannot be a moral principle.⁷¹

That is to say, of course: the utility principle cannot be a determinant of action and is thus radically different from the liberty principle.

Gray does seem to be exercising a certain interpretative licence here. It is puzzling. Certainly the passage from chapter 5 in *Utilitarianism* says that morality is necessarily connected with punishability. But Mill does not mention "Utility" or "questions of value" in the passage. The point of the passage, as is apparent when it is read in context, is to assert that, because morality is so closely connected with punishability, the idea of penal sanction does not of itself serve to distinguish *justice* from moral obligation in general⁷⁰. The context is a discussion of how best to define "justice"; chapter 5 is headed "On the Connection between Justice and Utility".

Moreover, a less selective reading of *Utilitarianism*, and indeed of Mill's other works, rather undermines much of what Gray has to say. Thus Gray claims that

the Principle of Liberty... cannot by itself impose obligations or *yield judgments about right action*^{68*}

* Emphasis added.

and refers to

Mill's denial that utility... has any direct application to the wrongfulness of acts^{72*}.

But, looking at Mill's own words in *Utilitarianism*, it is impossible to find any such denial. Rather the opposite: as has been noted, Mill writes in chapter 2 that utilitarianism

holds that actions are *right* in proportion as they tend to promote happiness, *wrong* as they tend to produce the reverse of happiness^{28*}.

To give him his due, Gray does actually consider these words. But he dismisses them as "not altogether perspicacious"⁵⁸ and "somewhat murky"⁶⁸. This is odd. By contrast to the passage from *Utilitarianism* which Gray chooses to concentrate on (the passage in chapter 5, cited above), these words are not tucked away at the back of the book. They are to be found in chapter 2 of *Utilitarianism*, which is entitled "What Utilitarianism Is". Rhetorically this is the central chapter of the book, and the words which Gray dismisses so lightly appear in the crucial, definitional, paragraph - arguably the counterpart of the "very simple principle" paragraph in *On Liberty*. As such these words, which directly contradict Gray's sweeping assertions about the relationship of utilitarianism to questions of right and wrong, deserve considerably more attention than he is willing to pay them.

Similarly, Gray alleges that Mill's utilitarianism never acquires the character of a moral principle⁷³.

Yet in the very same crucial paragraph in chapter 2 of *Utilitarianism*, Mill describes utilitarianism as a "theory of morality"²⁸ and writes of "the moral standard set up by the theory"²⁸.

Gray claims that Mill

affirms that questions of utility and of morality must be distinguished⁷³.

But Mill, in *On Liberty*, writes that liberty is not independent of utility, which is

the ultimate appeal on all ethical questions²⁷.

And, likewise, Gray's all-important distinction, between utility as an axiological value and liberty as a determinant of action, receives short shrift from Mill himself. Gray writes:

While [Mill] recognises utility as the supreme test of all conduct,... [utilitarianism] does not of itself impose moral requirements upon action⁷³.

Mill, however, writes:

This [the maximisation of happiness], being, according to the utilitarian opinion, the end of human action, is necessarily also the standard of morality; which may accordingly be defined, the rules and precepts for human conduct²⁹.

Indeed, even Mill's words in the *System of Logic* are unhelpful to Gray's distinction. Mill does not, it seems, take the view that, just because happiness is the ultimate value in the Teleology of the Art of Life, this in any way detracts from there being a practical obligation to act so as to maximise utility. Mill's words, in section vii of chapter 12 of book VI, are worth quoting in full:

For the remainder of the practice of life some general principle, or standard, must still be sought; and if that principle be rightly chosen, it will be found, I apprehend, to serve quite as well for the ultimate principle of Morality, as for that of Prudence, Policy or Taste...

I merely declare my conviction, that the general principle to which all rules of practice ought to conform, and the test by which they shall be tried, is that of conduciveness to the happiness of

mankind or rather of all sentient beings; in other words, that the promotion of happiness is the ultimate principle of Teleology.⁷⁴

Here, then, in the very chapter of the very volume of *System of Logic* which is the foundation of Gray's first pillar, are the words which wholly undermine that pillar. Mill is saying, quite unequivocally, that utilitarianism is the "ultimate principle of Teleology" (an axiological principle), which at the same time serves as "the ultimate principle of Morality" (a moral principle) and also "the general principle to which all rules of practice ought to conform" (a determinant of action, a practical principle). Like the liberty principle, the utility principle tells you what you should do; they are not "radically different" kinds of principle. In that case, it remains difficult to see how the primacy of the liberty principle can be consistent with the primacy of the utility principle - or how Mill's apparent commitment to liberty as an intrinsic value can possibly be reconciled with his claims that it is subject to utilitarianism.

Where does this take matters? Unfortunately, not very far - for the charge of inconsistency, against which Gray seeks to defend Mill, appears to be as valid as ever. However, as has been mentioned, there is a second pillar on which Gray rests his defence. And this one is, at least, more plausible than the first.

2.2.2. Gray's second pillar

In a way, the second pillar says almost the opposite of the first. Far from emphasising a radical difference between the liberty principle and the utility principle, Gray comes close to arguing that there is not much to choose between them and that, consequently, they cannot be inconsistent.

Gray's point is that Mill conceives both utility and liberty in such a broad sense that they almost wholly overlap; so that promoting one will not derogate from promoting the other, but, rather, promoting one will by definition serve to advance the other. As has already been discussed, Mill is at pains to emphasise that the utility he seeks is "utility in the largest sense"²⁷. By this he means that utilitarianism does not aspire merely to a sterile type of happiness in which people are granted a mental state consisting of satisfaction, contentment and security, and are spared fear, danger, risk, suffering and so on. This sort of "lifeless" happiness is the lot of the well-fed, benevolently treated slave; and it is not what Mill has in mind*. As he says in *Utilitarianism*:

Few human creatures would consent to be changed into any of the lower animals, for the promise of the fullest allowance of a beast's pleasures; no intelligent person would consent to be a fool... even though they should be persuaded that the fool... is better satisfied with his lot than they are with theirs.⁷⁶

On the contrary: the happiness envisaged by Mill is something rich and vital which, in his words, "could only attain its end by the general cultivation of nobleness of character"²⁹. In other words it is a happiness grounded in human self-development and the dignity of man. Moreover, when Mill tries to justify happiness (and this is a point which will be returned to later in this chapter) he does so in terms of individual free choice; he writes in *Utilitarianism*:

* In the parlance of modern moral theorists, this is the happiness produced by a "happiness drug" or a "hedon machine". Thus Robert Nozick: "Suppose there were an experience machine that would give you any experience you desired. Superduper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain. Should you plug into this machine for life...? What else can matter to us, other than how our lives feel from the inside?... What does matter to us, in addition to our experiences?"⁷⁵

No reason can be given why the general happiness is desirable, except that each person, so far as he believes it to be attainable, desires his own happiness⁷⁷.

Self-development, the dignity of man, free choice: these are the terms in which Mill's advocacy of the utility principle is couched, and they are all concepts intimately linked to the idea of liberty.

This is all the more important because Mill's conception of liberty appears to embrace what Gray calls "autonomy", as well as "security"⁷⁸. That means that it is concerned not only with removing impediments to the exercise of freedom, such as government repression, muggers in the street, foreign invaders - a traditional conception of liberty, which Isaiah Berlin calls "negative liberty"⁷⁹ - but also with encouraging freedom to be *fully exercised*, by living in as diverse and enriched a way as possible. Thus the type of liberty which involves "autonomy" is not very dissimilar to the type of happiness which is meant by utility "in the largest sense".

Gray's conclusion from this is that it makes no sense even to ask the question, Is liberty intrinsic or is it instrumental to the attainment of a utilitarian end? They are not alternatives, because they are not inconsistent. For a society to make the one its priority almost necessarily, in Gray's view, entails making the other its priority. As Gray puts it:

Mill's argument [is] that liberty of thought and expression is valuable, not just instrumentally as a means to the discovery and propagation of truth, but non-instrumentally, as a condition of that rationality and vitality of belief which he conceives of as a characteristic feature of a free man.⁸⁰

The same point is made by Geraint Williams. He contends that to argue about whether liberty is an instrumental or

an intrinsic value, a means or an end, is meaningless. In Mill's idea of liberty (he says) the categories of means and end are indistinct, and "the relationship is now more intimate". Williams insists that in *On Liberty*:

freedom is *not just* a means to progress, *not just* a precondition of improvement, but *constitutive* of them.^{81*}

All this is very plausible. Unlike Gray's first pillar, it is supported by textual analysis of Mill's work, especially *On Liberty*. Here freedom is conceived in terms of utility in the largest sense: not as a means to it, but as constitutive of it. Autonomy, self-development, human dignity - they are all part and parcel of the same broad idea in which utility, happiness and welfare are enmeshed with the concept of freedom.

Examples abound. Some have already been quoted. Thus, in *On Liberty*, Mill writes of

the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion⁴³.

Similarly, in his *Autobiography*, he acknowledges the connection between individuality and welfare, writing that the "internal culture of the individual" is one of the "prime necessities of human well-being"⁸². In *On Liberty*, he emphasises the connection between free choice and human advancement:

The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice.⁸³

And, just a couple of pages before, Mill makes it absolutely clear that liberty is intimately bound up with - is, in Williams's word, "constitutive" of - the

* Emphasis added.

objective of utilitarianism (in the largest sense, of course):-

If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is *not only a co-ordinate element* with all that is designated by the terms civilization, instruction, education, culture, but is *itself a necessary part and condition* of all those things, there would be no danger that liberty should be undervalued.^{84*}

At this point, it is necessary to plead guilty to a small sleight-of-hand. In the introduction to this thesis, in order to provide an example of Mill regarding liberty as an instrumental (rather than intrinsic) value, it was alleged that Mill "repudiates the idea of liberty as an 'abstract right... a thing independent of utility'"**. The dots in the quotation concealed one rather important word, for what Mill actually says (the citation is from the opening paragraphs of *On Liberty*) is:

I forego any advantage which could be derived to my argument [for the very simple principle] from the idea of abstract right *as a thing independent of utility*^{1***}.

The difference is significant because Mill is *not* saying that he repudiates the idea that liberty should be regarded as an abstract right *tout court*. He is saying, rather, that liberty should not be regarded as an abstract right *which is independent of utility*. In other words, he does not reject outright the concept of liberty as an intrinsic, absolute, abstract "right" (nor could he be expected to, since he writes just a paragraph earlier that a man's independence "is, of right, absolute"); but he insists that that intrinsicality must be dependent on

* Emphasis added.

** See also this chapter, sections 1.3.1 and 1.3.3.

*** Emphasis added.

utility, must be bound up with instrumentality vis-a-vis utilitarianism. Again, then, just as Gray has argued, Mill in this quotation refuses to recognise any contradiction between liberty as an abstract right and liberty as dependent on utility. On the contrary, he professes to see the one as constitutive of the other.

Gray's arguments in support of his second pillar are therefore quite convincing. There is no significant contradiction between Mill's conceptions of liberty and of utility as ultimate objectives because, in effect, they mean the same thing: liberty-as-autonomy is almost equal to utility in the largest sense, meaning individual self-development.

But this concept, once grasped, turns to dust in one's hands. However convincing or plausible Gray's arguments may be here - and indeed they are - on closer inspection they reveal themselves to be almost entirely without substance as a "defence" of Mill. This is because, in order to achieve the overlap between the words "liberty" and "utility" (and hence between the concepts that they represent), it was necessary to redefine them so broadly and vaguely as virtually to rob them of their meaning. To say that "liberty", defined so that it does not exactly mean liberty, is virtually synonymous with "utility", defined so that it does not exactly mean utility... is, in the end, to say nothing that means anything at all.

"Liberty": As mentioned in the introduction to this thesis, the question of what exactly Mill means by "liberty" is the last of the three main ambiguities which the thesis proposes to address, and will be more fully discussed in chapter three. For the moment, however, it suffices to reiterate that there are two, very different, conceptions of liberty in traditional political theory.

One is the classical view, what Isaiah Berlin terms "negative liberty"^{84A}. This allows the individual the greatest possible scope to shape his own life, by restricting the *range of the state's functions* to the minimum interference which is necessary for the protection of individual freedom. In other words, under this so-called "negative" conception of liberty, the government and laws are restrained from interfering with an individual's freedom of action, except to stop others interfering in that freedom: that is, to stop the mugger, the terrorist, the foreign invader and so on. This, then, is a conception of liberty in terms of non-interference^{84A}, and it implies a state of the kind to be found in liberal societies* rather than in socialistic ones. The other view says almost exactly the opposite. It sees liberty not merely as non-interference:

not freedom from, but freedom to - to lead one's prescribed form of life^{84B}.

It is, therefore, an active, rather than a passive, conception of freedom: Berlin calls it "positive liberty"^{**}. It holds that liberty is pointless unless it can be acted upon or *used*. And a society based on the "positive" conception of liberty is one which holds that the state's responsibilities in safeguarding "freedom" are much wider than merely preventing interference: on the contrary, they involve active interference to enable freedom to be used. One example of a "positive" conception of liberty is Hegel's notion of freedom as self-realisation and self-knowledge. This is an active use of freedom, and Hegel sees the state as best placed to promote it: the state, he writes in *Philosophy of Right*,

* "Liberal" here is used in the sense explained in the Note on Terminology at the beginning of this thesis.

** Berlin's terminology of "negative liberty" and "positive liberty" is somewhat unhelpful, partly because "positive" has a more virtuous connotation than "negative", and partly because (as will be apparent) in the view of this thesis, so-called "positive liberty" is not, properly speaking, liberty at all.

is "the actuality of concrete freedom" and he declares that:

In civilised nations true bravery consists in the readiness to give oneself wholly to the service of the state so that the individual counts but as one amongst many^{84c}.

This, it will be appreciated, is a far cry from the liberal conception of the state with a minimum range of functions. Another aspect of positive liberty - liberty as pointless unless it can actually be used - finds expression in questions which are commonly asked in modern political discourse such as:

what is the point of having freedom of choice in education, with the ("negative") liberty of not being compelled to educate one's children in the state sector, if one cannot afford to pay the fees of an independent school?

or:

what is the point of being free to negotiate the terms of one's employment, if one is so poor that one is desperate for work and thus in a weak bargaining position to obtain good pay and conditions from the employer?

These kinds of question imply the view that liberty only has any point where people have access to the material resources which enable them to use freedom. This leads on to a socialist way of organising society where the state is expected to pour funds into schooling, and the freedom to take children out of state education is considered unimportant; or where the state regulates employment by dictating wage levels, limiting working hours, and so on. The "positive" conception of liberty thus demands very substantial state intervention in the workings of society. In this respect it is very different from classical ("negative") liberty, which accords the state a much more limited range of functions. Of course in exercising that narrow *range* of functions the classical liberal state may have cause to intervene quite a lot. If there is a crime

wave, or an upsurge in terrorist activity, or a real threat of foreign invasion or subversion, the state's function - on the "negative"/liberal view - of protecting citizens from interference in their liberty involves a considerable amount of state and legal activity. It might entail, respectively, severe laws to restrain terrorism (perhaps denying terrorists the "oxygen of publicity"), or the strengthening of the police force and other crime prevention agencies, or censorship where this is necessary to ensure the maintenance of national security. But because the state upholding "negative liberty" has a narrower range of functions than the state upholding "positive liberty", then, *all other things being equal*, the "negative liberty" state is likely to be much less interventionist than the "positive liberty" state*. A state founded on the concept of "positive liberty" is therefore less inclined to acknowledge limitations on its range of functions and on its right to intervene in people's lives. For these reasons, in the view of many, "positive" liberty is not really liberty at all: thus Hobbes argued that the view that freedom requires more than just the absence of "external impediments" is an "abuse" of the word; and the demand for access to resources is a demand for "ability" and "power", but it is not a demand for liberty⁸⁵.

Returning now to Gray's interpretation of liberty in Mill as "autonomy", it is apparent that this rather blurs the distinction between the two conceptions of liberty. In some ways it seems to echo the question asked by proponents of the "positive" conception - what is the point of liberty unless it can actually be used? Gray writes of the "capacities and opportunities" involved in "self-critical and imaginative" choice-making⁸⁶. This

* Thus in the nineteenth century, Bismarckian Germany, drawing inspiration from Hegel's concept of positive liberty, had far more state intervention than England where liberty was still conceived essentially in "negative" terms.

suggests that simply having the liberty to make a choice is not enough; there must be something more active. Choice-making must be "self-critical and imaginative", and there must be the "capacities and opportunities" to make choices (rather than merely the absence of impediments to doing so). Gray elaborates further on this when he declares:

A society of autonomous agents, then, would be a society whose members enjoyed legal immunity in the exercise of certain important powers and *of whom it was also true that they had developed these capacities and abilities up to at least a minimum level*^{87**}.

But this is hopelessly vague. Is Gray talking about protecting the individual from state interference, as the expression "legal immunity" suggests; or about the promotion of "ability" or "power" ("capacities and abilities")? Is he speaking about the light hand of government or the heavy? There is the classical, "negative", liberty of liberal societies; and there is its "positive", statist (and often socialistic) opposite. The question of which of these is meant by liberty-as-autonomy is left open. In chapter three this question will be fully considered. At this stage suffice it to say that the "definition" of liberty as autonomy so bleeds the word of any clear or precise meaning that it is hardly surprising that it can be equated with utility.

"Utility": In much the same way, just as liberty-as-autonomy is not recognisably liberty (or indeed anything very meaningful at all), so too utility "in the largest sense" is not recognisably utilitarian. As has been seen, utility is made to seem like liberty because its meaning is developed along two new paths. The first is the identification of happiness - the "end" or goal of utilitarianism - with the "general cultivation of

** Emphasis added.

nobleness of character"²⁹. The second path is Mill's claim, already quoted, that general happiness is what each person desires or chooses⁷⁷.

These two points need to be examined carefully. The first, concerning happiness as the general cultivation of nobleness of character, is spelled out in more detail by Mill in chapter 2 of *Utilitarianism*:

Now it is an unquestionable fact that those who are equally acquainted with, and equally capable of appreciating and enjoying, both, do give a most marked preference to the manner of existence which employs their higher faculties... Whoever supposes that this preference takes place at a sacrifice of happiness - that the superior being, in anything like equal circumstance, is not happier than the inferior - confounds two very different ideas, of *happiness* and *content*^{87A}.

It is unclear what is being said here. If Mill, and Gray in endorsing his position, are suggesting, as an assertion of fact, that the "inferior" pleasures do not actually produce as much happiness as the "superior", "nobler" pleasures, then they are making an empirical claim, which requires empirical proof. They need to produce some evidence or argument to substantiate their assertion; to show, for example, that watching "Rambo"-type films at the cinema *as a matter of fact* produces less happiness in the audience than seeing Shakespearean plays at the theatre. But Gray and Mill do not offer any evidence or argument to support such an assertion. Instead, they seem to fall back on the proposition that it is a question not of fact, but of meaning or definition: that the sensations produced by employing the lower faculties are not really "happiness", but "content" - a "very different idea". They are saying, in short, that the word "happiness" (in contradistinction to the word "content") *means* the cultivation of nobleness of character. However, this essentially *semantic* proposition involves quite a shift

from the normal, commonly-understood definition of happiness. As a matter of ordinary language, it makes sense to say that people derive happiness from watching "Rambo"-type films at the cinema; otherwise they probably would not go. Yet this is a far cry from saying that doing so cultivates nobleness of character. Defining happiness as nobleness of character thus involves denying that certain forms of happiness are happiness - which is (to say the least) a contortion of language.

So, too, with the second point, the suggestion that happiness is that which a person desires or chooses⁷⁷. Again, if this were an empirical claim - an assertion that if people attain what they desire or choose, this will as a matter of fact make them happy - it would require supporting evidence. But, again, no evidence is forthcoming. Instead, it appears to be a linguistic rather than an empirical assertion, a statement about meaning rather than substance: that happiness *can be defined* simply as anything that a person chooses or desires. That is to say: if someone wants something, and obtains it, he is happy *by definition*, regardless of what it is that he actually obtains, or how he actually feels when he has obtained it. Isaiah Berlin puts the point succinctly:

In J.S. Mill's writings happiness comes to mean something very like "realization of one's wishes", whatever they may be. This stretches its meaning to the point of vacuity⁸⁸.

In both of these cases, a semantic game is being played. If Mill and Gray were making *empirical* statements about happiness, such statements would have to be verified empirically: evidence or argument would have to be furnished to demonstrate that true happiness can in fact only be obtained by cultivating nobleness of character, or having one's choices realised. But no attempt is made to do this (as will be seen later in this chapter, in section

3.3.2., Mill does attempt a "proof" of the principle of utility, and Gray attempts to refine it, but neither is remotely successful). It does not seem far-fetched to presume that the reason Gray and Mill do not try to prove these claims is that they cannot. As claims, as assertions of fact, they are unsustainable. So what has been done is to pretend that no proof is required, on the grounds that no contentions of fact are being made: only *definitions* are being offered (and definitions need no proof). What Gray is saying, and what Mill seems to be saying, is that happiness *means* cultivating nobleness of character, and happiness *means* realising one's wishes. But of course these "definitions" are *not* what is meant in common usage by the word happiness. The meaning is no meaning; as Berlin says, it has been stretched to the point of vacuity.

The consequence of all this stretching of definitions is that the precise meaning of words like liberty and utility are removed, and the distinctions are blurred. This enables Gray to see them as overlapping concepts and to reconcile the paramountcy of liberty as an objective with the paramountcy of utility (and hence the notion of liberty as an intrinsic value with the idea of it as instrumental to attaining utility). But so what? Gray's reconciliation, the denial of incompatibility and inconsistency, rests on ultimately meaningless definitions. It is built on sand.

It would of course be unfair to blame all this on Gray. For, as the textual evidence has demonstrated, Mill himself seems to adopt the broad definitions of liberty (as autonomy) and utility ("in the largest sense"), such that the one is "constitutive" of the other. *To that extent, Gray's interpretation, in his second pillar, is probably correct.* But it is not very helpful. Because it

involves redefining liberty and utility practically beyond recognition, it goes nowhere towards answering the central question of this chapter: does Mill's very simple principle entail that liberty (in a sense that actually means something) is to be pursued for its own sake, or rather because it leads to utility (in a sense that also means something)? No clear or unambiguous answer can be found in Mill's writings.

3. WHY DOES IT MATTER?

The project on which this thesis has embarked is to ascertain what kind of "free society" there would be if the very simple principle were applied in practice. Would it be liberal/laissez-faire* or socialistic? Would it, truly, be free?

The question of "why freedom?" - of whether Mill intends liberty to be upheld because it is intrinsically right, or because it is instrumental towards producing an ulterior end, and in particular utility - matters enormously for understanding the practical implications of the very simple principle. Three ways in which commentators have suggested that it could matter will be considered here.

The first is the argument that a belief in liberty is incompatible with the assertion of any other systems of belief or values such as utilitarianism - so that in a society where a value or end like "general happiness" is promoted, freedom cannot flourish. In the view of this thesis, the premise on which that argument is based - that a free society must be *ethically neutral* - is a false one, and the argument is unsound. Secondly, it is alleged that the utilitarianism in Mill derogates from the liberty because it entails "*act-consequentialism*": in order to maximise happiness, some happiness or goodness must be "traded-off" against others to obtain an optimum balance, and this means "sacrificing" some people for the sake of others, an unacceptable infringement of people's liberties. This is the view taken by, for example, Robert Nozick⁸⁹; but, in the view of this thesis, it likewise is an invalid objection to the notion of Mill's liberty as

* See the Note on Terminology at the beginning of this thesis.

instrumental towards utility. Thirdly, there is the question of "*rule-consequentialism*": the point that if liberty is made *subject to* another objective such as utility, then whenever the exercise of liberty would obstruct the attainment of that other objective, liberty is liable to be jettisoned. Liberty, if instrumental towards another objective, thus rests on the fragile foundation of contingency. This third point is, this thesis will argue, the *real* problem about liberty being merely instrumental - and, moreover, it is a very serious problem.

3.1. Liberty as ethically neutral

To begin with the first of these arguments: the allegation that liberty is incompatible with other systems of belief or value, so that a free society cannot co-exist with the pursuit of an ultimate end, such as utility. Taken to its logical conclusion, this argument holds that a free society must be ethically neutral and, indeed, relativistic. Liberty, the proponents of this argument contend, depends on there being no absolute view of goodness or rightness or truth - because (they say), once a single truth or ultimate end is asserted, the right to have lots of different contending views of truth, or a variety of different ends and ambitions, is accordingly denied. Among the most vociferous spokesmen for this argument, at least in the context of Mill, is Isaiah Berlin.

Berlin is anxious to defend Mill's reputation as a champion of liberty. On account of this, he insists, Mill's assumptions must contradict⁹⁰ the assumptions upon which utilitarianism is founded. In particular, they must reject the moral and scientific absoluteness of utilitarianism in favour of relativism. Thus Berlin claims that Mill worked from the premise

that human knowledge was in principle never complete...; that there was no single, universally visible, truth⁹¹.

Moreover, in Berlin's view, Mill rejects a teleological analysis of human development (for, if there is no single truth, there can be no single end and no single direction). Mill, he says,

assumes that finality is impossible, and implies that it is undesirable too⁹⁰.

Berlin's portrayal of Mill in these colours is, quite simply, unsupportable by any analysis of what Mill actually writes. Indeed, Berlin comes close to acknowledging this when he qualifies his assessment with the (somewhat devastating) caveat:

...even if he [Mill] never, so far as I know, admits this explicitly⁹².

That is a masterpiece of understatement. The reality is that, in almost everything that Mill writes - in *On Liberty*, in *Utilitarianism* and elsewhere - there is a passionate commitment to absolute truth, to finality of knowledge, to teleological human advancement. Mill's very argument in favour of allowing freedom of discussion is predicated on the idea that indeed there *is* a single truth. The "peculiar evil", he argues in *On Liberty*, of people silencing the expression of an opinion is that

If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error⁴⁰.

In *Utilitarianism* Mill confidently asserts this progressive, teleological nature of human endeavour:

Yet no one whose opinion deserves a moment's consideration can doubt that most of the great positive evils of the world are in themselves removable and will, if human affairs continue to

improve, be in the end reduced within narrow limits⁹².

The two points are fused in the following passage from *On Liberty* where Mill demonstrates his belief not only in absolute truth and not only in human advancement, but in human advancement to the point (the finality) where a single absolute truth comes to prevail in society:

As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase; and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested⁹³.

The vision of a diminution in the "number of doctrines" might seem to sit uneasily with Mill's apparent espousal of the cause of diversity and variety of opinion. But this is to miss a distinction which Mill makes - and which Berlin fails to acknowledge - between the present and the teleological end which is yet to come. Thus Mill in *On Liberty* stresses that

diversity is not an evil but a good, *until mankind are much more capable than at present of recognizing all sides of the truth*^{94*}.

Moreover, this point is "applicable to men's modes of action not less than to their opinions"⁹⁴. With regard both to freedom of speech and to freedom of action, variety and diversity are desirable only for the time being,

while mankind are imperfect⁹⁴

- which carries the unavoidable implication that Mill expects that ultimately mankind will be perfect. He does (*pace* Berlin). And the perfect state to which Mill refers is one where utilitarianism prevails and where happiness and the general good will be maximised by people acting in the interests of each other. In *Utilitarianism* he writes

* Emphasis added.

that the maxim of love-thy-neighbour-as-thyself is the "ideal perfection"⁹⁴ of utilitarian morality.

In similar vein, there is Mill's endorsement of the doctrine of Wilhelm von Humboldt, referred to earlier in this chapter, that

"the end of man, or that which is prescribed by the eternal and immutable dictates of reason... is the highest and most harmonious development of his powers to a complete and consistent whole"⁴⁵.

It is all there: the absoluteness of truth ("eternal and immutable"), the finality ("complete and consistent whole") and the teleological progression towards that finality ("development of his powers"). Here is to be found "the end of man" - "end" in the sense of an ultimate, absolute value, and "end" in the sense of the final point to which man is progressing through time. That end, both those ends, can be summed up as utility in the largest sense. This is Mill's ultimate value.

In the face of this, it is impossible to maintain the view that Mill's vision is ethically neutral, relativistic or value-free*. Mill does believe in one single truth and in the likelihood and indeed desirability of that truth being universally accepted. As has been seen, his espousal of diversity of opinions and actions is only contingent: ultimately he looks forward to a day when doctrines "are no longer disputed or doubted"⁹³. Because of this at least one commentator has argued that Mill's commitment to liberty is only superficial and that Mill's vision is, in reality, a prescription for "moral totalitarianism"⁹⁶.

* Indeed Berlin, ten years after having made his original claims in an essay entitled "John Stuart Mill and the ends of life", actually conceded the point. Writing an introduction to a new edition of his works in which the essay re-appeared, Berlin noted: "Mill does seem to have convinced himself that there exists such a thing as attainable, communicable, objective truth in the field of value judgements"⁹⁵.

It must be said at once that, if Mill's commitment to utilitarianism means that the liberty he envisages is a sham, and that the very simple principle will lead to *moral totalitarianism*, then that is a very serious business indeed. If this is true, the question of "why freedom" matters very much. It matters enormously whether Mill intends liberty to be promoted as an intrinsic value (in which case, according to Berlin, his "free society" will be ethically neutral), or as merely instrumental to a utilitarian end (in which case, it is alleged, it will be totalitarian).

In fact, both the Berlin analysis and the "moral totalitarianism" argument rest on the same logical fallacy - even though they reach diametrically opposite conclusions. The former view supposes that the very simple principle rules out any belief in absolute truth or values; and the latter view supposes that, because Mill clearly is committed to absolute truth and morality, it rules out genuine liberty. Both views presuppose, wrongly, that morality is synonymous with legality. That is to say, both presuppose that a belief that certain things are right (absolutely right, not just relatively) is the same as a belief that those things must be compelled or enforced by law. Conversely, they presuppose that because certain things are not prohibited by law, there is nothing wrong morally in doing them: in other words, that liberty is licence.

But legality is not morality, and liberty is not licence. Being allowed to do something does not make it right to do it. Equally, just because something is wrong does not mean that it should be forbidden. Indeed, it is the essence of a free society to recognise this distinction. In a free society it is acceptable to persuade others of the rightness or wrongness of an opinion or action; it is acceptable to use argument,

exhortation, explanation, the setting of examples - but not coercion. The freedom lies in allowing each individual the moral space to act as he chooses, rightly or wrongly (even after all the persuasion, exhortation and so on): in granting people the right to be wrong. An inability to differentiate liberty from licence, persuasion from coercion, morality from legality, is characteristic of totalitarian societies; forcing people to do what is right really *is* moral totalitarianism. But Mill is not guilty of this inability. He recognises that the distinguishing mark of a free society is *not* to confuse morality with legality, or coercion with persuasion. Mill is not ethically neutral or scientifically relativistic but he insists, in the paragraph where he spells out the very simple principle itself, that a man

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. Those are good reasons for remonstrating with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise².

Further on in *On Liberty* Mill expands on this point. Preventing people from interfering in each other's actions - that is, recognising their independence and moral space - does not, he says, entail moral neglect or "selfish indifference which pretends that human beings have no business with each other's conduct in life". On the contrary, there should be "disinterested exertion to promote the good of others" - which, crucially, should use "other instruments to persuade people to their good than whips and scourges, either of the literal or metaphorical sort". Virtue should be inculcated by "conviction and persuasion" rather than by "compulsion". People, Mill concludes

should be forever stimulating each other to increased exercise of their higher faculties and increased direction of their feelings and aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations. But [no-one]... is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it⁹⁷.

It is interesting to note, parenthetically, that Berlin himself appreciates precisely this distinction when he pleads:

only tolerate; disapprove, think ill of, if need be mock or despise... We may argue, attack, reject, condemn with passion and hatred. But we must not suppress or stifle.⁹⁸

In other words, if we argue, attack, reject, condemn... we must assume that something is wrong in the first place. As we do so, we implicitly reject (as Berlin does so, he implicitly rejects) moral relativism. We accept (Berlin accepts) the compatibility of a commitment to absolute truth with a commitment to freedom**.

But more than being just *compatible* with a system of values, liberty is - and this is Mill's view - probably *the best way* to ascertain (in opinions) and attain (by actions) what is right and good. This works two ways. First, the restraint on freedom whereby the state uses its coercive power to regulate conduct and suppress immorality allows individuals to delegate moral responsibility to the

** Indeed, as Berlin's words here virtually acknowledge, the kind of tolerance which a free society embodies and demands is pretty well meaningless *unless* it is combined with a system of values, with an objective conception of right and good. Roger Scruton expresses it succinctly when he defines toleration as

...patient forbearance towards that which is not approved. There is toleration only when there are also things that are disapproved; if men were perfect, tolerance would be neither necessary nor possible⁹⁹.

authorities, such that their consciences and social norms become redundant and eventually, through lack of use, numbed. The result of this unfreedom is moral regression, for it enables people to blame "the government" or "society" for all their wrongdoings* (and therefore to carry on those wrongdoings untroubled by the qualms of conscience), and also to take the view that it is all right to do anything that is not forbidden by law: telling lies, breaking promises, hurling abuse, displaying contempt for the old and the weak and those who hold unfashionable opinions, and so on. Freedom, conversely, enables the development of personal moral responsibility and thus acts as a safeguard against such moral regression. The second way that freedom enables advancement towards truth and goodness is by acting as a corrective mechanism. As was seen earlier, this seems to be the main argument which Mill employs in favour of freedom in chapters 2 and 3 of *On Liberty*, saying that mankind's

errors are corrigible. He is capable of rectifying his mistakes by discussion and experience³⁰.

Only a free society gives him the opportunity to do so.

So it is that liberty is not only compatible with, but actually enhances the promotion of, values. The allegations of incompatibility - with the conclusions being drawn either that Mill's vision must be ethically

* Symptoms of this are to be found even in "welfarist" countries where it is felt that compassion is the responsibility of the state, and where the role of the state has been extended accordingly. The attitudes which this fosters include, typically, sociological "explanations" that place the blame for shoplifting, or for the deliberate running-up of debts, on the temptations provided by the "consumer society". Attitudes to the 1981 inner city riots in England are also instructive, such as the incredulity shown by two BBC commentators at Mrs Margaret Thatcher's reaction: "After the appalling urban riots in Toxteth... when the frustrations of hundreds of unemployed, badly-housed no-hopers burst into horrific violence, Mrs Thatcher's reaction was, *while startling*, all of a piece. Recounted by someone who heard her say it, and not disputed by Lord Whitelaw, it was 'Oh, those poor shopkeepers'."¹⁰⁰ [Emphasis added.]

neutral or that it must be morally totalitarian - simply cannot, therefore, be sustained. This is *not* why the intrinsicity/instrumentality question matters so much.

3.2. Liberty, utilitarianism and act-consequentialism

Nor does the importance of the intrinsicity/instrumentality question rest on the fact that utilitarianism entails act-consequentialism. However, as has been mentioned (at the beginning of section 3.), Robert Nozick would disagree. Nozick thinks that the act-consequentialist nature of utilitarianism *is* a significant danger to liberty. His case is simple. Utilitarianism, he correctly points out, by requiring the maximisation of happiness, measures acts in terms of the totality of their consequences. Mill's definition of utility bears this out:

Utility... holds that actions are right in proportion as they tend to *promote* happiness, wrong as they tend to *produce* the reverse of happiness... All desirable things... are desirable *either for the pleasure inherent* in themselves, *or as a means* to the promotion of pleasure and the prevention of pain^{28*}.

Accordingly, when there are a number of alternative courses of action, the utilitarian will assess, so far as foreseeable, the total happiness produced in consequence of each of them (including the happiness inherent in the act itself: this is a matter not of means-versus-ends but of aggregating means with ends), and will pronounce the one with the highest score to be the right course of action, which therefore ought to be adopted.

This means that it may happen that, for example, out of two available options, one entails a certain amount of

* Emphasis added.

suffering but will eventually lead to an enormous amount of happiness ("jam tomorrow"), whereas the other entails no suffering but does not bring any happiness either (as is often the case with *inaction*, which may be the only alternative to a certain course of action). If the net happiness (the happiness minus the suffering) in the first course of action equals a total of more than the net happiness in the second, the utilitarian will opt for the first - *even though this entails some suffering and the second does not*. This sort of "act-consequentialism" is what Nozick objects to about utilitarianism. It involves calculations in which a "moral balancing act" is attempted and, when utilitarianism becomes the rule in society, this involves "sacrificing" or "violating" people - and thus infringes their liberty, autonomy, sovereignty. Nozick puts his case thus:

Why may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit: ... we go to the dentist to avoid more suffering later... But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only... different individual people... Using one of these people for the benefit of others, uses him and benefits the others. Nothing more... To use a person in this way does not sufficiently respect... the fact that he is a separate person... *He* does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him - least of all a state or government that claims his allegiance...⁸⁹

The implication is that, because utilitarianism enables some people to be sacrificed for others, a liberty which is expressed to be dependent on utility, must necessarily be a negation of liberty. A truly free society, Nozick believes, involves no such act-consequentialist violations at all. Instead it rests on

a libertarian *side constraint* that prohibits aggression against another^{101*}.

This is not the place to attempt a full critique of Nozick's deontological position or to try to justify act-consequentialism. The point which needs to be made at this stage is that the act-consequentialist nature of utilitarianism is *not* the issue here: act-consequentialism is not what makes the question of instrumentality or intrinsicity so important for understanding the nature of Mill's "free society".

A couple of examples will serve to illustrate this. They both come, perhaps unsurprisingly, from the time of the second world war, a period of the twentieth century when moral dilemmas facing the western world were possibly more acute than at any other. One is fictional, from the novel *Sophie's Choice* by William Styron. The heroine, Sophie, is a Polish woman with two young children. The central scene in the novel occurs where Sophie and the two children are in a Nazi extermination camp standing in the queue where those who are to live and those who are to die are being selected. The camp doctor is making the selection and approaches Sophie:

The doctor said "You may keep one of your children."

"*Bitte?*" said Sophie.

"You may keep one of your children," he repeated.

"The other one will have to go. Which one will you keep?"

"You mean, I have to choose?"

"You're a Polack, not a Yid. That gives you a privilege - a choice."

...

* Emphasis added. The use of the term "libertarian" here is, strictly speaking, incorrect; Nozick means "liberal": see the Note on Terminology at the beginning of this thesis.

"Don't make me choose," she heard herself plead in a whisper, "I can't choose."

"Send them both over there, then," the doctor said to the aide, "*nach links*."

"Mama!" She heard Eva's thin but soaring cry at the instant that she thrust the child away from her and rose from the concrete with a clumsy stumbling motion. "Take the baby!" she called out. "Take my little girl."¹⁰²

This, then, is Sophie's choice, and it undoubtedly is an extremely difficult one (and one which, in the novel, is to haunt Sophie in later years). The significance of it in this context is that it is an act-consequentialist choice, involving a "moral balancing act" and the "sacrificing" of an individual human being. One option open to Sophie was to nominate one of her children for death, the consequence of which was that one survived. The only alternative was inaction or abstention - a refusal to nominate either - the consequence of which would have been that both were killed, neither survived. Act-consequentialism dictates choosing the option with the consequences which maximise goodness: that is, one child surviving rather than none. A doctrine of side constraints, by contrast, would dictate that Sophie should absolutely refuse to nominate one of her children to die, that no balance and no sacrifice be made - in which case, of course, both children would have been killed.

The other example is factual. In 1943, as the Germans were attacking England with V1 and V2 missiles:

The German missile attacks were directed against London; but, through miscalculation, many of these automated weapons exploded with comparatively small effect in the Home Counties. The military authorities [in Britain] favoured a calculated policy of planting false information on the enemy, designed to convince him that the metropolitan

target was being successfully reached. The Cabinet, however, ordered the ending of this policy on the... ground that it involved... deciding who should and who should not be killed. [Duncan] Sandys [chairman of the Cabinet's defence committee] is alleged to have blandly ignored the instruction, thereby saving much devastation in London and contributing to the frustration of the enemy's strategic aim.¹⁰³

Sandys's choice, like Sophie's, is one which can only be justified on act-consequentialist grounds. It involved balancing the consequences of planting false information (deaths in the Home Counties) with the consequences of the alternative, inaction (far more deaths in London), and choosing the option with the less evil consequences. A policy of side constraints, by contrast, would have meant refusing to decide "who should and who should not be killed", refusing to sacrifice the people of the Home Counties for the people of London. It would have meant, also, that there could have been no saving of the devastation in London, no contribution to frustrating the Germans' strategic aim. Indeed, a true policy of side constraints would have meant not fighting Hitler at all: refusing to "sacrifice" lives in war *regardless of the consequences of such inaction*: refusing to "balance" some killing in the short-term against the likelihood of mass murder and tyranny if the Germans were able to conquer without resistance. In short, the doctrine of side constraints commits those who hold it to an absolute pacifist stance.

This is not the place to say whether such a stance is wrong or right, or indeed to say whether a morality of side constraints is, accordingly, wrong or right. What does need to be said and appreciated is that the abandonment of act-consequentialism in favour of side constraints does in fact carry these implications, fairly radical implications. Nozick refers to "libertarian side

constraints" and an individualist respect for "separate persons". But, as these examples show, individual life and liberty* are not necessarily best served by his doctrine: in Sophie's case, it would entail the killing of one more child; in Sandys's dilemma, the deaths of thousands more people; in a pacifist stance, the triumph of Nazi tyranny.

There are some who would be willing to endorse side constraints with all these implications rather than maximising liberty. Indeed, in this respect, Nozick is impeccably consistent. His criticism is directed not solely towards utilitarianism, a form of act-consequentialism designed to maximise happiness, but also towards any act-consequentialist doctrine which was designed to maximise liberty and rights. His objection to the latter is that

this would still require us to violate someone's rights when doing so minimizes the total (weighted) amount of the violation of rights in society¹⁰⁴.

This leads neatly to the main point being made about act-consequentialism and the intrinsicity or instrumentality of liberty. The purpose of the previous few paragraphs on act-consequentialism has not been to assess its merits or demerits, but to show that it is *immaterial* to the question of whether liberty should be viewed as an intrinsic value or as dependent on utilitarianism: it is a different issue altogether. For, as has been shown (and as Nozick plainly acknowledges), there can be act-consequentialism in the pursuit of liberty for its own sake as much as in the pursuit of utilitarian happiness. It is quite possible to value liberty as an intrinsic good, independent of utility, and to want to maximise liberty by adopting act-consequentialism and rejecting side constraints. The act-

* As to the connection between protecting life and protecting liberty, see section 1.4.1. of chapter two of this thesis.

consequentialist aspect of utilitarianism, therefore, is not what makes it so important for the maintenance of a free society that liberty should be independent of utility.

3.3. Liberty, utilitarianism and rule-consequentialism

What matters about the intrinsicity/instrumentality question - the question "why freedom?" - is not act-consequentialism, but rule-consequentialism. This is the third of the three points raised in the introductory paragraph to this section; and it is the one which, in the view of this thesis, most pertinently answers the question of why does it matter.

3.3.1. The real problem with instrumental values: contingency

As its name implies, the essence of rule-consequentialism is that, instead of specific courses of action being assessed in terms of their consequences, entire general rules or principles are assessed in terms of their consequences. This is the point about liberty not being independent of utility. If liberty is to be promoted not in its own right, but because it is instrumental to a utilitarian end, then the principle of liberty derives its value from its consequences: namely, that it is able to advance utility. This is crucial to how secure will be the freedom of a society governed in accordance with Mill's principle. For if the very simple principle is assessed in terms of its utilitarian consequences, then the focus of concern shifts away from liberty to another value altogether, utilitarianism; and liberty becomes subject to utility. Freedom is to be promoted so long as its consequences advance utility. This means that the prospects for freedom flourishing thus

depend upon - are contingent upon - its propensity to advance utility. It follows that if, in any circumstance or situation, freedom will not have the consequence of advancing utility, there will no longer be any reason for having freedom, and it can (and should) then be jettisoned. A "free society" which rests on such a fragile principle of liberty cannot be assured of its freedom lasting for long.

There is also what might be termed a rhetorical problem here. Once the focus has shifted from liberty to utilitarianism, and liberty is justified in terms of utility, then liberty is implicitly devalued at the expense of utility. According to J.W.N. Watkins, this is the main problem with Mill's very simple principle:

He cannot argue for *A* [liberty] merely by affirming *A*; he has to appeal to *other* principles, say *B* and *C*...; but if *A* is what he values most, he values *B* and *C* less highly: the superior principle is justified by inferior principles, and these may not prove quite good enough to justify it effectively.¹⁰⁵

Watkins here identifies a philosophical as well as a rhetorical issue. He writes that Mill *cannot* argue for *A* merely by affirming *A* (and hence has to justify it on the grounds of its propensity to do something else). But why? Why is it illegitimate merely to affirm *A*? Why is it illegitimate to say that *A* is right intrinsically, as an abstract right, a self-evident truth? Why must a rule (such as the liberty principle) be justified in terms of its consequences and of some other rule - with all the attendant problems of contingency, fragility and rhetorical limpness?

3.3.2. The alleged problem with intrinsic values: "self-evident" truths

It is at this point that the reasons for Mill's insistence that liberty is not to be regarded as "independent of utility" (an insistence which gives rise to the countless ambiguities in his work) begin to be apparent. Mill, it seems, felt he had to be a rule-consequentialist, and had to justify liberty in terms of something else, because he just could not accept the idea of any principle being self-evidently true. He appears to have believed that there must be some ulterior reason for everything. In this, he displays the spirit of rationalistic scientific inquiry in which he was brought up.

The world in which Mill grew up, the world of his father and of Bentham, was one infused with the spirit of Enlightenment rationalism, applying a critical and sceptical eye to everything from physics and biology to religious belief and the question of whether to obey governments. The Benthamites maintained that dogmas and values ought not merely to be accepted as given; things were only true if they could be justified by reasons. Nothing was intrinsically, self-evidently true. In his essay on *Bentham*, Mill identifies, and endorses, this attitude:

An age of formalism in the Church and corruption in the State, when the most valuable part of the meaning of traditional doctrines had faded from the minds even of those who retained from habit a mechanical belief in them, was the time to raise up all kinds of sceptical philosophy... The father of English innovation, both in doctrines and in institutions, is Bentham: he is the great *subversive*... the great *critical* thinker of his age and country¹⁰⁶.

But as traditional values regarding custom and divine right came to be replaced by Enlightenment ones, such as liberty and happiness, it began to be claimed that the Enlightenment values were also intrinsic, and did not need to be justified by reasons. Thus the famous lines from the American Declaration of Independence in 1776:

We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable [*sic*] rights, that among these are Life, Liberty and the pursuit of Happiness^{107*}.

If traditional values were not to be accepted as intrinsic and self-evident, still less were Enlightenment values (which could not even benefit from arguments that they were tried and tested over the centuries or that they were divinely ordained). The new values had a *fortiori* to be exposed to sceptical and critical scrutiny: to reasons. Mill inherited this view from Bentham; and the consequence was that he could not accept the idea of a self-evident, abstract, intrinsic right to liberty that is independent of utility. In his writings he puts forward three main arguments for rejecting the concept of intrinsic, abstract values.

The first presages the Popperian concept of unfalsifiability. Writing in *Utilitarianism* about various, conflicting, "notions of justice", Mill complains:

I cannot see how any... can be refuted¹⁰⁸.

In other words, each of these "notions of justice" asserts its validity by virtue of its own *presumed* validity, internally and intrinsically. There is no attempt to justify any of them in terms of reasons ulterior to the notion which could be grasped by people who did not already believe in it. Therefore nobody can refute, or

* Emphasis added.

argue against, the notion, because there are no common grounds or terms of discourse on which to base such an argument. Equally, however, nobody can prove the notion either: there are no grounds on which to base a justification. So the various notions remain, internally self-justifying, externally unfalsifiable and irrefutable, but therefore unprovable - and all still contradicting each other without any prospect of the contradiction being resolved.

Secondly, Mill suggests that intrinsic or absolute values lack coherence, in that they often fail to take into consideration other values which, though equally valid and plausible, would undermine the validity of the first value. Thus - again in the context of competing notions of justice - Mill writes, of people who advocate these notions:

Each is triumphant so long as he is not compelled to take into consideration any other maxims of justice than the one he has selected; but as soon as their several maxims are brought face to face, each disputant seems to have exactly as much to say for himself as the others. No one of them can carry his own notion of justice without trampling upon another equally binding¹⁰⁸.

Mill's first and second arguments, alleging the unfalsifiability and the incoherence of intrinsic, absolute values, are in truth rooted in the third. This third argument is, quite simply, that intrinsic values are to be rejected because they are impossible to prove. If the question is asked *why* one notion of justice is preferred to the other, the answer can be no more than the bald assertion that it *is* to be preferred. No way of falsifying, no account taken of conflicting maxims, no reason or justification or proof. If the question is asked, "why freedom?" and the answer is, "because it is intrinsically good", this begs the further question of why

it is intrinsically good. To that question there can be no answer other than "because it is".

Mill, and Bentham before him, rejected such "reasonless" answers as inadequate for a sceptical, critical, rational age. Thus Bentham accused the framers of the American Declaration of Independence - with its assertions of "self-evident" truths - of "bawling on paper"¹⁰⁹. And Mill, in *On Liberty* itself, commenting on jurisprudential rules which claim to be "self-evident and self-justifying", dismisses them by arguing that

an opinion on a point of conduct, *not supported by reasons*, can only count as one person's preference^{110*}.

To sum up the arguments about intrinsicity and rule-consequentialism so far: this thesis has argued that, to justify a principle of liberty in terms of its consequences in being instrumental to utilitarianism, means that the principle is contingent, and hence fragile and insecure, and also that it is rhetorically more difficult to justify. Against this there is the Bentham/Mill argument that *not* to justify liberty in terms beyond itself, and merely to assert its intrinsic value, is just "bawling on paper". Therefore, Mill appears to conclude, liberty has to be regarded as dependent on utility, because otherwise there can be no reason, and no justification, for it.

In the view of this thesis, that (Benthamite/Millian) argument cannot be sustained. It may be true that the intrinsic value of liberty cannot be proven; but to justify liberty on the grounds of its propensity to promote utility merely produces the same difficulty at one remove. For why is it good to promote utility? What is

* Emphasis added.

good about utility? The intrinsic value of utility is no more susceptible to proof than the intrinsic value of liberty.

Mill denies this, as indeed he must. Chapter 4 of *Utilitarianism* is entitled "Of What Sort of Proof the Principle of Utility Is Susceptible", and in it Mill attempts to formulate a proof of the validity of utility - that is, of the alleged connection between satisfying happiness, and rightness or virtue. His putative proof takes the form of an apparent syllogism. The first premise is:

The only proof capable of being given that an object is visible, is that people actually see it... In like manner, I apprehend, the sole evidence it is possible to produce that anything is desirable, is that *people do actually desire it*^{77*}.

This in itself is uncontentious. So likewise is the second premise: that

Virtue... [is] a thing desirable in itself^{77*}.

From these two premises, the conclusion is inferred that *virtue*

is a thing that people do actually desire.

Thus is "proven" a linkage between what people actually desire (happiness) and virtue (rightness). Thus, apparently, utility is "proven".

The "proof" is specious, for it blurs the all-too-real distinction between two quite separate definitions of the word upon which the whole syllogism turns: "desirable". In the first premise "desirable" is used in the sense of "capable of arousing desire". In the second it is used in its other sense, of morally desirable or good. Once this is appreciated, what remains is not the conclusion that happiness is virtue, but instead two separate statements: first, that something capable of

* Emphasis added.

arousing desire is what people "do actually desire"; and, secondly, that "virtue" is good. Both are true, but they are also tautologies. They prove nothing. They certainly do not prove the validity of utilitarianism.

John Gray, in this as in other respects, springs to Mill's defence. He responds to the many critics of Mill's "proof" of utilitarianism thus:

Mill does not mean that "being desirable" is synonymous with "being desired"... His argument is, rather, that only things *capable of being desired can be intrinsically desirable* and, further, that the fact that something is desired is evidence that it is desirable.^{112*}

Unfortunately, Gray's formulation merely re-states the original argument (re-inviting the same criticisms). It does not advance the argument further, because it fails entirely to meet the point about the word "desirable" being used in two, quite different senses - first to mean "capable of arousing desire" and secondly to mean "morally desirable or good". Bearing this crucial distinction in mind it is worth re-examining Gray's words, substituting for the word "desirable" its first definition and then afterwards its second definition. In the first instance, this produces:

...His argument is, rather, that only things capable of being desired can be intrinsically [capable of arousing desire] and, further, that the fact that something is desired is evidence that it is [capable of arousing desire].

This is true, but it is a truism and says nothing at all. Then, adopting the second definition of "desirable", Gray's sentence reads:

...His argument is, rather, that only things capable of being desired can be intrinsically

* Emphasis added.

[good] and, further, that the fact that something is desired is evidence that it is [good].

This, of course, is false.

So Mill, even when assisted by Gray's valiant efforts, does not succeed in proving the validity of utilitarianism. The utility principle cannot be proven. Because of this, it cannot be legitimate to criticise the concept of a liberty principle independent of utility for being unprovable. The intrinsic value of utility is just as unprovable as the intrinsic value of liberty. Consequently, the criticism that a liberty principle *independent* of utility is "not supported by reasons" is an illegitimate criticism. It certainly does not meet the criticism that a liberty principle which is *dependent* on utility is contingent, fragile and thus fails to provide a firm basis for the "free society" which Mill claims to seek.

3.3.3. The *specific* problems with liberty being contingent on utilitarianism:

3.3.3.A: Overriding individualism

The problem of the contingency and dependence of the liberty principle on utility is exacerbated by the actual content and nature of utilitarianism. It is not just that Mill makes liberty contingent on another principle*: the particular cause for concern is that Mill makes liberty contingent on utilitarianism, a principle which, in certain circumstances, is antithetical to liberty, and therefore potentially subversive of it.

* while at the same time (as has been seen) never wholly rejecting the idea of it as abstract right, so long as it is not "abstract right as a thing independent of utility"¹. Mill's apparent belief that the two are reconcilable, and that one is "constitutive" of the other, is what causes fatal ambiguities in his argument.

One aspect of this is the way that, in John Rawls's words,

utilitarianism does not take seriously the distinction between persons¹¹³.

What Rawls means is that, because the aim of utilitarianism is to promote happiness to the greatest extent, measured by aggregating the total of happiness throughout society, it attaches no great importance to the particular situation of each individual human being - other than as a component element in the collective social "sum". Mill in effect acknowledges this when he insists that the utilitarian standard

is not the agent's own happiness, but the greatest amount of happiness altogether¹¹⁴.

This point should not be confused with Nozick's criticism of act-consequentialism for "sacrificing" individual persons (which, as has been seen, can be applied as much to liberty as an intrinsic value as to liberty which is dependent on utility). Nozick's objection was to the very concept of a moral balancing act. The objection here has to do with the *method* by which the balances are calculated in utilitarianism.

Act-consequentialism, when attached to a commitment to liberty for its own sake, has the object of maximising liberty and, by necessary implication, life*; that is, it seeks to maximise what are commonly called fundamental individual rights. Unbound by side constraints, it may allow individual rights to be violated - *but only to prevent them being violated more*. By contrast, utilitarianism seeks to maximise happiness of any and every kind, and it accords no especial priority to individual rights. Utilitarianism treats life and liberty just as forms of happiness (of a certain measurement or extent) to be aggregated in the balance with all other forms of happiness. The practical distinction between the

* life being an essential prerequisite of liberty: see chapter two, section 1.5.1.A for a discussion of this question.

two can be seen by returning to the example of Sophie's choice. Both the utilitarian, and the act-consequentialist committed to liberty, would concur with Sophie's decision to sacrifice one of her children to prevent both being killed - the utilitarian because two lives rather than one means twice as much happiness, the act-consequentialist - for - liberty because it means twice as much freedom. Yet what would be the position if there were no threat of both children being killed, but it had been found that one of the children had a virus which would infect every other person on earth, giving each person a bad headache for a day but never troubling them again?* Suppose also that the total unhappiness caused by everyone on earth having a bad headache for a day outweighs the unhappiness caused by one child dying. In those circumstances, ought the child to be sacrificed? A commitment to liberty as paramount would forbid this, for to sacrifice the child does not maximise liberty or advance it in any way; accordingly a commitment to liberty, even an act-consequentialist commitment to liberty, will respect the individuality of the child. Utilitarianism, however, will require the very opposite. The individuality of the child does not matter for the utilitarian if it is outweighed by the happiness of everyone being spared a bad headache for a day. This is what is meant by utilitarianism not taking individuals ("the distinction between persons") seriously enough: where liberty is subject to utility, an individual's entitlement to life and liberty takes second place to the collective happiness.

* This infection would be such that its spread could not be prevented by any attempt to quarantine or isolate the child.

3.3.3.B: Paternalism and the socialist state

But the more important problem for liberty in making the liberty principle subject to utilitarianism, is that utilitarianism in public policy can lead towards paternalism and even state socialism. At the beginning of this chapter, the polarity between individual freedom and government power was discussed, and it was seen how Mill recognises the need to limit the role of the state in order to protect the liberty of individuals. Indeed, as Mill writes in *On Liberty*, the very simple principle is designed to answer

the practical question where to place the limit - how to make the fitting adjustment between individual independence and social control¹³.

An increase in the role of the state - that is, in the range of its functions (see section 2.2.2. above) - must therefore be at the expense of liberty. It follows that, when the state assumes greater responsibilities for managing society, freedom is accordingly diminished. Paternalism in government means precisely this: the state acting as *paterfamilias* to its citizen-children, caring for their welfare, acting for their own good, regarding an attitude of let-them-stand-on-their-own-two-feet ("laissez-faire") as unconscionable neglect. Socialism is a species of paternalism. It will not abandon its citizen-children to the mercy of market forces and laissez-faire. It sees it as the state's role to provide certain social goods and promote certain social objectives: universal welfare, equality, reward in accordance with need, economic planning, environmental planning or any combination of these. So the socialist state is one which assumes greater responsibility and extends its role.

Mill's very simple principle suggests that liberty involves an unequivocal rejection of such paternalism. It is not the responsibility of the state or society, the

principle avers, to look after individual citizens by interfering in the running of their lives - but only to prevent them from harming others. Individual citizens must, indeed, be left to stand on their own two feet. Unlike a father who protects his children from the consequences of their own follies and mistakes by limiting their freedoms (insisting that they do their school homework, eat their vegetables, observe bed-times, and so on), the state is not entitled to exercise analogous power over individual citizens. The individual's

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 right².

It is here that the difficulties of treating the principle as dependent on utility become most acute. For if Mill's principle is applied to solve "the practical question" of the extent of state power, what should the state do in circumstances where a majority of individuals, acting autonomously and *without harming others*, cause injury and unhappiness to themselves? In such circumstances, the "very simple principle" would require non-interference. Since those individuals are harming no-one but themselves, none of them can "rightfully be compelled to do or forbear because... it will make him happier", so that the majority in society are left to cause unhappiness to themselves. However the point about a commitment to utilitarianism is that it entails exactly the opposite view. Utilitarianism does not hold, as Alan Ryan suggests, that "to see if an action is wrong we have to see whether it is an other-regarding action which tends to diminish other people's welfare"^{114*}. Utilitarianism holds that actions are "wrong as they tend to produce the

* Understandably, on this view, Ryan regards the very simple principle as perfectly consistent with utilitarianism.

reverse of happiness"²⁸ - the individual's own happiness, as well as the happiness of others. Accordingly, where a majority of individuals cause injury and unhappiness to themselves, the utility principle requires that individuals must be "compelled to... forbear", even if they do not harm others: their action is increasing general unhappiness in society, and only a prohibition of that action would produce the "greatest happiness". The utilitarian, in short, would take a paternalist view of the state's role. This is true of utilitarianism in the original Benthamite sense of satisfaction and the absence of pain, which (assuming a causal link between smoking cigarettes and lung cancer) might require a ban on smoking if the majority were smokers. It is also true of "utility in the largest sense", used by Mill to mean "the general cultivation of nobleness of character", whereby if most people spent their evenings watching soap operas on television, these might be censored and people encouraged to take part in "improving" activities. (The telescreen in Orwell's 1984, exhorting the masses to Physical Jerks, comes to mind.)

It therefore matters very much to know whether Mill's conception of liberty is to be pursued for its own sake, or as subject to utilitarianism. It is crucial to understanding which of two radically different types of political order would subsist if the very simple principle were applied. And on this point Mill's ambiguity on the intrinsic/instrumental question is, to say the least, unfortunate.

That same ambiguity translates, not surprisingly, to Mill's attitude on the question of whether the *polis* would be a liberal/ "laissez-faire" society (non-paternalist), or a (paternalistic) socialist state. As was noted in section 1.3.3., Mill mentions socialism by name only once in *On Liberty* and then his attitude is one of antipathy⁴⁸.

Similarly, in a letter to his wife Harriet Taylor in 1855, Mill explained the need to write *On Liberty* as being that all the projects of social reformers these days are really *liberticide*¹¹⁵.

Again, in his articles on socialism published posthumously in the *Fortnightly Review*, Mill compares a society based on "private property" with a socialist state. "In order", he says, "to state this question in its simplest form", he equates the form of socialism which advocates equality of reward with what he calls "simple Communism"⁴⁹. He concludes his comparison with a ringing endorsement of "private property" as more conducive to liberty than "Communism":

...in Communist associations private life would be brought in a most unexampled degree within the dominion of public authority, and there would be less scope for the development of individual character and individual preferences... Already in all societies the compression of individuality by the majority is a great and growing evil; it would probably be much greater under Communism...¹¹⁶

In the light of these remarks it is perhaps hard to understand how commentators can regard Mill as sympathetic to the idea of a socialist state. However, as was noted in the introduction, this is precisely the view of Geraint Williams. John Gray compares Mill's vision with what has been attempted in Titoist Yugoslavia. And C.L. Ten is quite explicit on the point, claiming that there is "no necessary connection" between Mill's views and

either a doctrine of economic laissez-faire* or a theory of the minimal function of the state. It is possible to combine Mill's liberty principle with, for example, a belief in socialism¹¹⁷.

* For her part, as has been seen, Gertrude Himmelfarb is convinced that "Mill, after all, was a laissez-fairist"¹¹⁸.

In fact these interpretations of Mill are comprehensible, and even legitimate, precisely because of Mill's ambivalence on the subject. He is simply not clear about which is paramount: liberty, or utility; individualism, or paternalism; a liberal state with a minimum range of functions, or a socialist state. The consequence is that, alongside his insistence that the individual's "own good... is not a sufficient warrant" for state interference, and that compulsion is not justified "because it will make [an individual] happier" - and alongside his condemnation of social engineering as "liberticide" - Mill appears at times to take a quite contrary view. Thus, in *Utilitarianism*, he seems to envisage the role of the state and society as *including* compulsion to make an individual happier:

laws and social arrangements should place the happiness, or (as speaking practically it may be called) the interest, of every individual, as nearly as possible in harmony with the interest of the whole³⁹.

(Such talk of harmonising the interests of individuals with a collective interest is a far cry from Mill's passionate espousal of individualism and nonconformity³⁷, and from his rejection of the equation of individual people with "the people" as a single entity⁸.)

Of course, Himmelfarb, with her notion of "two Mills", would probably claim that this is only to be expected from a passage in *Utilitarianism*, whereas *On Liberty* takes an altogether different approach. Alas, it does not. There are passages in *On Liberty* too where Mill appears to view compulsion by the state as desirable, not just to prevent harm to others, but to promote the common good. He writes:

There are also many positive acts for the benefit of others which [an individual] may rightfully be compelled to perform²⁷.

Mill then lists some of these. The first few, such as compulsion on an individual to give evidence in a court of justice or to "bear his fair share in the common defence", would be unexceptionable to the most ardent champion of a liberal system, whose paramount commitment to liberty implies a concern that the state should have only a minimalist role, intervening only to protect individual liberty. Courts of justice are needed to uphold the laws which protect an individual's freedom from the mugger, the thief, and so on. If they are to function effectively, people must be compelled to give evidence. Similarly a common defence is necessary to protect people's freedom from the threat of foreign attack or invasion.

But the later items in Mill's list suggest a wider - more paternalist, more socialist - role for the state. Mill declares that individuals may be compelled to "perform certain acts of individual beneficence" and he includes among these

interposing to protect the defenceless against ill-usage^{7e}.

The possibilities for state interference (at the cost of individual liberty) which these words imply are almost limitless. In labour relations, the road is open for endless state regulations as to pay and conditions to prevent the employer "ill using" the "defenceless" workers; the freedom of a worker to accept a job with (say) low wages would be curtailed. So, too, with other commercial contracts. The obligation to protect a party with relatively weak bargaining power from being exploited by the other party implies state interference in freedom of contract. The consumer who makes a bad bargain may be protected from his mistake; the borrower who agrees to a high interest rate may be spared having to pay that interest rate - perhaps by making debts unenforceable, or setting statutory interest rates, or introducing credit controls. These are the characteristics of a socialist

society; and they involve a rejection of the view that an individual's "own good, either physical or moral, is not a sufficient warrant" for interventionism. Moreover the notion of compelling people into acts of individual beneficence sits strangely with a commitment to liberty. It is, indeed, almost a contradiction in terms. For acts of individual benevolence are those which are done by choice: freely, voluntarily, spontaneously. There is nothing benevolent or generous about giving under compulsion - giving because one has to, rather than because one wants to. Yet this confusion of benevolence with transferring wealth under compulsion (usually through the mechanism of taxation)* is what lies at the heart of the socialist ethic: the belief that poverty, misery, unkindness and ill-usage are problems soluble by *dirigiste* interventionism. It implies a singular lack of faith in the way people would behave to each other if left to their own devices - and, hence, a singular lack of faith in freedom.

The examples quoted so far of "protecting the defenceless against ill-usage" have been extrapolations of Mill's reasoning, rather than examples chosen by Mill. But in chapter 5 of *On Liberty*, entitled "Applications", Mill gives his own example of the paternalistic possibilities opened up by his ambiguities. He writes that it would be perfectly consistent with the application of his principle

if either a public officer or anyone else [who] saw a person attempting to cross a bridge which had been ascertained to be unsafe... [were to] seize him and turn him back¹¹⁹.

The "bridge example" has been a source of much controversy among Mill scholars. Mill *could* have justified his commendation of such interventionism by the "public officer" with the argument that it is the state's role to

* and also with "treating people well" under compulsion, for example by statutory regulation of conditions at work.

protect an individual's life and liberty, and where these are endangered the state must interfere. But Mill chooses a different argument which, it must be said, is among the sloppiest pieces of reasoning to be found in his works. He says that the individual should be prevented from trying to cross the bridge because

liberty consists in doing what one desires, and he does not desire to fall into the river¹¹⁹.

This, unmistakably, is paternalism*. It involves the public officer, on behalf of the state, deciding that what the individual expresses to be his desire (crossing the bridge) is not his *real* desire; the individual's "real" desire is what is good for him (not falling into the river), and if the outcome of acting on his expressed desire is not his real desire, then his expressed desire must be overridden. In the very simple principle Mill appears to say that liberty consists in allowing people to act on their expressed wishes regardless of whether it is for their own good, or will make them happier, or "in the opinions of others... would be wise or even right". In the bridge example, he says the exact opposite: liberty consists in allowing the opinion of the public officer (or anyone else) as to the wisdom of the individual's chosen act to prevail.

Faced with this difficulty, Gray and C.L. Ten, both anxious to mount a defence of Mill, are forced to invent a distinction between what they call "weak" paternalism and "strong" paternalism. No matter that Mill never makes the distinction; it is worth considering on its own terms. "Strong" paternalism, they say, means interfering for the individual's own good, pure and simple. "Weak" paternalism, on the other hand, permits such intervention only in certain circumstances - and this, they insist, is the only form of paternalism that Mill would countenance. Gray takes the circumstances for invoking weak paternalism

* or, to feminise the metaphor, the "nanny state".

as being when an individual's expressed desire is "clearly not the result of considered rational deliberation"¹²⁰. Ten adopts a slightly different criterion, saying that Mill would allow interventionism in circumstances where the individual does not understand the consequences of what he chooses to do.

The "strong"/"weak" distinction gives rise to more difficulties than it solves. For one thing, it totally removes the clarity and simplicity from the operation of Mill's "very simple" principle. Mill puts forward the principle as a convenient yardstick for answering "the practical question" of where to set the limit of social control encroaching on individual independence¹³. What Gray and Ten are saying is that this yardstick will not suffice, and it is necessary to consider further, supplementary, criteria about whether the individual understands what he is doing, or is "clearly" acting as a result of "considered rational deliberation". This introduces far greater complexity, uncertainty and, indeed, arbitrariness into the application of Mill's principle. Moreover, it is hard to believe that the state can possibly know what goes on in people's minds - whether they have made rational deliberations or understand what they are doing - and, even if it could, the arrogation by the state of the discretion to make such judgements involves an enormous extension of state power. The world of the "Thought Police" beckons.

Moreover, and linked to these difficulties, is the problem that not only is the line between "strong" and "weak" paternalism difficult to determine: it may in fact be non-existent. When a person makes a mistake, or enters into a bad bargain, or over-borrows, then it follows virtually by definition that he did not understand the consequences of his choice: if he had understood that it was a mistake or a bad bargain (or, if he had "clearly" made a rational choice), he almost certainly would not

have done it. The mistake is the strongest evidence that the person did not understand what he was doing. Therefore, even applying so-called "weak" paternalism, the state would be entitled to interfere in an individual's actions virtually much every time that he might otherwise make a mistake. The scope for exercising free choice is accordingly diminished, and a state entitled to act in this way is indistinguishable from a paternalistic, socialistic, even totalitarian, state.

This is what the very simple principle is supposed to guard against. But this is also where the inconsistencies and contradictions in which that principle is couched, lead to. When Gray says that Mill's principle of liberty does not exclude the possibility of his favouring socialism¹²¹

it is impossible to disagree. Mill's principle does not exclude any possibility at all.

3.4. Mill's gamble

Mill would not admit to any such inconsistencies. He does not acknowledge a contradiction between liberty as an intrinsic value, and liberty as valuable because it leads to utilitarianism. As has been seen, Gray interprets Mill to regard liberty and utilitarianism as virtually synonymous (see section 2.2.2. of this chapter), and in this Gray's analysis is very plausible. Certainly, as has also been seen, Mill believes that the maintenance of liberty is *as a matter of fact* the best way to attain utilitarian objectives, and that the two go hand in hand, so that the paramountcy of one is consistent with the paramountcy of the other. Free discussion (Mill asserts) is the most effective way to produce truth, and free competition in ways of life is the best way to attain a better way of life. Mill makes this empirical claim in various forms throughout *On Liberty*:-

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.^{122*}

Intolerance... induces men to disguise [their opinions]... A state of things in which a large portion of the most active and inquiring intellects find it advisable to keep... their convictions within their own breasts... *cannot send forth* the open, fearless characters and logical, consistent intellects who once adorned the thinking world.^{41**}

Never when controversy avoided the subjects which are large and important enough to kindle enthusiasm

* Emphasis added.

** Emphasis added.

was the mind of a people stirred up from its foundations, and the impulse given which raised even persons of most ordinary intellect to something of the dignity of thinking beings.^{123*}

...the only unfailing and permanent source of improvement is liberty...¹²⁴

All of these quotations - variations on a theme - are assertions of empirical fact. They are not easily provable (if at all), and Mill does not even try to prove them. He simply *assumes* that they are true, that the pursuit of liberty is factually consistent with the pursuit of utility, and that there is no contradiction between them. Of course, Mill must assume this, since his whole theory depends upon it.

But the implications of this unproven assumption are dangerous for Mill's theory, in two ways. The first is a logical difficulty. If liberty is justified *because of* its propensity to produce "utility in the largest sense", then if the premise is disproven (that liberty does produce such "utility"), liberty loses its justification. Secondly, and closely linked to the first point, is the factual difficulty. Mill says that liberty is to be pursued as the best way of attaining the utilitarian "goods" of truth, virtue, happiness, "nobleness of character" and so on. Maybe it is. But maybe there is, or will be, a situation when there is an alternative means of attaining these goods: a situation in which freedom would derogate from their attainment, and the suspension of freedom would help. Mill's assumption implies that such a factual situation is impossible. But in the view of this thesis, it is at very least conceivable, and perhaps it is factually possible. In that case, Mill's

* Emphasis added.

assumption perishes, and with it the basis of his argument for liberty.

Isaiah Berlin claims that historical fact disproves Mill's "at best empirical"¹²⁵ assertion. Berlin himself makes the empirical assertion that

it is a commonplace that neither political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty¹²⁶

and he cites as an example of unfreedom's propensity to achieve utilitarian "goods" the alleged fact that goodness and truth have thrived in "severely disciplined communities" such as the Scottish Calvinists¹²⁵. Rather than enter into an historical dispute with Mill and Berlin, it might be better to give Mill the benefit of the (factual) doubt and concentrate on the question of whether a contradiction between liberty and utilitarianism is at least *conceivable*. For if it is, there is no need to quibble about historical facts.

Alasdair MacIntyre has shown that it *is* conceivable. There are situations where the demands of liberty and of utility will not go hand-in-hand. MacIntyre accepts, first, that often they will coincide:

The concept of the public happiness has obviously legitimate application in a society where the consensus is that public happiness consists in more and better hospitals and schools.¹²⁷

But he warns against assuming that such a consensus, or one that is similarly benign, will *necessarily* prevail:

What application has [utilitarianism] in a society where the public happiness is found by the public itself to consist in the mass murder of Jews? If in a society of twelve people, ten are sadists who will get great pleasure from torturing the remaining two, does the principle of utility enjoin that the two should be tortured?¹²⁷

What hope for freedom then? Kenneth Minogue makes the same point thus:

...we might imagine a situation in which some expert, who knew perfectly well what we needed, might well dispose of our lives much more satisfactorily than we could do ourselves, since we often suffer disappointment because the obligations we contract provide us with less satisfaction than we expected¹²⁸.

In that case, too, liberty would have to be jettisoned to achieve happiness and better lives.

Mill's defenders would almost certainly object to this line of reasoning as being based on an unfair caricature of what Mill really believes about the relationship between liberty and utility. They would reject the idea that Mill sees liberty as a mechanistic means to a utilitarian end; and indeed there is reason to believe that Mill's very commitment to liberty arises from despair at the single-minded pursuit of a utilitarian end, for Mill writes that after his mental crisis

The end [realizing all one's objects in life] had ceased to charm, and how could there ever again be any interest in the means?¹²⁹

It is at this stage in his life that Mill begins to pursue utility "in the largest sense" and - as Gray and Geraint Williams insist - he sees liberty as "constitutive"¹³⁰ of, rather than merely a means to, utility. In other words the larger kind of happiness is to be found *in* freedom, and the two therefore go hand-in-hand.

But the "constitutive" argument is of little assistance to Mill here. Again it rests on an unproven empirical assumption, that people do in fact derive "larger" happiness in a state of freedom, and that they always will, and necessarily must. Mill's principle of liberty is to be promoted as of right on the basis of this assumption. Yet it is at least *conceivable* that the

assumption is wrong, in which case the basis for liberty disappears, and liberty itself may be overridden.

Gray himself acknowledges this problem, and admits that

this moral right [to liberty] is a defeasible right¹³⁰.

He expresses doubts about this which are similar to the points made by MacIntyre and Minogue:

What if (Gray asks) men do not converge on the higher pleasures: suppose, after due thought and experiment, they come to prefer forms of life and activity in which autonomous choice is an insignificant ingredient - what then?¹³¹

What, indeed?

Gray thus hits upon the main weakness in Mill's justification of liberty: Mill argues for liberty because it is constitutive of utility; this rests on the factual assumption that liberty actually *is* constitutive of utility; and this in turn does not rest on any proof but instead (to quote Gray)

reposes on the *wager* that civilised men will in fact prefer the life of free men because it is in such a life that they will find their happiness^{132*}.

A wager! A gamble! Mill's entire commitment to liberty rests on a gamble. This is the view expressed by Gray in his book *Mill on liberty: a defence*. And Gray believes that it is defensible because this wager is, in his words, a reasonable wager¹³².

Some might well challenge whether it actually is a "reasonable" wager. The anonymous author of an article in *Fraser's Magazine* in 1872 criticised Mill's assumptions, with the scathing declaration that to expect men to become

* Emphasis added.

more vigorous (and hence attain happiness "in the largest sense")

by simply removing restrictions, seems to be as fallacious as the hope that a bush planted in an open field would naturally develop into a forest tree¹³⁴.

But reasonable or not, a wager is hardly a firm basis for establishing a principle which is supposed to safeguard liberty. As was seen earlier, Mill rejects the notion of so-called "self-evident" truths because they are "not supported by reasons"¹¹⁰. Yet the same rigorous standards of proof cannot be applied to the assumption - the gamble - which is Mill's answer to the question "why freedom?".

The very simple principle is thus based on a gamble or wager. To repeat Gray's question: what if the gamble is wrong? "What then?"¹³¹ For those who care about the safeguarding of liberty this is a very serious question, for if the principle is only contingent and can therefore be jettisoned, then it is not an effective guarantee of liberty. Mill offers no clear answer to the question "what then?". He himself presents the principle as being designed to solve "the practical question" of when interference in individual liberty is and is not justifiable; but its contingency means that it cannot properly do this:

the power of the doctrine to cope with practical dilemmas [may be] less than he hoped¹³⁵.

These are Gray's words, in the conclusion to his "defence" of Mill. They are an understatement, and an eloquent one.

* * *

SOURCES: CHAPTER ONE - WHY FREEDOM?

All page numbers are, unless otherwise indicated, references to:

John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974/1859).

- 1 Page 69.
- 2 Page 68.
- 3 J.W.N. Watkins; "John Stuart Mill and the liberty of the individual" - in: David Thomson; *Political ideas*; Penguin (Harmondsworth 1969); page 155.
- 4 John Gray; *Mill on liberty: a defence*; Routledge and Kegan Paul (London 1983); page 17.
- 5 Page 67.
- 6 Jean-Jacques Rousseau; "The Social Contract" - in: Jean-Jacques Rousseau; *Oeuvres Completes*, edited by Gagnebin and Raymond; *Bibliothèque de la Pleiade* (Paris 1959/1762); volume III, page 360.
- 6A Rousseau; volume III, page 380.
- 6B Rousseau; volume III, page 361.
- 7 G.W.F. Hegel; "Philosophy of Right" - cited in: Shlomo Avineri; *Hegel's theory of the modern state*; Cambridge University Press; page 178.
- 8 Page 62.
- 8A Page 59.
- 9 Isaiah Berlin; "Two concepts of liberty" - in: Isaiah Berlin; *Four essays on liberty*; Oxford University Press (Oxford 1969/1958); page 147.
- 10 Thomas Hobbes; *Leviathan*; Everyman (1914/1651); page 111.
- 11 Hobbes; page 67.
- 12 Page 71.
- 13 Page 63.
- 14 Gertrude Himmelfarb; "Editor's introduction" - in: John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974); page 31.

- 15 Page 66.
- 16 *Gray*; page xi.
- 17 Edmund *Burke*; *Reflections on the revolution in France*; Penguin (Harmondsworth 1968/1790); pages 152 to 153.
- 18 F.A. *Hayek*; "*Postscript: why I am not a conservative*" - in: F.A. *Hayek*; *The constitution of liberty*; Routledge (London 1960).
- 19 F.A. *Hayek*; *Rules and order*; page 12 - in: F.A. *Hayek*; *Law, legislation and liberty*; Routledge and Kegan Paul (London 1982/1973).
- 20 Page 151.
- 21 John Stuart *Mill*; "*Utilitarianism*" - in: J.S. *Mill* and Jeremy Bentham; *Utilitarianism and other essays*; Penguin (Harmondsworth 1987/1861); page 133.
- 22 *Hobbes*; page 64.
- 23 *Hobbes*; page 87.
- 24 John Stuart *Mill*; *On socialism*; Prometheus Books (Buffalo, New York 1987/1879); page 136.
- 25 Page 66.
- 26 *Himmelfarb*; page 30.
- 27 Page 70.
- 28 *Mill*; "*Utilitarianism*"; page 278.
- 29 *Mill*; "*Utilitarianism*"; page 283.
- 30 Page 80.
- 31 Pages 77 to 96.
- 32 Pages 97 to 108.
- 33 Pages 109 to 110.
- 34 Page 129.
- 35 Page 132.
- 36 Page 123.
- 37 Page 137.
- 38 Page 133.
- 39 Page 82.

- 40 Page 76.
- 41 Page 94.
- 42 Page 95.
- 43 Page 115.
- 44 Page 120.
- 45 Page 121.
- 46 Page 164.
- 47 Pages 180 to 183.
- 48 Page 155.
- 49 *Mill; On socialism; pages 118 to 119.*
- 50 Geraint L. *Williams*; "Introduction" - in: Geraint L. Williams (editor); *John Stuart Mill on politics and society; Collins/Fontana (Glasgow 1976); page 44.*
- 51 Page 128.
- 52 Page 141.
- 53 *Mill; "Utilitarianism"; page 322.*
- 54 *Himmelfarb; page 30.*
- 55 *Williams; page 30.*
- 56 *Himmelfarb; page 15.*
- 57 *Himmelfarb; page 16.*
- 58 *Gray; page 14.*
- 59 John C. *Rees*; *John Stuart Mill's "On Liberty" (constructed posthumously from published and unpublished sources by G.L. Williams); Clarendon Press (Oxford 1985); page 5.*
- 60 *John Stuart Mill; Autobiography in the Collected Works of John Stuart Mill; University of Toronto Press (Toronto 1981/1873); pages 162 to 164.*
- 61 *Gray; page 1.*
- 62 *Gray; page 2.*
- 63 *Gray; page 8.*
- 64 *Gray; pages 10 and 14.*

- 65 John Stuart Mill; "System of Logic", book VI, chapter 12, section vi - in: J.S. Mill; The logic of the moral sciences; Gerald Duckworth (London 1987/1843); page 140.
- 66 Gray; page 21.
- 67 Gray; page 23.
- 68 Gray; page 22.
- 69 Gray; page 25.
- 70 Mill; "Utilitarianism"; page 321.
- 71 Gray; pages 25 to 26, and 27.
- 72 Gray; page 32.
- 73 Gray; page 27.
- 74 Mill; "System of Logic", book VI, chapter 12, section vii; page 142.
- 75 Robert Nozick; Anarchy, state and utopia; Basil Blackwell (Oxford 1974); pages 42 to 43.
- 76 Mill; "Utilitarianism"; page 280.
- 77 Mill; "Utilitarianism"; page 307.
- 78 Gray; pages 55 and 54.
- 79 Berlin; "Two concepts of liberty"; page 122.
- 80 Gray; page 107.
- 81 Williams; page 38.
- 82 Himmelfarb; page 15.
- 83 Page 122.
- 84 Page 120.
- 84A Berlin; "Two concepts of liberty"; page 128.
- 84B Berlin; "Two concepts of liberty"; page 131.
- 84C R.S. Peters; "Hegel and the nation-state" - in: David Thomson; Political ideas; Penguin (Harmondsworth 1969); pages 132 and 135.
- 85 Hobbes; page 110.
- 86 Gray; page 55.

- 87 Gray; page 77.
- 87A Mill; "Utilitarianism"; pages 280 to 281.
- 88 Berlin; page 181.
- 89 Nozick; pages 32 to 33.
- 90 Isaiah Berlin; "John Stuart Mill and the ends of life" - in: Isaiah Berlin; Four essays on liberty; Oxford University Press (Oxford 1969/1959); page 189.
- 91 Berlin; "John Stuart Mill and the ends of life"; page 188.
- 92 Mill; "Utilitarianism"; page 286.
- 93 Page 106.
- 94 Mill; "Utilitarianism"; page 288.
- 95 Isaiah Berlin; Four essays on liberty; Oxford University Press (Oxford 1969); page 1.
- 96 Maurice Cowling; Mill and liberalism; Cambridge University Press (Cambridge 1963); page xii.
- 97 Page 142.
- 98 Berlin; "John Stuart Mill and the ends of life"; page 184.
- 99 Roger Scruton; A dictionary of political thought; Pan Books/Macmillan (London 1983); page 464.
- 100 Hugo Young and Anne Sloman; The Thatcher phenomenon; BBC (London 1986); page 86: first broadcast on BBC Radio 4, 26th May 1985.
- 101 Nozick; page 33.
- 102 William Styron; Sophie's Choice; Corgi (London 1980); pages 642 to 643.
- 103 Obituary of Lord Duncan-Sandys in *The Times* (London), 27th November 1987.
- 104 Nozick; page 28.
- 105 Watkins; page 166.
- 106 John Stuart Mill; "Bentham" - in: J.S. Mill and Jeremy Bentham; Utilitarianism and other essays; Penguin (Harmondsworth 1987/1838); pages 135 and 134.

- 107 Declaration of Independence of the United States of America (Philadelphia), 4th July 1776.
- 108 *Mill*; "Utilitarianism"; page 329.
- 109 *Jeremy Bentham*; Answer to the Declaration of Independence, 1776 - quoted in: H.L.A. Hart; "Between utility and rights"; 79 *Columbia Law Review*; page 829.
- 110 Page 64.
- 111 *Mill*; "Utilitarianism"; page 308.
- 112 *Gray*; page 45.
- 113 *John Rawls*; A theory of justice (1971) - quoted in: H.L.A. Hart; "Between utility and rights"; 79 *Columbia Law Review*; page 829.
- 114 *Mill*; "Utilitarianism"; page 282.
- 114A *Alan Ryan*; The philosophy of John Stuart Mill, second edition; Macmillan (London 1987); page 234.
- 115 Letter to Harriet Taylor, 15th January 1855 - in: Francis E. Mineka and Dwight N. Lindley; "Later letters 1849-1873", in the *Collected Works of John Stuart Mill*; University of Toronto Press (Toronto 1972); volume I, page 294.
- 116 *Mill*; *On socialism*; page 130.
- 117 C.L. Ten; *Mill on liberty*; Clarendon Press (Oxford 1980); page 60.
- 118 *Himmelfarb*; page 47.
- 119 Page 166.
- 120 *Gray*; page 92.
- 121 *Gray*; page 124.
- 122 Page 72.
- 123 Page 96.
- 124 Page 136.
- 125 *Berlin*; "Two concepts of liberty"; page 128.
- 126 *Berlin*; "Two concepts of liberty"; page 167.
- 127 *Alasdair MacIntyre*; A short history of ethics; Routledge and Kegan Paul (London 1967); page 238.

- 128 K.R. *Minogue*; "Freedom as a skill" - in: A. Phillips Griffiths (editor); *Of liberty*; Cambridge University Press (Cambridge 1983); page 198.
- 129 John Stuart *Mill*; *Autobiography*; page 138.
- 130 *Gray*; page 16.
- 131 *Gray*; page 73.
- 132 *Gray*; page 46.
- 133 *Gray*; page 118.
- 134 *Fraser's Magazine*, volume VI (August 1872), pages 155 to 157 - quoted in: John C. Rees; John Stuart Mill's "On Liberty" (constructed posthumously from published and unpublished sources, by G.L. Williams); Clarendon Press (Oxford 1985); page 97.
- 135 *Gray*; page 129.

CHAPTER TWO - PREVENTING HARM TO OTHERS

CHAPTER TWO - PREVENTING HARM TO OTHERS

1. THE PROBLEM

- 1.1. The night-watchman state?
- 1.2. Utilitarianism revisited
- 1.3. The threats to liberty
 - 1.3.1. The first threat
 - 1.3.2. The second threat
 - 1.3.3. The third threat
- 1.4. Two caveats
 - 1.4.1. No threat to freedom of contract
 - 1.4.2. Taste and "harm"
- 1.5. The threats to liberty illustrated
 - 1.5.1. Mill on smoking
 - 1.5.1.A: The right to smoke in public
 - 1.5.1.B: The right to smoke at home
 - 1.5.1.C: The right to smoke alone
 - 1.5.2. Other illustrations: "pursuing our own good in our own way"
- 1.6. How Mill responds to the problem

2. TRYING TO DEFINE "HARM"

- 2.1. Harming others means "violating their interests"
 - 2.1.1. The textual evidence
 - 2.1.1.A: "Interests" in the text
 - 2.1.1.B: "Concerns" in the text
 - 2.1.1.C: Terminological randomness in the text
 - 2.1.2. Trying to define "interests"
 - 2.1.3. The problem remains
- 2.2. Harming others means "violating their security"
- 2.3. Harming others means "violating their freedom"
- 2.4. Harming others means "threatening social cohesion"
- 2.5. Several principles

3. WHY DOES IT MATTER?

- 3.1. A principle of serious and practical moment
 - 3.1.1. The Satanic Verses
 - 3.1.2. Religion and sex
- 3.2. Socialism and harm-prevention

CHAPTER TWO - PREVENTING HARM TO OTHERS

1. THE PROBLEM

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.

John Stuart Mill, *On Liberty*¹.

Is compulsion ever justified? Mill had no doubt that it was. Since justice demands that all individuals be entitled to a minimum of freedom, all other individuals were of necessity to be restrained, if need be by force, from depriving anyone of it. Indeed the whole function of law was the prevention of just such collisions: the state was reduced to what Lassalle contemptuously described as the functions of a night-watchman or traffic policeman.

Isaiah Berlin, *Two concepts of liberty*².

1.1. The night-watchman state?

According to Isaiah Berlin, then, Mill's principle of liberty entails the reduction of the state's role to that of "night-watchman".

In modern times one of the leading exponents of such a night-watchman state has been Robert Nozick. He describes it as

the night-watchman state of classical liberal theory, limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts...³

- and, also, as a "minimal state"⁴. In other words, the "night-watchman" state is one where the line between the sphere of individual activity and the sphere of governmental activity (the line which Mill's "very simple

principle" was intended to mark out)* has been drawn such that government's range of functions is minimised, and the scope of individual freedoms is accordingly maximised. It is, as Nozick emphasises, the classical liberal state**.

So, if Berlin is right, the very simple principle set out in *On Liberty* would serve as the basis of a liberal, minimal state. It would not entitle a government to assume such a wide range of functions as are required in a socialist state. The functions of government, the state and its laws would be limited, as Berlin puts it, to restraining individuals from depriving other individuals of the liberty to which they are entitled. There is some evidence to support Berlin's contention that this is how Mill himself viewed the very simple principle. Thus, in his *Autobiography*, Mill writes that *On Liberty* was written as the latest contribution in a series of nineteenth-century writings reassessing the "doctrine of Individuality"

which, though bearing a superficial resemblance to some of the projects of Socialists, is diametrically opposite to them in principle, since it recognises no authority whatsoever in Society over the individual, except to enforce equal freedom of development of all individualities⁶.

There, one might suppose, the matter ends.

However, the difficulty with Berlin's "night-watchman state" interpretation is that it does not in fact accord with the actual wording of the very simple principle. In formulating the principle Mill does *not* say (*pace* Berlin) that the state may only restrict liberty so as to restrain individuals from depriving others of liberty. He does *not* (*pace* the *Autobiography*) say that the sole justification

* See above, chapter one, section 1.1.

** "Liberal" being used in the sense set out in the Note on Terminology at the beginning of this thesis.

for state intervention is to "enforce equal freedom of development for all individualities". What the very simple principle *does* say is that the sole end and the only purpose for which interference in freedom is justified is

to prevent harm to others¹.

That, it will be appreciated, is something quite different. Preventing harm to others is not the same as just preventing infringements of others' liberty. It can allow for a much wider range of functions to be accorded to the state. It does not necessarily ensure maximal liberty and minimal state interference. It does not guarantee a liberal society. It could be used to justify a socialist state.

Perhaps it will be thought that one is making a mountain out of a molehill in emphasising this distinction, and that it is ludicrous to exaggerate the importance of the exact form of words in the very simple principle, read in isolation and out of context. But the point is that it is *not* out of context. In addition to the very simple principle itself - which is of course the focal point of *On Liberty* - virtually every one of the many references in *On Liberty* to the boundary between individual freedom and state intervention conceives it in terms of harm-prevention rather than liberty-protection. This will be seen in more detail later in this chapter (see section 2.1.1.). Only once in *On Liberty* does Mill seem to imply that preventing infringements of others' liberty is the crucial thing⁷. Against that background it is impossible to sustain Berlin's analysis, or to agree that (even ignoring the uncertainties, discussed in chapter one, about liberty being contingent on utility) the very simple principle necessarily entails a liberal, minimal state.

1.2. Utilitarianism revisited

Arguably Mill's emphasis on harm-prevention is traceable, once again, to his chronic inability to wrench himself away from his utilitarian roots (discussed at length in chapter one of this thesis). Moreover, once again, this inability on Mill's part may be what explains the failure of the very simple principle to meet its principal stated objective - its failure, that is, to provide a clear and unambiguous theoretical basis for securing a free society⁸.

Harm-prevention, after all, is the essence of utilitarianism. It is hard to contest John C. Rees's crisp assertion that

a major component... of Mill's conception of the proper limits to liberty derives from the need to prevent, or minimise, injury; and the notion of injury is supplied by the principle of utility⁹.

In *Utilitarianism*, for example, Mill asserts as a tenet of the utilitarian faith the proposition that "most of the great positive evils of the world are in themselves removable"¹⁰. The principle of utility, moreover, will provide the basis for removing those great positive evils and - the other side of the same coin - for promoting "the happiness of others"¹¹. Mill repeats the concern with others' happiness (and, implicitly, with preventing others' unhappiness) when he stresses that the utilitarian moral standard "is not the agent's own happiness, but that of all concerned"¹². Finally, in the same paragraph of *Utilitarianism*, Mill writes that utility would enjoin that "laws and social arrangements"¹³ should play their part in the attainment of this standard. From here it is but a short step to the very simple principle - "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"¹ -

which specifically entitles laws and social arrangements to provide for the prevention of harm.

It is necessary to be careful here, more careful perhaps than Rees has been. For the very simple principle does not entitle legal interference on any occasion when it is necessary to prevent harm - but only when it is necessary to prevent harm *to others*. Preventing harm to oneself is emphatically not the business of the state and its laws according to the very simple principle. At least by intention the very simple principle is extremely hostile to such paternalism*, and it insists that an individual's own well-being, either physical or moral, is an insufficient warrant for governmental interference:

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 right¹.

In this respect Mill's very simple principle differs fundamentally from utilitarian doctrine. The best way of appreciating this is to consider examples of where a majority of the population engage in activities which do themselves (but no one else) harm - for instance, spending more time suffering hangovers after drinking too much the previous night than going on energetic walks in the countryside. In such a case, a utilitarian concern with the greatest happiness of the greatest number, when given effect by "laws and social arrangements"¹³, necessarily entails coercive action to rectify the sorry state of affairs. By contrast, the very simple principle would *not* entitle the state to interfere with such purely "self-regarding" actions, as Mill calls them¹⁴ - for the simple

* By intention undeniably - but perhaps not in effect. The main charge which this thesis lays against the very simple principle is that, whatever its robust intentions, its ambiguity is such that it does allow for state paternalism. See chapter one (especially section 3.3.3.B), and see this chapter and the next.

reason that this is not a matter of preventing harm to others**.

In short, a principle of preventing harm to others is not the same as utilitarianism. But the two doctrines share common roots, in the impulse to rid the world of its "great positive evils" - that is, to Prevent Harm. What they also have in common, in giving priority to harm prevention, is the capacity thereby to undermine liberty and to endanger the free society which the very simple principle was intended to uphold.

1.3. The threats to liberty

At the beginning of this chapter we saw how Berlin's concept of a state which only intervened to prevent infringements of liberty entails a minimal range of governmental functions and the maximum scope for individual freedom. It entails a liberal society.

What is it about a state which is entitled to intervene "to prevent harm to others" that endangers this maximal individual liberty? Three main factors will be considered here.

1.3.1. The first threat

The first factor is that a government which is entitled to prevent people doing harm to each other enjoys far more *discretion*, and hence more power, than one restricted to protecting people's liberties. "Harm" is not an objective term with a limited, specific definition. What constitutes "harm" will always be a controversial issue, involving subjective value judgements. When a trade union calls a strike, but some of its members

** With specific regard to drinking, this is borne out by Mill's remarks on the subject in *On Liberty*^{14A}. But see C.L. Ten's doubts on this: section 2.4. of this chapter.

continue to work and walk through the picket lines, undoubtedly their action in crossing the picket lines damages the chances of the strike succeeding. It might appear to follow from this that the workers breaking the strike are *harming* the workers on strike and so, in order to prevent harm to others, they should be prohibited from crossing the picket lines and deprived of their freedom to go to work. Arguably, however, it might be against the long-term interests of all the workers, the strikers as well as the strikebreakers, for the strike to succeed - because, for instance, the success of the strike forces the management to increase wages, face higher costs, become less competitive and less profitable, go out of business and make the workers redundant. In that case, breaking the strike would not have harmed the workers, but rather the very opposite. The point here is not to say whether it would or would not harm the workers, but to show that it is all a matter of opinion. And a government charged with intervening to "prevent harm to others" is not only entitled, but *obliged*, to take sides and permit or prohibit conduct on the basis of entirely subjective opinions. This of course makes for arbitrary government: *ad hoc* and unpredictable state interference. But more than that, because "harm" is a concept without a limited or specific definition, a principle of preventing harm to others can be extended to entitle governments to interfere in an ever-expanding range of activities. Both in its arbitrariness and in its unlimited scope for interference such a state is a permanent threat to liberty*.

* A state whose functions were limited, *a la* Berlin, to protecting individual freedom could not possibly have contemplated prohibiting workers from crossing the picket line. For although their strikebreaking might (or might not) have *harmed* the strikers, it certainly would not have infringed their liberty. On the contrary, such a state would have been obliged to protect the strikebreakers' freedom to go to their place of work.

1.3.2. The second threat

The second threat to freedom in a liberty principle being subject to preventing harm to others is its *asymmetry*, an asymmetry whose bias is against freedom. To use the words of Berlin (cited in the epigraph to this chapter), Mill's liberty principle sees the law as a mechanism to avoid "collisions" between individuals in society². I want to do something: you would rather I refrained from doing it. Which of us should have his way? Should I be permitted to do what I want, or should I be prohibited from so doing? In the sort of liberty principle which entitles the state to prohibit actions only if they infringe the liberty of others, there is a conception that, as Berlin says, each individual is "entitled to a minimum of freedom"². The presumption that I am free to do what I like is only rebutted if I start to encroach on your freedom to do what you like, and *vice versa*. Here lies the symmetry between our respective rights, or what Mill in his *Autobiography* calls "equal freedom of development for all individualities"⁶. Thus are our respective freedoms given the greatest scope that they can possibly have, stretching to the utmost point short of encroaching on each other's freedom. This, in short, is the maximisation of our freedoms.

But where - as in the "very simple principle" - liberty may be limited in order to prevent harm to others, there is no such symmetry between our respective rights. There is a much lesser presumption in favour of my being free to do what I like. You can stop me doing what I want even if I do not for one moment encroach on your freedom to do what you want - on any occasion when what I want to do causes you harm. Many things, which do not encroach on others' freedom, nonetheless cause them harm. Mill writes in *Utilitarianism* about rules which forbid mankind

to hurt one another (in which we must never forget to *include* wrongful interference with each other's freedom)^{15**}.

In other words: harm is not coterminous with interference with freedom; harm *includes* interference with freedom; harm is a broader concept than interference with freedom; and, therefore, the prevention of harm requires greater intervention than the prevention of interference with freedom. On the one hand there is my entitlement to freedom. On the other hand there is your entitlement to limit my freedom, not only when it threatens your freedom (which would be symmetrical) but also in all the other cases in which "harm" - a *broader* concept - is done. The grounds for limiting freedom (infringement of freedom *plus all the other things which "harm" includes*) are broader, and outweigh, the grounds for allowing freedom. Here is the asymmetry. Thus does the very simple principle, limiting liberty to prevent "harm to others", provide a broader range of justifications for interfering with freedom. Thus does it abandon the maximisation of freedom.

This can be expressed in concrete terms by returning to the example of the strike and the strikebreakers. If the freedom to go to work is limited only by the imperative to prevent others' freedom being infringed, the presumption in favour of the freedom to go to work remains intact: no one could maintain that the pickets' or the strikers' *freedom* was curtailed by the strikebreakers' action. But if the *wider* concept of preventing harm to others is applied, then (at least arguably) it could be said that the strikers are *harmed* by the strikebreakers' action and, further, that this gives grounds for restricting the freedom to go to work. The presumption in favour of freedom has been rebutted.

** Emphasis added.

In ordinary, everyday life, many things harm people without infringing their liberty. People may read (or merely see their friends read) books which are shockingly offensive, and they can be deeply and genuinely pained in consequence*. The price of washing machines may sharply rise, so that many people can no longer afford them; and the price of stocks and shares may fall, depleting the value of many people's investments. One may find that one's favourite local grocer has been put out of business because his prices have been undercut by a store in a neighbouring village (which of course harms the grocer at least as much as oneself). Or maybe one's morning walk is made pleasant every day by the smell of roses from a neighbour's front garden, and then one weekend the neighbour uproots the roses and replaces them with irises whose aroma one does not like at all.

Just because one may be harmed - genuinely harmed - in any or all of these ways, does it mean that the actions which cause the harm should be prohibited? Should books be banned? Should manufacturers not be free to set the prices of their washing machines, and should shares not be bought and sold freely on the stock exchange? Should one store not be free to compete with, and undercut, another? Should a man not be free to decide what flowers he grows in his garden? Under a liberty principle qualified only by the need to prevent infringements of other people's liberty, it is inconceivable that any of these freedoms would be curtailed. Under the very simple principle, with its broader qualification of preventing harm to others, it is not inconceivable at all.

* See section 3.1.1. below.

** See section 3.1.1. below.

1.3.3. The third threat

As these examples from ordinary everyday life illustrate, there are many ways in which it is daily possible to cause harm to others. This is a function of the interdependence of people in society. No man is an island entire of itself¹⁶; life, in almost every aspect, is *social* life, and each of us is bound up in a complex web of relationships with and commitments to parents, brothers and sisters, spouse, children, more distant relatives, friends, acquaintances, colleagues, employers, employees, customers, vendors, fellow motorists, fellow pedestrians, passers-by... Practically everything that one does has an impact on others. There are virtually no purely "self-regarding" actions, and if, under the very simple principle, "other-regarding" actions are to be amenable to external control and interference¹⁷, the scope for inviolable individual freedom will be negligible indeed, and in practice almost nil.

C.L. Ten cautions against viewing Mill's principle as being based upon such a simplistic distinction between self- and other-regarding conduct. He acknowledges the argument of "Mill's critics" that man lives in society and cannot be isolated from others and that, therefore, "except for actions which no one has ever thought of suppressing, all our actions will affect others in some way"¹⁸. But, Ten insists, the issue is not whether an action *affects* others, it is whether an action *harms* others:

I shall argue that Mill's defence of liberty does not depend on there being two different areas of a person's conduct which have very different effects. His case depends on distinguishing between different reasons for interfering with the individual's conduct in any area. Certain reasons are always ruled out as irrelevant, but there is

one reason, the prevention of harm to others, which is always relevant¹⁹.

The "very simple principle" does, indeed, say that liberty may be interfered with only "to prevent harm to others", rather than "to prevent people's actions affecting others". To that extent Ten's argument is right, at least partially*. However, in terms of proving Ten's case that Mill was "a consistent liberal, deeply committed to the cause of freedom for everyone"²¹, this argument does not advance matters very far. For what the examples from ordinary everyday life (in section 1.3.2.) had in common was not just people affecting each other, but people harming each other, day after day, in a myriad of ways. There are thus, under Mill's principle, a myriad of justifications for limiting freedom. This constitutes the third threat to liberty posed by the words "to prevent harm to others".

The example cited of the neighbour who uproots his roses for irises is particularly instructive. The harm done to the passer-by who every morning looked forward to breathing the scent of roses lies in the fact that the passer-by *prefers* the smell of roses to that of irises. But the owner of the garden has a contrary preference: hence his supplanting of the irises for roses. It is in the nature of things that people's preferences, desires, ambitions are not all identical, but instead contradict each other. In an interdependent society, if practically every action affects someone else, it follows from the inherent conflict between people's different preferences that virtually every action will, inevitably, harm someone else. That being so, because the very simple principle renders the scope for freedom in society inversely proportional to the amount of harm done to others, a

* At one point, as will be seen (in section 2.1.1.C of this chapter), Mill talks of the "appropriate region" of human liberty as being that part of a person's life "which affects only himself"²⁰.

society which follows the principle can leave precious little scope for freedom.

1.4. Two caveats

Pausing for a moment in this indictment of Mill's doctrine of preventing harm to others, two caveats should perhaps be inserted here.

1.4.1. No threat to freedom of contract

The first caveat is that Mill expressly states that freedom will not be limited even where harm is caused to others if those others have *consented* to the harm being done. Society, he writes in *On Liberty*, may not intervene even in actions which affect or harm others if such actions are done "with their free, voluntary, and undeceived consent and participation"²⁰. This is an affirmation on Mill's part of his commitment to the liberal doctrine of *freedom of contract*, the idea that in an interdependent society liberty depends on people being free not only to mind their own businesses but also to reach binding agreements with each other, provided that those agreements are freely and voluntarily entered into. In a liberal society, the state's role in upholding liberty involves according recognition, and giving legal effect to, such free contracts. This is what lies behind Nozick's inclusion of "the enforcement of contracts" among the functions of "the night-watchman state" of classical liberal theory (see above³). The proviso that the contract must be freely and voluntarily entered into involves the law of a liberal state in pronouncing contracts made under duress or coercion as void and unenforceable. It also means that, for the contract to be valid, the parties to it must have understood what they were doing: not necessarily known what the consequences

of what they were doing would be, or whether the contract would turn out to be a good or a bad bargain (after all, who can predict the future for certain?) - but known the meaning of the words which constituted their agreement. No one must be duped into agreeing to something which they did not mean to agree to: such an "agreement" would not, truly, be voluntary. Hence, as Nozick puts it, one of the functions of a liberal state is to protect its citizens against fraud (see above³); hence too, the oft-repeated slogan that the liberal state is limited to the prevention of "force and fraud". The concern with preventing force and fraud is also what explains Mill's insistence that agreements must be "free, voluntary and undeceived"²⁰. To be fair to Mill, the doctrine of freedom of contract (provided that the contract *is* free, voluntary and undeceived) is consistent with his view of the state as being entitled to prevent harm to others, and consistent also with the very simple principle's anti-paternalistic statement that a person's "own good, either physical or moral, is not a sufficient warrant" for interference with liberty. If the state prohibits something done unilaterally by *A* to *B* which harms *B*, it is merely restraining *A* from harming *B*. But if the state prohibits something done by *A* with *B*'s consent, on the grounds that such an act harms *B*, the state is restraining *B* from agreeing to something which harms himself - which is a self-regarding action by *B*. In other words, since *B*'s own good does not warrant the state interfering in *B*'s freedom, the state is not entitled to prevent *B* from entering into the agreement with *A*, notwithstanding that it involves *A* harming *B**

* However, Mill makes clear in *On Liberty* that his commitment to the doctrine of freedom of contract is not unalloyed. He writes that it is "sometimes" a "sufficient reason" for releasing people from a contract that the contract "is injurious to themselves", even where the contract has been voluntarily entered into²². This question will be explored further in the conclusion to this thesis.

1.4.2. Taste and "harm"

There is an obvious objection to citing the case of the roses and irises as an example of the way preventing "harm to others" severely limits freedom. To prefer the smell of roses to the smell of irises, it will be objected, is purely a matter of personal taste. There is nothing *harmful* about not having everything according to one's taste. Here is the second caveat.

This objection has its merits, but cannot greatly assist any defence of Mill's principle of preventing harm to others. The objection raises at least as many difficulties as it answers. For what, precisely, is wrong with the roses/irises example? That taste is purely a personal matter? But so are many, if not most, instances of physical pain. One person may be in severe pain whilst no-one else around him is. Moreover, it is a commonplace about pain that it is impossible to know how another person in pain actually *feels*. There is, therefore, nothing more "objective" about pain than about taste. Does it follow that physical pain should be excluded from the policy of preventing harm to others, so that the principle permits people to inflict pain on each other?

Or is the objection that the roses/irises example is trivial? Going without the smell of roses is not very great suffering, not a very important kind of harm. Well this is true - up to a point. Arguably, the pleasure obtained by the passer-by from smelling the roses every morning was a crucial element in his daily routine and a major (if semi-conscious) contribution to his cheerfulness for the rest of the day - every day. To deprive someone of something like that may not be an inconsiderable harm at all. Besides, making the state's right to intervene depend on a concept so uncertain as preventing "important" harm is - again - to introduce a dangerous degree of

discretion and arbitrariness into the business of governing.

These difficulties, about whether Mill really intends to prevent only "objective" kinds of harm, or harms which are non-trivial, will be dealt with in more depth later in this chapter*. At this juncture suffice it to say that they greatly complicate the notion of preventing harm to others and make the principle much less useful at providing a clear-cut answer to what Mill calls "the practical question - how to make the fitting adjustment between individual independence and social control"²³. In short, raising these difficulties robs the "very simple principle" of perhaps its major asset - its very simplicity.

1.5. The threats to liberty illustrated

The arguments advanced thus far about preventing harm to others can be summarised as follows. By delineating the bounds of individual liberty at the point where its exercise would cause harm to others, the very simple principle severely undermines freedom. Three main ways in which this happens have been identified. First, the question of whether or not an action causes harm is so closely linked to value-judgements that the state is given a wide discretion to argue that interference is justified in order to prevent an action which it considers harmful; there is almost no limit to what can be deemed harmful. Secondly, a principle of preventing harm to others is much broader than a principle of preventing infringements of others' liberty - in Mill's words, harm *includes* interference with freedom¹⁵ - so that this formula gives much more scope for state interference than the one which

* Section 2.1.2. (read with the rest of section 2.1.) on "objective" kinds of harm, and section 2.5. on "non-trivial" harm.

Berlin attributes to Mill in the epigraph to this chapter. Moreover, because the grounds for state interference (preventing harm) are wider than the grounds for individual independence (liberty: harm *includes* interference with freedom), there is an asymmetry between the claims of the state and the claims of the individual which works to the latter's detriment. Thirdly, the interdependence of people in society, with their conflicting preferences and objectives, means that virtually any action will in some way cause harm to others, so that the scope for freedom under Mill's principle becomes so limited as to be virtually negligible. Against this bleak picture, it is to be noted that Mill's principle respects the doctrine of freedom of contract, because the policy of harm-prevention does not extend to actions to which the "victim" has given his consent; and also that the principle *perhaps* respects a man's right to replace the roses in his garden with irises - but only if modifications and complications are introduced into the principle.

1.5.1. Mill on smoking

A less controversial illustration than the roses-and-irises example is the question of cigarette smoking. During the past few decades there has of course been a great deal of debate in most western countries about what role, if any, the state and its legislative machinery should play in curbing smoking. It is seldom contended that the issues involved in this debate are purely matters of "personal taste", or that the harms allegedly caused by smoking are merely trivial. The smoking debate is, then, a suitable testing-ground to examine the practical impact of applying Mill's principle of coercion to prevent harm to others - by comparison with what Berlin takes to be Mill's principle, namely, coercion only to prevent anyone depriving anyone else of freedom. For convenience's sake, the former principle will be called the "*Mill principle*",

and the latter will be called the "*Berlin principle*" (even though of course Berlin does not himself actually *endorse* the latter, minimal-state, principle; he merely believes that Mill does).

It will be appreciated that the debate about smoking envisages various ways by which the state can intervene in addition to absolute bans and prohibitions. For example the state can use taxpayers' money to finance advertising campaigns warning of the dangers which smoking poses to health. The state may also choose to impose extra taxes and duties on the sale of cigarettes in addition to the normal sales tax, singling out cigarettes among other goods *because the extra duty will deter people from buying cigarettes* rather than because it will raise more revenue (indeed, to the extent that it succeeds in deterring people from buying cigarettes, it can actually *diminish* revenue from both the extra cigarette duty and also the normal sales tax on the sale of cigarettes!). In *On Liberty*, Mill himself expresses a view on such "deterrent taxation" which is equivocal and perhaps surprising. Mill acknowledges that "to tax stimulants [he is thinking of alcohol, but the point applies equally to cigarettes] for the sole purpose of making them more difficult to be obtained is a measure different only in degree from their entire prohibition", and - true to his anti-paternalist protestations - he declares that people's "choice of pleasures and their mode of expending their income... are their own concern and must rest with their own judgement". And yet, barely pausing for breath, he goes on to say:

It is the duty of the State... in the imposition of taxes... to select in preference those [commodities] of which it deems the use, beyond a very moderate quantity, to be positively injurious. Taxation, therefore, of stimulants up to the point which produces the largest amount of revenue... is not only admissible but to be approved of²⁴.

Questions of state involvement short of prohibition - through advertising and through deterrent taxation - thus complicate any discussion of the state's role in curbing cigarette smoking. In order to keep this illustration as clear and straightforward as possible, therefore, it will be confined to the simple issue of prohibition. How does the application of the "Mill principle" (compared with the "Berlin principle") resolve the central question of the extent to which people should be free to smoke, and the extent to which the state should ban them from doing so?

1.5.1.A: The right to smoke in public

In an essay written in 1966, J.W.N. Watkins - also attempting to apply Mill's principle to the smoking question - stated that he assumed there to be "a causal connection between smoking and lung cancer"²⁵. Since 1966, medical thinking has developed to the point where, for the purposes of this thesis, the same assumption can be made with considerable certainty: that smoking can cause the smoker to contract lung cancer, and can thus endanger his life. But there has also been another medical development, with the emergence of the theory of "passive smoking": that is, the idea that non-smokers who are in the vicinity of smokers involuntarily inhale cigarette fumes and are thus themselves exposed to the fatal risk of lung cancer. That is to say, that cigarette smoking endangers the lives of others. The passive smoking theory is by no means as uncontentious as the view that the smoker himself is at risk from lung cancer, and therefore it cannot be assumed to be true for the purpose of this thesis.

But *if* the passive smoking theory were true, what would be the implications of the "Mill principle" and the "Berlin principle"? About the Mill principle there can be no doubt: insofar as the passive smoking theory is true, smoking in public causes harm to others; therefore, in

order to prevent harm to others, smoking in public must be banned. But this is also the conclusion reached by applying the Berlin principle: if smoking in public *endangers the lives of others*, then it must be prohibited in public. The Berlin principle restricts actions which infringe the *liberty* of others. Here the question is the *lives* of others. Life and liberty are obviously not the same thing, but it is impossible to have liberty without also having, as its essential prerequisite, life. The protection of others' liberties therefore necessarily and inescapably implies the protection of others' lives. This "prerequisite" argument of course has other, fairly significant, implications. If life must be protected by the state, then it is incumbent on the state to ensure that every citizen is provided with health care. The state must also ensure that everyone has food, clothing and shelter - truly the essentials of life. And, since basic education is a prerequisite of freedom in that a person cannot be considered free unless he is capable of meaningfully making his own choices (as Mill himself says, the concepts of individual liberty, independence and sovereignty "apply only to human beings in the maturity of their faculties"²⁶), it must be the state's role to provide, or at least to ensure the provision of, education up to a certain standard*. To repeat: under the "Berlin principle", the liberal principle of a minimum state limited to protecting freedom, the state must nevertheless ensure the provision of the prerequisites to liberty, including the protection of life and the provision of the basic welfare services of health, housing and education. This is *not*, however, to say that the Berlin principle entails the full-blown social-democratic welfare state or even socialism. It does not amount to redefining liberty

* In *On Liberty*, Mill states that it is "almost a self-evident axiom" in a free society that "the State should require and compel the education, up to a certain standard, of every human being who is born its citizen"²⁷.

as socialists do to mean "power" or "ability"^{**} such that the state's role in protecting "liberty" is so wide as to encompass virtually anything. It does not mean, either, that every kind of harm can be subsumed under an expanded definition of "liberty", such that the supposedly minimalist "Berlin principle" of preventing infringements to others' liberty turns out to be little different from the "Mill principle" of preventing harm to others. The concept of infringements of liberty *and its prerequisites* is by no means unlimited or all-embracing. It does not encompass an unhappy marriage, or a leaking drainpipe, or an unpleasant smell (the irises, again). Those are harms, but they do not in any way infringe anyone's liberty. Without life or health or education, however, a person is not truly free. Where any of these are endangered - as with "passive smoking" - the state intervenes as much under the Berlin principle as under the Mill principle.

By contrast, even with a leaking drainpipe, an unhappy marriage or an unpleasant smell, a person can still be free. None of these things, undesirable and harmful though they may be, has any bearing at all on his liberty; protecting the prerequisites of liberty does not entail state intervention in people's lives to rectify these sorts of problem. And this point is crucial when considering the position when one does *not* assume the "passive smoking" theory to be true - which, given the current state of medical knowledge on the subject, must be the case at present. Applying the "Berlin principle", in the absence of any danger to health - that is to say, in the absence of any danger to a prerequisite of liberty, and hence to liberty - the state may not intervene. However unpleasant may be the smell and stuffiness one experiences in the vicinity of smokers, under the Berlin principle the state is not justified in stopping them from smoking in public places. Of course this does not prevent

^{**} As to which, see chapter three of this thesis.

private institutions from making sensible arrangements to minimise the unpleasantness, for example through the demarcation of areas for smokers and non-smokers in restaurants or cinemas. But that is entirely a matter for the restaurateur or cinema owner, and if they do not want to make such arrangements they do not have to. Under the Berlin principle the state is not entitled to take any coercive measures in this matter, since there is no danger to anyone's liberty. It is otherwise with the Mill principle. Under the Mill principle, the danger to others' liberty is not the crucial test; "harm to others" is. By the smells and stuffiness which they create, smokers undoubtedly do harm other people. The Mill principle of preventing harm to others would therefore entitle the state to prohibit smoking in public. *Under present circumstances, when there is no conclusive evidence to prove the passive smoking theory, applying the Mill principle would thus entitle the state to remove people's freedom to smoke in public.* On any measure that would be a substantial curtailment of individual liberty - but one which is implicit in the notion of preventing harm to others*.

The Berlin principle, then, would allow state interference only where there was a danger to others' liberty; in the case of smoking there could be intervention only to stop smoking in public and only *if* the truth of the passive smoking theory were established. Thus far the Berlin principle goes, and no further. The Mill principle, however, is not constrained in this way. As we have seen, the Mill principle would allow the state

* Although, of course, if the people harmed give their "free, voluntary and undeceived consent"²⁰ (see section 1.3.1.), the Mill principle will not interfere with the freedom to smoke. Presumably such consent is tacitly given by people who sit in the "smoking room" of a Pall Mall club. But when someone gets on a crowded train and finds that he is in the smoking compartment, he cannot be said to have given his consent to his fellow passengers smoking. The Mill principle would entitle the state to prohibit any railway company from keeping smoking compartments on its trains.

to ban smoking in public, whether or not the passive smoking theory is true. But even *that* is not the limit of its potential for interventionism; the Mill principle is capable of posing even bigger threats to individual liberty.

1.5.1.B: The right to smoke at home

What, for instance, of smoking, not in public, but in one's own home?

One of the most important defining characteristics of a free society lies in the demarcation of a clear boundary between the public domain on one side, and the private, independent world of home and family on the other. Very occasionally, it is necessary and desirable for the line to be breached, and for the law to invade the private world; in cases of child abuse, for example, the state must intervene in the family, in order to protect the child's liberty. But it is in the interests of liberty that such instances should be exceptional, and even then approached by the state with extreme caution. As a general rule, liberty is best served when the world of the family is left untouched by state intervention. For families are a focus of allegiance which rivals the state and undermines the state's chances of exercising monopoly power over individuals. The bonds of family loyalty, being more natural than any fealty and obedience which the state can command, are potentially stronger and more enduring. In addition, the family serves as a mutual protection society and, because of this, the individual does not stand alone before the state. In all these ways the family is an important and effective bulwark against threats to individual liberty posed by the state. The family is (as one writer has put it) "subversive" of the state's wilder pretensions²⁸. Conversely, the success of a totalitarian state depends largely on weakening family ties as much as possible - a point effectively brought out

by George Orwell in *Nineteen eighty-four*, where the state exercised control over adults by obtaining the unswerving loyalty of their children ("by means of such organizations as the Spies"), with the result that

It was almost normal for people over thirty to be frightened of their own children. And with good reason, for hardly a week passed in which *The Times* did not carry a paragraph describing how some eavesdropping little sneak - "child hero" was the phrase generally used - had overheard some compromising remark and denounced its parents to the Thought Police²⁹.

In this context, the stance taken by Mill in *On Liberty* is not reassuring. Presumably inspired by the proto-feminism for which he has become so widely acclaimed in the late twentieth century, Mill sees the domain of the family as very much an area for state interference:

The despotic power of husbands over wives [he writes in *On Liberty*] 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 the protection of the law in the same manner as all other persons³⁰.

The sentiments seem innocuous enough, until we realise that Mill recognises nothing particularly special, private or inviolate about the family such as would mark it off from the public domain. Fellow members of one's family are, in Mill's vocabulary, "others" in much the same way that passers-by in the street are "others", and the state's role in curbing freedom to prevent "harm to others" necessarily involves the state in regulating relations within the family. Mill writes, in the same paragraph as his comment about the "despotic power" of husbands, that

the State, while it respects the liberty of each in what specially regards himself, is bound to

maintain a vigilant control over his exercise of any power which it allows him to possess over *others**...

He then immediately expresses regret that

this obligation [on the part of the State] is almost entirely disregarded in the case of family relations - a case, in its direct influence on human happiness, more important than all others put together³⁰.

It is not difficult to imagine what this entails in terms of the case study which we have chosen to illustrate the practical effects of Mill's principle - that is, the question of cigarette smoking. On Mill's analysis, as set out above, smoking at home is not a private activity at all. It involves "others" - the members of one's own family. It is, in short, not "self-regarding"¹⁴, but "other-regarding". Moreover it *harms* those "others". If smoking in public is unpleasant to "others", smoking at home is hardly less so. On the contrary: they have to endure the unpleasantness day after day at close quarters; have to live with the stale nicotine smell permanently hanging in the air, lingering on the carpets and curtains. (Mill is undeniably correct when he says that family relations have a "direct influence" on human happiness which is "more important than all others [all other relationships between individuals] put together"³⁰.) And there can be little doubt that he regards these things as legitimate matters for state regulation. In an earlier passage of *On Liberty* he writes that "whenever there is a definite damage or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law". He cites a number of examples to demonstrate this point, one of which is "the frequent case of a man who causes grief to his family by addiction to bad habits".

* Emphasis added.

Such a case, according to Mill, is emphatically not in "the province of liberty". But neither are cases where a man does not actually cause grief but merely cultivates habits not in themselves vicious, if they are painful to those with whom he passes his life, or who from personal ties are dependent on him for their conduct³¹.

The inference to be drawn from this is really quite astonishing: the Mill principle - the "very simple principle" of liberty - offers no guarantee even of a man's freedom to smoke cigarettes in his own home.

1.5.1.C: The right to smoke alone

It is, then, possible to imagine a state which, without in any way derogating from Mill's principle of liberty, denied its citizens the freedom to smoke either in public or even among their own families. In such a state, smokers would doubtless seek refuge in solitude. People would confine their smoking to moments when they were absolutely alone, with no chance of their fumes touching any other person: on a deserted beach, perhaps, or a quiet country lane, or - more prosaically - on their own in the car, stuck in a traffic jam on the daily drive to and from work. It might be thought that at least this most private activity would surely be impregnable from interference by a state which faithfully applied the very simple principle.

But it would not be. Where interference is justified to prevent "harm to others", even the apparently personal realm of solitary smoking is vulnerable. For smoking alone can, in a wholly serious and non-trivial way, cause harm to others. As was mentioned in section 1.3.3. of this chapter, the harm which an individual can cause others derives not solely from physical proximity (smoking in the same room as others, for instance) but from the complex network of relationships and commitments which

constitute modern life. This analysis of the right to smoke in the context of Mill's principle was predicated, it will be recalled, on the assumption that there is a causal link between smoking cigarettes and the smoker contracting lung cancer, an assumption which (unlike the "passive smoking" theory) is no longer medically controversial. That being so, smoking can cause the smoker to suffer long periods of illness, to spend time in hospital away from work, friends and family, and even of course to have his life cut short. This is obviously *harm to himself*. But because of the many relationships and commitments in which his life is bound up, *it is also harm to others*. The smoker's family will share his pain while he is ill, will miss him if he is hospitalised, and will undergo bereavement on his premature death. If he is the breadwinner, his loss of earnings during prolonged illness - not to mention his premature death - will be in addition financially damaging to them. His colleagues at work who depend on his contribution will, in a different way, suffer from his absence and of course all the more from his loss. To prevent these harms, there is a case, under the Mill principle, for banning even solitary smoking.

That case strengthens of course with the magnitude of the harm caused, and the numbers of "others" so harmed. If the smoker was a great entrepreneur, the whole economy will be harmed by his loss. Literature would suffer if he was a great playwright, technological advance if he was a great scientist. But what if he was a vagrant? Not only would his demise be less harmful to fewer others, but of course it might actually save a great deal of money, trouble and so on. Is a person's life worth less, and is there less need to prevent smoking-induced death, because less "harm to others" is caused? And if so, does this mean that the vagrant should be allowed to smoke when the entrepreneur, playwright and scientist are not? That is, should he, by virtue of his vagrancy, have *greater* rights to exercise individual liberty than they?

By this stage one has entered the realms of an absurd and grotesque calculus which, one assumes, cannot have been what Mill intended in formulating the very simple principle. However it is implicit in the wording of the principle, in setting up the prevention of "harm to others" as the criterion by which to assess whether individual liberty may be interfered with. Whatever Mill's intentions, the way that they have been formulated in the principle generates ambiguities by which the most monstrous and illiberal notions can become legitimate considerations in drawing the line between "individual independence and social control" - the problem which the very simple principle was supposed to resolve²³.

All this is - to reiterate - a function of the interdependence of people in society which makes a nonsense of the "harm to others" concept. It is not just, as C.L. Ten would contend, that the Mill principle has been sloppily misinterpreted as limiting liberty whenever it "affects" others*. The point about smoking alone is that, without in any way depriving other people of their freedom, it does not merely *affect* them, but actually *harms* them. The wording "harm to others" is the problem. The inherent ambiguity of those words, the almost unlimited scope there is for extending their ambit to cover such a wide variety of activities, is what gives the state a justification for encroaching on its citizens' lives even to the point of prohibiting them from smoking cigarettes alone**. The all-pervasive state, even the totalitarian state: these potentially are the

* See above, section 1.3.3.

** Alan Ryan puts the point nicely on the question of drink: "A man who drinks so much that there is no money left for the housekeeping can be *variously described*. We may just say: 'He spends all his money on drink' - describing the action in merely self-regarding terms... or we might say: 'He is neglecting his wife and children', and here we have an other-regarding action."²⁴.

consequences of defining the state's functions in terms of preventing harm to others.

1.5.2. Other illustrations: "pursuing our own good in our own way"

Smoking is in some ways a special case. It is easy to see why objections might be raised to the way that this thesis has dwelt so much on smoking as an illustration of what is wrong with the "preventing harm to others" principle. The principle of preventing harm to others is so restrictive of freedom in the case of smoking because smoking, by contrast to many other private activities, is particularly harmful to oneself. A great many of the types of "harm to others" which have been listed here, particularly in section 1.5.1.C - the family's bereavement, depriving one's colleagues of one's contribution at work, the losses to the economy, literature and technological advance - are all direct consequences of the lung cancer caused to the smoker himself: that is, of the harm to himself. It is just that smoking happens to cause lung cancer. Lots of other activities which people do by themselves are not "bad for them" in that way, and do not cause harm to themselves. Accordingly, all those consequent harms to others (the family's bereavement and so on) do not arise, and there is less reason to prohibit them. Thus, the objectors might conclude, the extensiveness of "harm to others" is more limited than the smoking example would suggest; and the very simple principle only encroaches so pervasively on people's private activities when they are harmful to themselves.

This objection is a good deal less helpful to Mill's case than it might at first seem. To accept the force of the objection is to acknowledge as relevant a point which Mill, in the paragraph where the very simple principle is set out, expressly repudiates. It ought not to be a

justification for interfering in private smoking, as opposed to other forms of private activity, that smoking, unlike those other activities, is bad for the agent himself. To accept this consideration as relevant, and to countenance interference on these grounds, makes a nonsense of Mill's anti-paternalistic protestations that the agent's "own good, either physical or moral, is not a sufficient warrant" for interference and that he "cannot rightfully be compelled to do or forbear because it will be better for him to do so"¹. It is no defence of the very simple principle to say that it comes down hardest on people's actions when they cause harm to themselves. That only serves to blur the very distinction, between "self-regarding" and other-regarding, between harm to oneself and "harm to others", which is the essence of Mill's attempt to draw the line dividing individual independence from social control.

Besides, the objection ignores a very great number of everyday ordinary actions which are good rather than bad for the agent, which in any free society would be regarded as perfectly lawful, but which - applying the Mill principle - could be prohibited on the grounds that they cause harm to others. Some of these were mentioned in section 1.3.2. The point about the stock exchange example cited there is that an individual may derive considerable profit and advantage to himself by selling a substantial block of his own shares in a company, but insofar as that sale causes the price of that company's shares to fall, his personal action will have caused losses and disadvantage to the other people who hold these shares³². A family may enjoy a particular picnic spot in the country because it is unspoilt: there is simply no-one else around. They return there for lunch every year on midsummer's day. Then one midsummer's day it so happens that an hour before the family arrive at their favourite spot, three other families travelling on holiday together discover the same spot, admire it for the same reasons and

themselves decide to settle down for a picnic there. By the time the first family arrive it is no longer an unspoilt spot "away from it all". The three families had exactly the same - legitimate - motive as the first one in setting up their picnic: they wanted to enjoy themselves in a peaceful, quiet, ordinary way. But in doing so they ruined the first family's day: they caused harm to others. Transpose this metaphor to the Costa del Sol or Majorca or the Greek islands, and you have (writ large) what thousands of holidaymakers have done to each other on the originally unspoilt beaches there.

Here, again, can be seen the effect of the interdependence of people in society. Mill writes in *On Liberty* that "the only freedom which deserves the name is that of pursuing our own good in our own way"³³. This is precisely what the person who sells his shares, or the three families who settle down at the picnic spot, or the countless families who fly off to the Costa del Sol, are doing. They are not infringing anyone else's liberty. That being so, under the "Berlin principle" there would be no question of interfering with their freedom to sell shares, settle down at a picnic spot, go on holiday where they choose. But the Mill principle is different. It guarantees freedom only where its exercise does not cause "harm to others". But *in an interdependent society, people's private desires and ambitions inevitably conflict*: the desire of one shareholder to profit from the sale of his shares conflicts with the desire of others to preserve the value of theirs, the desire of one holidaymaker to have an unspoilt beach conflicts with the desire of others to go there too, and so on. In every sphere of activity where they do so conflict - and they are many, if not infinite - the action of any one man will, with equal inevitability, cause harm to others. In consequence the range of activities in respect of which

interference is authorised under the Mill principle is very large, and the range of activities in respect of which freedom is guaranteed by the Mill principle correspondingly small.

1.6. How Mill responds to the problem

Mill's defenders have an answer to the criticism, voiced in this thesis and many times before, that by virtue of society's interdependence there is almost no limit to the range of activities which cause harm to others. Warily, these defenders point out that Mill himself recognises the interdependence problem in *On Liberty* and takes account of it: therefore, they continue, Mill's principle is considerably more sophisticated and refined than those who crudely denigrate it give him credit for^{34*}.

It is undeniably true that Mill recognises the point. In chapter 4 of *On Liberty*, echoing Donne's observation that No man is an island, Mill writes (albeit less poetically)

No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least to his near connections, and often far beyond them³⁵.

Earlier, in chapter 1, he likewise acknowledges that, with regard to an individual's actions,

whatever affects himself may affect others through himself²⁰.

However it is less clear that Mill, having appreciated the problem, deals with it effectively. He obviously thinks that there should be exceptions to the sanctioning of intervention to prevent "harm to others", but the scope of such exceptions is left unclear. There are, Mill writes, a number of instances in which "to extend the bounds of what may be called moral police"

* C.L. Ten even goes as far as to claim that "Mill readily and explicitly admits that self-regarding conduct affects others, and this admission is fatal to the traditional interpretation"²⁴.

would have the effect of encroaching on "the most unquestionably legitimate liberty of the individual"³⁶. Such cases, he implies, arise even when all that is being done by the "moral police" is applying his own principle of preventing harm to others. Thus he acknowledges that in a society with a Muslim majority the eating of pork by non-Muslims among the general public will cause great harm to the general public there:

The practice is really revolting to such a public³⁷.

Notwithstanding this harm done to others - intense and extensive harm - Mill believes that to prevent the harm being done to others would be an interference with the "most unquestionably legitimate" sphere of individual liberty: therefore in this instance he *opposes* interference "to prevent harm to others". This is at once an admission that the application of the Mill principle of preventing harm to others potentially undermines the most basic human freedoms (and is thus not the guarantee of liberty it is supposed to be), and also an explicit statement that there must be exceptions to the application of the principle. A more modern example cited by Ten makes the same point:

if a fanatical Nazi desires that all Jews be put to the gas chamber, and his desire is not realised, then he has been harmed³⁸.

Most people, including Mill if he had lived to see Nazism and its works, would take the view that - as with the harm felt by the Muslims when people eat pork - for the state to prevent the harm felt by the fanatical Nazi in this case (by sending all Jews to the gas chamber) would encroach on "the most unquestionably legitimate liberty of the individual". After all, if a principle of liberty is such that, if applied, it does not stand in the way of a Nazi state, then it really cannot be said to be much use at all to the cause of liberty. But again the problem is that, even as Mill and his defenders would

balk at "preventing harm" to the fanatical Nazi by sending Jews to the gas chamber, they are admitting that exceptions must be made to the very simple principle of preventing harm to others - and, by implication, that to apply the principle *as it is formulated* consistently (that is, without exceptions) truly would not be a guarantee against Nazism, and is thus pretty well useless in upholding liberty.

That Mill allows for exceptions to the principle obviously exonerates him from the charge that his intentions are in any way inimical to "the most unquestionably legitimate liberty of the individual": he clearly would have been anxious to ensure that the very simple principle would not allow for a Nazi state. But this is where the difficulties begin. For if there are to be exceptions, on what grounds should they be made? The state should not interfere to prevent the harm to the Muslim majority or the Nazi fanatic. What kinds of harm, then, should not be a cause for interference, and what kinds should?

In the same paragraph of *On Liberty* where Mill acknowledges that, among an individual's actions, "whatever affects himself may affect others", he also suggests that the criterion for deciding whether an action is self-regarding and thus inviolable by the state or other-regarding and thus a ground for intervention, is to look at the action's effects (and hence the harm it causes) insofar as they operate

directly and in the first instance²⁰.

In other words, if the action is "directly and in the first instance" harmful only to the individual himself, while any harm caused to others is only indirect and incidental, liberty should be respected and the state should not intervene. It follows that the state should intervene only in cases where the harm done to others is direct and in the first instance.

The first thing to note about this refinement of the principle is, of course, that it clouds the simplicity and consistency which is one of the main advantages which Mill claims for the principle: "one very simple principle". It in effect creates an exception to an exception - the principle accords individuals the right to liberty, except when exercising the liberty would cause harm to others, except that such harm to others may be discounted when it is not "direct and in the first instance". In doing so it allows yet more scope for ambiguities in a principle already amply riddled with ambiguity.

But, worse than that, the "direct and in the first instance" refinement does not work. That is to say it does not meet the objections enumerated so far in this chapter that allowing interference to prevent harm to others undermines the liberty which Mill's principle is supposed to protect. Even if interference is to be allowed only where the harm is direct and in the first instance, application of the principle would still legitimise assaults on many basic human freedoms. As has been pointed out, to a devout Calvinist or a principled vegetarian

the very presence in his community of a Catholic or a meat-eater [respectively] may cause him fully as much pain as a blow to the face or the theft of his purse³⁹.

The harm to the Calvinist or the vegetarian is, then, direct and in the first instance. On Mill's doctrine of allowing interference to prevent harm (which is direct and in the first instance) to others, this would mean that the principle would not guarantee the liberty of worship of the Catholic, or the right of the meat-eater to eat any meat at all (that is, he could face even greater restrictions than under the Muslim state which denied him the right to eat pork!).

Surely this is not what Mill means by his very simple principle? But if not, then his principle is insufficiently clear to achieve its ends. Insofar as it is not profoundly illiberal, it is hopelessly inconsistent.

This was the charge, it will be recalled, which was laid at Mill's door in chapter one of this thesis - and of course by many earlier critics of *On Liberty* - in the matter of whether or not the principle is supposed to be contingent on achieving utilitarian ends. Then of course there were defenders of Mill - notably Gray - who claimed that, on the contrary, the principle is "consistent almost to a fault"⁴⁰. On this issue, of "preventing harm to others", Mill again has his defenders. *These* defenders claim that the word "harm" has been misinterpreted by Mill's critics and that, if "harm" is understood properly in the context of *On Liberty*, the doctrine of harm-prevention loses its potentially illiberal implications. Foremost among the defenders on this point is J.C. Rees, who protests (in similar vein to Gray) that if the word "harm" in *On Liberty* is properly interpreted, it will "yield a single consistent principle"⁴¹.

The case for the defence will now be examined.

2. TRYING TO DEFINE "HARM"

2.1. Harming others means "violating their interests"

Probably the most widely-canvassed "interpretation" of the term harm in *On Liberty* is that it means "violation of another person's interests". This, it is argued, carries the implication that Mill's principle justifying interference applies to a "more limited range"⁴² of conduct than the traditional interpretation would suggest.

The point about violating others' "interests" is that it involves something more specific than merely harming others (in the sense in which "harm" has so far been used in this chapter). In particular it excludes situations where all that has happened is that someone else's sensibilities have been offended - situations such as that where the Muslim is offended by the presence in his midst of the pork-eater, the vegetarian by the presence of the meat-eater, the Calvinist by the presence of the Catholic, the fanatical Nazi by the presence (or even survival) of the Jews. As Rees puts it:

I could be very seriously affected by the action of another person merely because I had an extraordinarily sensitive nature, and no claim to have others respect these tender spots would be recognised as an interest⁴³.

The consequence of defining "harm" like this is that (at least some of) the most obnoxious effects of a policy of preventing harm to others would be avoided. To a far greater extent than under the traditional interpretation of harm, the application of the very simple principle would respect the "most unquestionably legitimate" of human liberties - the freedom of worship of the Catholic, the Jews' right to live, and so on. In the words of Raymond Plant, contemplating cases where a work of literature causes offence,

Unless we have a tolerably clear distinction between harming interests and offending sensibilities we are on a very slippery slope. Offended sensibility is an inherently subjective matter and if [it is] considered the basis of legal coercion or moral disapproval, then this is a licence for people with strong beliefs of any sort to claim that their sensibilities have been offended by a work of art. This then would involve a *prima facie* case for limiting freedom of speech...⁴⁴.

Granted, then, that interpreting harm to mean violation of interests would remove some of the worst defects of the very simple principle on the traditional interpretation, the question which arises next is whether there is any justification for interpreting the principle in this way. Does a proper reading of the very simple principle, in the context of *On Liberty*, really yield the "interests" interpretation, with its more liberal implications?

Mill's defenders are convinced that it does. Once again Gray joins the fray. His view is that Mill's concern is for the protection of people's "vital interests"⁴⁵, and he cites as an example an extract from Mill's essay on *Auguste Comte and positivism*:

It is incumbent on everyone to restrain the pursuit of his personal objects within the limits consistent with the essential interests of others⁴⁶.

But in the vanguard of the argument that harming others means violating their interests, is Rees. According to Geraint Williams, it is "difficult to overestimate the influence on later Mill study" of Rees's interpretation⁴². In a 1960 article originally entitled *A re-reading of Mill on liberty* (and since republished in a volume edited by Williams), Rees expressed his view thus:

My case... is that we ought not to gloss over the different modes of expression, that there is an important difference between just "affecting others" and "affecting the interests of others", and that there are passages in the essay [*On Liberty*] which lend support to the view that Mill was thinking of "interests" and not merely "effects"⁴⁷.

And he suggested an alternative formula to the wording of the very simple principle:

The revised version would read something like this: "Social control of individual actions ought to be exercised only in cases where the interests of others are threatened or actually affected"⁴⁸.

2.1.1. The textual evidence

2.1.1.A: "Interests" in the text

Perhaps the most obvious, yet nonetheless important, objection to Rees's 1960 "revised version" is precisely that it *is* a revised version. It is not what Mill actually says. Mill's words in the very simple principle are that the only purpose for which interference may be exercised is "to prevent harm to others"¹. Nowhere in the entire paragraph of *On Liberty* in which the very simple principle appears is the word "interests" so much as mentioned. This is something which ought at least to give some pause for thought.

Nonetheless, elsewhere in *On Liberty* the word "interests" *is* mentioned. In the 1960 article Rees claimed that "the word appears at least fifteen times in the course of the essay" and, moreover, "some of the passages where it is used are of the greatest importance in assessing Mill's intentions"⁴⁹. In addition, he said, criticism of the very simple principle as illiberal

because of the breadth of the words "harm to others" is based on:

the supposition that Mill's principle depends for its validity on there being some actions, including some important ones, which are free from social consequences, i.e. they affect no one but the agent himself. I shall argue that this assumption on the part of the critics is false and that it derives from a failure to observe the form of words which Mill *often* employs in the text⁵⁰*

Rees's honesty and integrity in confining his claim to the assertion that Mill "often" uses the term "interests" is not merely rhetorically limp, but it undermines his whole case. For the point is that, apart from the central passage of *On Liberty* where the very simple principle is spelled out - and where the form of words used is "harm to others" - Mill expresses the delineation of the frontier between the realm of liberty and the realm of interference *in various different ways*. They all mean roughly similar things, and doubtless they are intended by Mill to mean precisely the same as the formulation in the very simple principle itself. But the exact words used differ greatly, and their usage is almost random, to the point of carelessness. Even if Mill did "often" write the word "interests" in *On Liberty*, perhaps indeed fifteen times, it would be mistaken to attach too much significance to this because he also used lots of other expressions to convey the same idea - expressions which do not in the same way imply a clear distinction between harming interests and offending sensibilities.

* Emphasis added.

2.1.1.B: "Concerns" in the text

One such expression is "*concerns*". A number of times in *On Liberty* Mill expresses the difference between the realm of liberty and the realm of interference in terms of whether someone's action "concerns" only himself (in which case he should be left free) or "concerns" others as well (in which case his actions are subject to legitimate intervention). Now of course many many things done by a person can easily be said to *concern* other people without actually violating their interests. For example in the sentence "the Professor's work concerns Australian society and the aborigines; questions concerning Red Indians should be addressed elsewhere", there is absolutely no inference to be drawn that the Professor's work violates (or even affects) the *interests* of Australian aborigines. "Concerns" here merely means "relates to" or "is connected with". It is a much less specific expression than "violates the interests of", and can be applied much more widely. When Mill writes about an action which "concerns" others being subject to intervention, this therefore leaves a much narrower range of actions in the realm of liberty to be protected by the very simple principle. With the use of the word "concerns", the principle is just as illiberal as if it had been expressed to apply to all actions which "affect" others; and Rees's rescue operation fails.

Rees has protested against this inference being drawn from Mill's use of the words "concern" and "concerns". While admitting that "concerns" can sometimes mean no more than "relates to" or "affects", he points out that it also has another meaning which is stronger, narrower in scope and not so very different from the concept of interests. When an interfering and meddling neighbour starts inquiring about the personal affairs of the family next door - for example, asking which church Sunday school they are sending their children to - a common response would

be: "That's none of your business. That's our concern." In other words, regardless of the fact that the meddling neighbour might be a committed Calvinist and would be offended and upset to hear that the children next door are being brought up as "papists", the issue of the children's religious education is the concern of - the interest of - only the family itself. (Therefore, if Mill is using "concerns" in this sense, offended sensibilities could not be a ground for interfering with the family's freedom to choose.) By contrast, the question of whether traffic lights are to be placed at the end of their street is of "common concern" to both the family and the neighbour, and to everyone else in the street, because it does not merely affect them but affects their *interests*. (Again, if Mill is using "concerns" in this sense, a decision about the traffic lights, unlike the question of children's upbringing, would be a matter outside the private realm of individual independence and one which would legitimately be subject to social control.) In short, there is a sense in which "concerns" can be used which means rather more than "affects". To quote Rees:

though the word "concerns" has sometimes no more force than "has reference to" or "affects", with no implication that interests are being referred to, it can also mean "*is of importance to*" and could in some contexts carry with it the suggestion that *interests are involved*^{51*}.

Rees's contention is that, this being so, Mill's use of the word "concerns", when defining the frontiers of individual freedom in *On Liberty*, does not necessarily invalidate the argument that the very simple principle only sanctions interference to prevent violation of other people's interests.

* Emphasis added.

Once again, Rees's honesty in not exaggerating his claims ("can also mean"; "could in some contexts carry with it the suggestion that...") lets him down. It is rhetorically weak and, more importantly, it alerts Rees's readers to a certain lack of confidence in what is being argued. To some extent Rees is correct. In some contexts, as he says, Mill's use of "concerns" does seem to imply the involvement of interests rather than mere effects. Thus, for instance, Mill writes about the "fanatical moral intolerance of the Puritans" who, prior to the English Restoration of 1660, attempted to meddle in the private lives of individuals to ensure conformity to strict ethical norms. No doubt the Puritans were affected (concerned) by the way various individual were conducting their own lives, but the Puritans' interests were not being affected (and it was thus not their concern):

If there be among those whom it is attempted to coerce into prudence or temperance any of the material of which vigorous and independent characters are made, they will infallibly rebel against the yoke. No such person will ever feel that others have a right to control him in his *concerns*, such as they have to prevent him from injuring them in theirs^{52*}.

Perhaps, too, Rees's interpretation of "concerns" as related to interests holds good for the opening paragraph of chapter 3 of *On Liberty*, where Mill maintains that "the liberty of the individual must be thus far limited" - to the extent that

he refrains from molesting others in what *concerns* them, and merely acts according to his own inclination and judgement in things which *concern* himself^{53**}.

But in other contexts in Mill's essay, the Rees interpretation stumbles, and it would go beyond the bounds

* Emphasis added.

** Emphasis added.

of plausibility to imagine that when Mill uses "concerns" in these passages he means anything so specific as "affects the interests of". In chapter 3 of *On Liberty* Mill links the idea of a person's action which "concerns" others directly with the central problem of interdependence in society -

The distinction here pointed out between the part of a person's life which *concerns* only himself and that which *concerns* others, many people will refuse to admit. How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being...^{35*}.

Mill's reference here to his critics' point about social interdependence (which is of course the main point being made by this chapter of this thesis) can only make any sense if "concerns" in this context means merely "relates to" or "affects". If Rees were right (that is, if "concerns" here could be taken to mean "affects the interests of") then it would be nonsensical to raise the issue of no person being an entirely isolated being: even where members of society are interdependent rather than isolated there are many parts of each one's conduct which do not violate the *interests* of others**. Consequently Rees's interpretation of the word "concerns" cannot possibly apply to Mill's usage of it in this passage.

The same is true of Mill's use of "concerns" in chapter 1 of *On Liberty*, the chapter where the very simple principle is first spelled out. He writes of

that part of the conduct of an individual which *concerns* other people^{20***}

but in the same paragraph, and in the same context and sense, he writes also about

* Emphasis added.

** This of course is the very basis of Rees's defence.

*** Emphasis added.

all that portion of a person's life which *affects* only himself*

and about the very simple principle requiring liberty of tastes and pursuits... without impediment from our fellow creatures, so long as what we do does not *harm* them*.

In other words, Mill is using "concerns" to mean "affects" (not "violates the interests of"), and is using both words as practically synonymous with each other and with the concept of "harming others". Rees's idea that Mill is really talking about "interests" rather lacks credence here.

2.1.1.C: Terminological randomness in the text

As is shown by the passages quoted above, Mill in *On Liberty* sometimes uses "concerns" to refer to interests, but sometimes merely to effects; moreover he uses the words "concern", "affect" and "harm" virtually interchangeably. Consistency of language is hard to detect here - certainly not consistency in the use of the concept of "violating others' interests" - and it is impossible to draw any other conclusion than the point made above: Mill's use of language to define the boundary of individual liberty is imprecise and ill-considered, to the point of randomness.

To do Rees justice, he is conscious of this criticism of Mill, and he writes of the objection made by critics that

we are not justified in attempting to produce a coherent theory when, from the variety of the terms used in the relevant passages, there is clearly not one there to extract⁵¹.

But Rees rejects the criticism. He persists in his view that a "coherent theory" of Mill - what he elsewhere calls a "single consistent principle"⁴¹ - can be discerned in the text. That coherent theory is, he insists, that

Mill's principle allows for intervention only to prevent the violation of others' interests. Having taken note of the objection about "the variety of terms used in the relevant passages", Rees continues,

My answer to this objection... is that...⁴¹

- and it is here that he makes his point that the word concerns "could in some contexts carry with it the suggestion that interests are involved".

But even if Rees were right about the word "concerns" (and, as shown in section 2.1.1.B, with regard to some passages he is clearly wrong), this is not the whole problem. The "variety of the terms used" in *On Liberty* to define the individual independence/social control delineation is very wide indeed. Many other expressions are used, and their usage is characterised by neither consistency nor coherence. Sometimes it does indeed seem as if the boundary depends merely on whether others are affected, sometimes on the way in which they are affected (that is, whether harmfully or not), sometimes on what is affected (their interests or just their tastes and sensibilities), and sometimes on a combination of these.

A selection of quotations from *On Liberty* will bear witness to this. Where Mill is delineating *the realm of individual freedom* which the very simple principle is intended to protect, in some places he does seem to suggest that the criterion is the individual's own *interests*. In chapter 4 of *On Liberty*, for instance, he writes that individual freedom must be unimpeded wherever a person's conduct affects the interests of no person besides himself because he is the person most interested in his own well-being⁵⁴.

Similarly, in chapter 5, Mill states that "the individual is not accountable to society for his actions" in so far as these concern

the interests of no person but himself⁵⁴.

However, in many other passages of *On Liberty* Mill defines the realm of individual freedom merely in terms of whether an action *affects or regards* only himself. In the paragraph where the very simple principle is introduced, Mill says that a person's independence is absolute "in the part [of his conduct] which merely concerns himself"²⁶. Further on in the same chapter Mill says that this applies in the portion of his conduct "which affects only himself"²⁰. Later, in chapter 4, Mill defines this area of individual liberty as "what only regards himself"⁵⁶, and as the "self-regarding class" of conduct⁵⁷, "self-regarding conduct"⁵⁸ (twice on the same page), "individual conduct"⁵⁹ and "private life".

In chapter 5, the realm of freedom is defined mainly in terms of *concerns*, although in which sense of the word (interests or merely effects) it is not made clear. The expressions used include "things wherein the individual is alone concerned"⁶⁰, "all that concerns only the agents themselves"²², "his own concerns"³⁰, and "things which concern only himself"⁶¹.

When it comes to Mill's definitions of the *scope of intervention* permitted by the very simple principle, the position becomes even more confused. There are a number of passages which suggest that liberty becomes subject to intervention when there is merely an *effect on others*. In addition to the two uses of the phrase "concerns others" which seem to bear this interpretation (see section 2.1.1.B)²², there are in chapter 1 the expressions "things which regard the external conduct of the individual"⁶³ and conduct which "affects others"²⁰.

Yet Mill also writes about the state's role as limited to preventing conduct which affects others (not necessarily others' interests) *in a prejudicial or harmful way*. At the head of this list of quotations is obviously the phrase used in the very simple principle itself - to prevent "harm to others"¹. But other examples of phrases in *On Liberty* where Mill defines the conduct to be prevented by intervention as any type of harmful action (regardless of whether interests are harmed), include: "conduct... calculated to produce evil to someone else"¹; "an act hurtful to others"⁶³; "injury"⁶³; "doing evil to others"⁶³; "harm"²⁰; "acts... which without justifiable cause do harm to others"⁵³; making oneself "a nuisance to other people"⁵³; "injury or molestation"⁶⁴; "acts injurious to others"⁶⁵; "the evil consequences of [an individual's] acts... on others"⁶⁶; "a definite damage or definite risk of damage either to an individual or to the public"⁶⁷; and "doing wrong to others"⁵².

Then there are a number of instances in *On Liberty* where the conduct to be prevented by intervention is stated to be that which affects, or prejudicially affects, *the interests of others*. These are the questions which (if selected to the exclusion of those cited in the previous two paragraphs) would support Rees's defence of Mill. They include: "those actions of each which concern the interest of other people"⁶³; "injuring the interests of one another"⁶⁴; "conduct [which] affects prejudicially the interests of others"⁶⁴; conduct and character which "affect the interest of others"⁶⁵; "such actions as are prejudicial to the interests of others"⁵⁵; and "damage, or probability of damage, to the interests of others"⁵⁵. In addition there are at least a couple of usages of the word *concerns* which, as stated in section 2.1.1.B, it is probably correct of Rees to regard as meaning "affects the interest of"⁶⁸.

The picture is further confused by Mill's use of a number of expressions which cannot be classified with confidence in any of the categories of conduct so far listed: affecting others, or harming others, or affecting/harming others' interests. Thus Mill variously defines the scope of interference as being to prevent: "an offence against the rights of others"⁶⁶; the violation of "a distinct and assignable obligation to any other person or persons"⁵⁷; and, even, attempts to deprive others of their freedom or impede their efforts to obtain it⁷. And as well as expressing the justification for intervention in terms of the negative things it is supposed to prevent, Mill also writes (creating yet more ambiguity) of the positive things which intervention should promote under the very simple principle: for example, "self-protection"¹, "the security of others"²⁶, justice "for the sake of others"⁶⁹. Is it possible to say with any certainty whether promoting these positive goods involves only preventing violations of others' interests (and hence a reasonably limited role for intervention, as Rees suggests) or preventing any kind of harm to others (and hence a virtually unlimited role for intervention)?

Rees's defence of Mill - that really the very simple principle would entitle state intervention only to prevent violations of others' interests, and that the critics are therefore wrong to see it as enabling potentially unlimited interventions by the state - depends for its plausibility on the support of textual evidence. That evidence simply is not there. The critics are, in fact, right, and it is Rees who is wrong. A thorough reading of the text of *On Liberty* does not yield up a "single consistent principle". Instead of one coherent definition of the boundary between the realms of individual liberty and state intervention, there is indeed, as the above selection of quotations all too amply illustrates, a "variety of... terms used in the relevant passages". It is a *potpourri* of different expressions with different

meanings, and the consequence is that Mill's principle suffers from the same defect as it was accused of in chapter one of this thesis. Far from being a coherent or "very simple" principle, it is chronically ambiguous.

For all Rees's protestations, there are places in the text where it really seems that Mill has been almost reckless in choosing his words, not even making an attempt at consistency. At the start of chapter 4 of *On Liberty*, Mill makes a distinction between, on the one hand, violating the rights of others, and, on the other, merely being "hurtful" to them; the latter type of action, he states, is not a ground for state intervention:

The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though *not by law*^{64*}.

But this fine semantic distinction is set at nought when the reader turns back to chapter 1 to discover Mill stating, no less equivocally,

If anyone does any act hurtful to others, there is a *prima facie* case for punishing him *by law*...^{63**}.

The point about Mill's use of the word "interests", Rees explains in his 1960 article, is that it implies something specific. Interests are not, he writes, "tender spirits" or "an extraordinary sensitive nature"⁴³. Equally, they "are not just arbitrary wishes, fleeting fancies, or capricious demands"⁷⁰. Offending someone's sensibilities, or failing to satisfy someone's likes or dislikes, is therefore not the same as violating his interests (and hence will not in itself justify state intervention). However, the trouble with this analysis is that Mill himself is not quite so precise about the

* Emphasis added.

** Emphasis added.

meaning of "interests". In chapter 2 of *Utilitarianism* he uses the word much more loosely when he writes about

the happiness, or (as speaking practically it may be called) the interest, of every individual¹³.

And in his *Thoughts on parliamentary reform*, Mill writes that

everybody has as many different interests as he has feelings; likings or dislikings, either of a selfish or a better kind⁷¹

- a description of "interests" which has been aptly summarised by one commentator as meaning: "a person had an interest in *x* when he wanted *x*". The fanatical Nazi wants to send all Jews to the gas chamber, the devout Calvinist wanted an end to Catholic practice, the vegetarian wants meat-eating to stop. If the failure to satisfy these wants constitutes a violation of interests, Rees's re-phrasing of the very simple principle in terms of preventing interest-violation does not render it any more liberal. But it is Mill's use of words - its randomness, inconsistency and ambiguity - which is to blame.

2.1.2. Trying to define "interests"

But even if Mill's own words had not been so unhelpful to the Rees case - even if, that is, the textual evidence showed consistent use by Mill of the term "harm" to mean "violation of interests" - it is by no means clear that the Rees argument would be of much help in mounting a defence of Mill. Rees, having insisted that some of the passages where the word "interests" is used in *On Liberty* "are of the greatest importance in assessing Mill's intentions"⁴⁹, seems unclear as to why. After working flat out to prove (unsuccessfully, in the view of this thesis) that "harm to others" means something very specific - violating interests - Rees does not explain satisfactorily what, precisely, "interests" means. The

result is that even if Rees's interpretation of Mill's text were correct, it would not remove the ambiguities.

At several points in his 1960 article, Rees appears to suggest that "interests" is closely related to the idea of human "rights" - something to which human beings are entitled by virtue of their humanity, as of right. Thus Rees distinguishes "interests" from "effects" by noting that

"effects" is a concept applicable to plants and animals as well as to human beings, but no one talks about the interests of plants⁴³,

and then goes on, albeit somewhat tentatively, to associate the concept of "interests" with that of rights:

Certainly Mill is not saying that rights and interests are the same thing, synonymous terms (and of course they are not), but he does seem to imply that they are very closely related to each other. It would be consistent with what he says here to suppose that when a person can be said to have interests he is thereby possessed of a right⁴⁹.

There is undoubtedly textual support in *On Liberty* for the view that Mill regards "interests" and "rights" as closely related, or at least that he uses both terms almost interchangeably as the criterion for the boundary between individual liberty and state intervention (which is perhaps not surprising, in view of the wide range of terms which he uses almost interchangeably for this purpose: see section 2.1.1.C above). Thus Mill states that the very simple principle permits interference where there is "an offence against the rights of others"⁶⁶ and "to prevent the stronger specimens of human nature from encroaching on the rights of others"⁶⁹. In the third paragraph of chapter 4, the chapter which purports to define "the limits to the authority of society over the individual", Mill writes of the indispensability of each individual in society

not injuring the interests of one another, or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights⁶⁴.

The trouble with defining interests in terms of rights is that it leaves the essential question (what justifies state intervention restraining individual liberty?) unanswered. For "rights" is a contentless word. A right is simply an entitlement - but to what? In the liberal view, people have a right to freedom. A socialist might say that people have rights to (are entitled to) welfare, or perhaps equality. Unless the term "rights" has a specifically liberal content, the idea of a state limited to doing no more than protecting others' rights could be a socialist state⁷². But Rees, in his 1960 article, seems to repudiate a specifically liberal content for Mill's conception of "rights" and to reject a definition of interests in terms of the right to freedom*. He does not, however, suggest what else the content of the "rights" to be protected by the state might be. So Rees's attempt to define interests as rights fails to remove the ambiguities, and fails to take the argument further. In *Utilitarianism* Mill offers his own definition of a "right":

* As was pointed out earlier, Rees emphasises that interests are "not just arbitrary wishes, fleeting fancies, or capricious demands", and thereby implies that they are something more substantial, such as welfare. But the point about freedom is that it *does* entail respecting each person's arbitrary wishes, fleeting fancies or capricious demands *no less than* his desire for welfare (although only in respect of his own life - *not* his arbitrary wishes or demands for the lives of others, which would of course entail meeting the demands of the fanatical Nazi in respect of Jews and so on: see section 2.1.1.C above). Freedom is not an entitlement to a specific "good" such as welfare, but consists rather in a person's entitlement to realise for himself, insofar as he is so capable, whatever desire he may have, regardless of how substantial or fleeting, serious or capricious, that desire might be. In limiting "interests" to the realisation of something substantial, and not "just" capricious demands, Rees is dissociating it from the concept of freedom. By 1980, however, it appears that Rees may have changed his mind on this: see section 2.3. below.

When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it... To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of⁷³.

If this passage is combined with Rees's interpretation of Mill, the exegesis becomes simply circular: *When should the state intervene to protect people? When they would otherwise be harmed. What does being harmed mean? Violating interests. What does interests mean? Rights. Rights to what? Rights to being protected by the state.* It is a tautologous argument, and it just begs the original question.

Rees, then, does not specify or define what exactly *is* the content of the "right"/interest to be protected under the very simple principle. But he does at least seem to recognise, in the 1960 article, that some form of definition is necessary. Unfortunately, though, his comments in this respect are contradictory, and serve to emphasise the ambiguities of Mill's principle more than to elucidate it. Thus in one passage in his article Rees insists that

there is an objective element about [the concept of an "interest"]⁷⁰

and that it is this "objective element" which "precludes any fanciful demand from being an interest"⁷⁰. In other words, the right which the state is to protect has an objective content. Since Rees does not appear to think that this right is merely the right to make free choices, it follows that he believes that the very simple principle exists to protect people's right to do certain, objectively-determined, specific things. This of course lays Mill's principle open again to the charge of "moral totalitarianism"^{74*}: a "Berlin principle" of preventing infringements of others' liberty involves the state in

* See also section 3.1. of chapter one of this thesis.

protecting people's right to do as they choose, but precludes the state from interfering in or directing the choices they actually make - whereas the Mill principle of preventing harm to others, defined as protecting people's objectively-defined "interests", requires the state to accord greater rights to those who choose to act in one way than to those who choose to act in another. In short Rees's "objective interests" interpretation fails to refute the allegation that the Mill principle, formulated in terms of preventing harm to others rather than preventing infringements of others' liberty, is subversive of freedom.

Moreover, if the "interests" to be protected are objective, how is their objective content to be ascertained? Rees recognises this problem when he notes that the "objective interests" interpretation means that
the principle... must necessarily harbour value-ingredients which will inevitably render its use a *controversial question*^{75*}.

This, of course, is quite an indictment of the Mill principle. It is supposed to be a "very simple principle"¹, to "govern absolutely the dealings of society with the individual"¹ and thereby to answer "the practical question where to place the limit... between individual independence and social control"²³. If its use becomes "a controversial question" the principle therefore cannot serve its purpose.

Perhaps because of the implications of an "objective" definition of interests - endless controversy resolvable only by moral totalitarianism - Rees elsewhere in his 1960 article seems to conceive the idea of interests in terms which are almost the very opposite of objective. Interests, he writes,

* Emphasis added.

depend for their existence on social recognition and are closely connected with prevailing standards about the sort of behaviour a man can legitimately expect from others⁴³.

This is a relativistic approach to the problem of defining interests: far from being specific or objective, the content of interests is variable according to time, place and the popularity or fashionableness of beliefs ("prevailing standards"). The implications of this for the capacity of the very simple principle to protect liberty are, if anything, more devastating than in the case of the "objective" approach. It is hard to disagree with Gray when he notes that, if Rees is right on this point, the principle "cannot perform the critical functions Mill intended for it"⁷⁶. Those "critical functions" were that the principle should stand as a bastion of freedom, unmovable in the face of "prevailing standards", rather than reflecting and embodying those standards. In the opening paragraphs of *On Liberty* Mill warns that democratisation of government does not necessarily protect individual liberty, and that there is a danger that the "tyranny of the magistrate" will be replaced by the "tyranny of the majority". That being so, he continues,

there needs protection also against the tyranny of the prevailing opinion and feeling,... the tendency of society to impose... its own ideas and practices as rules of conduct²³.

The very simple principle is proposed to fulfil that need. If, as Rees suggests, the principle is defined in terms of prevailing standards, then it clearly fails to do so. It becomes, instead, an instrument of the majority tyranny it is supposed to keep at bay.

2.1.3. The problem remains

Probably the most depressing aspect of Rees's 1960 interpretation of harm to others is that - even if the textual evidence were there, and even if Rees could have formulated a definition of interests by which the very simple principle did not entail either moral totalitarianism or the tyranny of the majority - the problem Rees was endeavouring to solve would still in large part remain. That problem, it will be recalled, is that enabling the state to intervene to "prevent harm to others" allows for state intervention and the curtailment of individual liberty in an almost limitless range of human activity, simply because the number of actions which cause harm to others of one form or another is virtually limitless. Preventing harm to others implies encroachments on "the most unquestionably legitimate liberty of the individual"³⁶. Rees's contention was that a "revised version"⁴⁰ of the principle (based, he claimed, on what Mill really meant), entitling intervention only to prevent violation of others' interests, would limit the scope for state intervention and prevent encroachments on the "most unquestionably legitimate" liberties. Rees was arguing that the violation of someone's interests, however hard to define, is a far more specific phenomenon than mere harm to others, and therefore one which arises in far more limited circumstances.

The trouble is that the same interdependence in society which means that so many "unquestionably legitimate" private acts which have harmful effects on others, also means that a large number of "unquestionably legitimate" private acts can violate others' interests as well. As Mill himself acknowledges in *On Liberty*,
the mischief which a person does to himself may seriously affect, both through their sympathies and

their interests, those nearly connected with him and, in a minor degree, society at large^{57*}.

One example of this is where an individual allows his house to "run to seed": the consequence may well be that his next-door neighbour, seeking to sell his own house, finds it more difficult to do so. That is to say, the neighbour's financial interest is seriously and adversely affected by the perfectly private and unquestionably legitimate behaviour of the first person. The Mill principle, *as modified by Rees*, would entitle the state to intervene in the way the first person keeps his house.

The violation of others' interests does not only arise out of self-regarding "mischief". There are other self-regarding acts which are not only legitimate but commendable, yet which nonetheless can seriously and adversely affect the interests of others. Anti-smoking campaigns, if successful, result in tobacco companies sustaining financial losses (and perhaps even having to make their employees redundant)⁷⁵. Robert Nozick cites the case of Toscanini who at one time conducted an orchestra called *Symphony of the Air*. That orchestra depended, in order to survive financially, on Toscanini being conductor: it was he who gave the orchestra its reputation and attracted the audiences. If Toscanini had retired, the other members of the orchestra would have lost their jobs and in all probability would not have been able to find alternative employment that was equally lucrative⁷⁸.

Rees, although he never properly defines interests, illustrates the distinction between interests and mere effects thus:

How one is *affected* by a theatrical performance depends on one's tastes, but the *interests* of a businessman would be affected by a tax on business

* Emphasis added.

property no matter what his tastes or susceptibilities⁴³.

By analogy, the actions which cause the tobacco company's financial losses, the home-owner's selling difficulties, and the orchestra members' redundancies, are all undeniably violations of their respective interests. If the Mill principle, and even Rees's "revised version" of it, were applied, the state would be entitled to prevent these violations. It would be entitled not only to suppress the "mischief" of letting one's house run to seed, but also to prohibit anti-smoking campaigns, and to remove Toscanini's right to retire. The "most unquestionably legitimate" liberties would be curbed. And the problem would remain.

2.2. Harming others means "violating their security"

In 1980, twenty years after writing his original article, Rees turned again to the problem of how to interpret "harm to others". Lecturing at the Royal Institute of Philosophy, he conceded that he had been wrong to assert, in the article, that harm to others relates to the violation of "interests" where interests are defined in terms of "prevailing standards". This interpretation, he said, was

relativistic... Mill is clearly not limiting the application of his remarks to Britain in the nineteenth century⁷⁹.

That being so, the principle can still perform what Gray calls "the critical functions Mill intended for it"^{76*}, and "harm to others" does mean something definite and specific.

But what does it mean? The Rees of 1980 is as anxious as the Rees of 1960 to reformulate the very simple principle so that the prevention of harm to others cannot be interpreted as entitling widespread state interference. But by 1980 there is less emphasis on the word "interests", and there are not one but two "revised versions".

The first is based on a particular reading of a passage in chapter 3 of *On Liberty* where Mill says that the rationale for the state restraining individual liberty is the need for people

to be held to rigid rules of justice for the sake of others⁸⁹.

"Harm to others", Rees infers, is a violation of the rigid rules of justice⁸⁰. This view is partially substantiated by a passage in chapter 5 of *Utilitarianism* - the chapter

* See above, section 2.1.2. of this chapter.

dealing with the connection between justice and utility - where the issues of "just and unjust" are stated to have an "obvious connection with *hurt or injury*". Moreover, with regard to the injustice of breaking promises, Mill writes:

Few *hurts* which human beings can sustain are greater... than when that on which they habitually and with full assurance relied, fails them in their hour of need^{s1**}.

But justice in itself, like "rights", is a contentless term, unless it is more fully defined. In chapter 5 of *Utilitarianism*, Mill puts forward a definition. He states, first, that

Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence...^{s2}.

What people do have a moral right to, however, is security, to every one's feelings the most vital of interests. Nearly all other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without^{s3}.

The conclusion which Rees in 1980 draws from this is that the "rigid rules of justice" require that each person be accorded a moral right to security: the restraint of individual liberty to hold people "to rigid rules of justice for the sake of others"^{s9} therefore implies intervention to prevent the violation of others' *security*.

The violation of people's "security" - that which, according to Mill, "no human being can possibly do without"^{s3} - is of course a very specific type of harm. A state which limits itself to protecting its citizens'

** Emphasis added.

security would have a far smaller range of functions than one which was entitled to intervene to prevent almost every type of harm. If the very simple principle really means to limit the state's functions thus, then there is indeed little risk that it could be interpreted to justify an over-extended socialist-type state.

However, Rees's interpretation of harm as security-violation, ingenious though it may be, suffers from one major defect: the textual evidence supporting it is, to say the least, thin. Rees in 1960 claims to have counted the word "interests" at least fifteen times in the course of *On Liberty*^{29*}; and even that could hardly be regarded as impressive evidence when there are so many alternative formulations used by Mill such as "harm", "concerns" and so on. In the case of the word "security", Rees in 1980 does not even bother to say how many times he counted it in *On Liberty*. It is true that Mill writes, just one paragraph after setting out the very simple principle, that compulsion is "no longer admissible" as a means to people's own good and is

justifiable only for the security of others²⁶.

Perhaps the word appears elsewhere in the text as well. But it is impossible to read Mill's essay in its entirety and feel that it is suffused with the principle of protecting people's security. The concept simply does not predominate in the text. It is swamped by other words and concepts which have a less specific meaning and which suggest a wider range of reasons for intervention - preventing harm, protecting people's interests, taking care of actions which concern others. That is to say, it is swamped by the randomness with which Mill scatters concepts throughout *On Liberty*.

* See above, section 2.1.1.A of this chapter.

2.3. Harming others means "violating their freedom"

The second "revised version" which Rees in 1980 proposes, or at least alludes to, is that harming others means violating their freedom. Freedom, he seems to suggest, is the content of the "rights" and "interests" which Mill's principle - as interpreted by himself in 1960 - is intended to protect. (This of course differs radically from the view actually taken by Rees in 1960: see section 2.1.2. of this chapter.) The Rees of 1980 cites with approval H.L.A. Hart's argument that

if there are any moral rights at all, it follows that there is at least one natural right, namely, the equal right of all men to be free⁸⁴.

And he refers to a passage from *Utilitarianism* in which, he claims, Mill says that "an essential interest is damaged when there is wrongful interference in a person's freedom"⁸⁵.

If this second "revised version" is correct, the implications are enormous. If the "harm" to be prevented is the violation of others' freedom, then the very simple principle means that interference is only justified to protect people's liberty. That implies a state whose functions are limited to preventing interference with liberty: the specifically liberal, non-socialist state of the Berlin principle. On this interpretation the Mill principle is the Berlin principle, and the formulation "harm to others" poses no threat to liberty.

But, as with Rees's other interpretations, the textual evidence is not plentiful. His quotation from *Utilitarianism* is a misquotation. The way that Rees has it - "an essential interest is damaged where there is wrongful interference in a person's freedom" - gives the impression that Mill is equating freedom with a person's essential interest. But what Mill actually says (in chapter 5 of *Utilitarianism*) is that a person's essential

interest is in not being *harmed*, and that wrongful interference in freedom is just one of the types of action which constitute harm. Thus he writes of the "moral rules" which

forbid mankind to *hurt* one another (in which we must never forget to *include* wrongful interference with each other's freedom)^{15*}

and notes that

the moralities which protect every individual from being *harmed* by others, *either* directly or by being hindered in his freedom of action, are... those which he has *the strongest interest* in publishing and enforcing by word and deed^{15**}.

In short, a state entitled to prevent harm to others will, indeed, protect wrongful interference in people's freedoms - but it will intervene to prevent a whole range of other types of harm as well. Such a state will not be limited to the purely liberal functions suggested by the Berlin principle: the type of state sanctioned by the Mill principle will have these functions, and many more besides.

Already in 1832 Mill had stated his antipathy to a state limited to the liberal functions of simply protecting individual liberty. For the reasons explained in section 1.4.1. of this chapter, the limited functions of the liberal state are sometimes characterised as the prevention of "force or fraud". But in 1832, in an article in *The Examiner*, Mill had advocated a much more active interventionist role for the state. Discussing the issue of whether legal limits should be imposed on the number of hours to be worked in factories by women and children, Mill specifically rejected arguments drawn from the non-interference philosophy, and resting on the maxim that government ought not to prohibit

* Emphasis added.

** Emphasis added.

individuals, not under the influence of force or fraud, from binding themselves by any engagement which they may think free to contract⁸⁶.

Is there any evidence that by the time he comes to write *On Liberty*, and formulates the very simple principle, Mill has changed his mind? Mill words the principle itself - it cannot be repeated often enough - in terms of preventing *harm to others*. He does not write of preventing force or fraud; indeed, he does not use this formulation anywhere in *On Liberty*. However, he does seem to suggest at one point in *On Liberty* that intervention is warranted only to prevent violations of others' liberty. He writes, in the introductory chapter, that

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 [this can only mean their freedom, not their good]...⁷.

But this, like the quotation about "security", is just another example of the terminological randomness of *On Liberty*, in which words like "freedom" and "security" jostle with "interests", "concerns", "rights", "harm" and so on in Mill's casual re-phrasings of his principle. It is a symptom of that randomness and of the ambiguity which inevitably results. Rees's various interpretations fail in their professed intent - "to yield a single consistent principle"⁴¹ - and they fail to remove the possibility that the Mill principle as formulated could be used to justify an interventionist or socialist state whose role in society would leave little scope for individual freedom. For all Rees's efforts, the threat to liberty remains.

2.4. Harming others means "threatening social cohesion"

C.L. Ten, like Rees, believes that Mill's harm-prevention principle is consistent. Moreover, in Ten's view,

it is as a consistent liberal, deeply committed to the cause of individual freedom for everyone, that Mill should be remembered²¹.

Like Rees, too, Ten is concerned that misunderstanding of the "harm to others" formulation has been the cause of much ill-considered criticism of Mill; and, like Rees, Ten seems to think it necessary to re-formulate it in order that it should be better understood.

But Ten's reformulation differs considerably from Rees's. It is yet another revised version (and the proffering by Mill's defenders of so many versions seems to emphasise the principle's ambiguities far more than its alleged consistency). Ten, posing the question of what Mill means by "harm to others", cites two passages, from *Utilitarianism* and *On Liberty* respectively, which appear to link it with a concern for the cohesion and unity of society. In the first passage, in chapter 5 of *Utilitarianism*, Mill writes that

a human being is capable of apprehending a community of interest between himself and the human society of which he forms a part, such that *any conduct which threatens the security of society generally, is threatening to his own*^{87*}.

The second passage is from chapter 4 of *On Liberty*:

Though society is not founded on a contract... the fact of living in society renders it indispensable that each should be bound to observe a certain course of conduct towards the rest⁶⁴.

* Emphasis added.

Ten's conclusion is that "a central part of Mill's concept of harm is tied to the infringement of those rules which are *necessary for the continued survival of society*^{88**}.

The extraordinary aspect of this interpretation is that, although in one respect it narrows the concept of "harm" by confining it only to those kind of acts which threaten the continued survival of society, in another respect it broadens it by enabling it to include a great many activities which are usually regarded as private and self-regarding - and hence beyond the scope of the state's functions. Under Ten's interpretation the state could intervene with these private, self-regarding acts as well. It is not insignificant that, as noted in section 1.3.3. of this chapter, Ten rejects the idea of "there being two different areas of a person's conduct", self-regarding and other-regarding^{***}; on Ten's interpretation *both* areas of conduct are open to intrusion by the state, with profoundly illiberal implications.

For it is not just other-regarding actions which endanger "the continued survival of society". This is a point upon which Lord Devlin insisted in his celebrated polemic *The enforcement of morals*⁸⁹. Attacking what he took to be Mill's position - that self-regarding, private conduct should be beyond the reach of the state - Devlin argued that it is absurd to say that if a man gets drunk every night in the privacy of his own home that is no business of the law, for what sort of society would there be if half the population got drunk every night? Thus, Devlin maintained, "society cannot live without morals"⁹⁰ and "an established morality is as necessary as good government to the welfare of society"⁹¹. He concluded that it was the duty of the state, through its laws, to

** Emphasis added.

*** in spite of the fact that Mill several times makes the distinction, actually using the term "self-regarding"¹⁴.

enforce morality, including purely private conduct: "the suppression of vice is as much the law's business as the suppression of subversive activities".

The traditional response to Devlin has been to draw a clear distinction between liberty and licence: of course private morals are important, and just because people should be free to get drunk does not mean that they ought to do so, or that it is right or acceptable to do so. Conversely, because an action is wrong, this does not mean that that action should be prohibited, since it is the essence of government in a free society that - unlike totalitarian regimes - it permits actions which it disapproves of or considers wrong. H.L.A. Hart, in his equally celebrated reply to Devlin, makes this point succinctly. There is, Hart writes, a very important distinction

between the use of coercion to enforce morality and other methods... to preserve it, such as argument, advice and exhortation... It is a disastrous misunderstanding of morality to think that where we cannot use coercion in its support we must be silent and indifferent⁹².

And this seems to be what Mill means when he writes, immediately after setting out the very simple principle, that although an individual "cannot rightfully be compelled to do or forbear" on the grounds that "to do so would be wise or even right", these are nonetheless 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 otherwise¹.

But when Ten defends Mill against Devlin, it is on entirely different - indeed incompatible - grounds. Ten refers to Devlin's point about half the population getting

drunk in the privacy of their own homes every night, and declares that

Devlin has obviously misunderstood Mill... [in believing] that Mill's liberalism commits him to invoking "a principle that exempts all private immorality always from the operation of the law"⁹³. Ten's defence of Mill against Devlin is that Mill does *not* believe that private immorality should be always exempted from the operation of the law. Ten thinks that there is no distinction to be drawn in Mill's principle between self-regarding and other-regarding actions. Just as Devlin believes that "society cannot live without morals"⁹⁰ and that this therefore requires the enforcement of morals, so Ten understands Mill's principle to be that the state may interfere in any conduct where this is "necessary for the continued survival of society"⁸⁸ - and does not demur from Devlin's assertion that this includes private conduct such as getting drunk in one's own home. Devlin's view is that an individual should not have absolute liberty in self-regarding conduct. Ten apparently agrees with him - and believes that Mill does too!

Whatever one may make of Ten's interpretation, it most certainly is not consistent with Mill's assertion, in the paragraph of the very simple principle, that an individual's

own good, either physical or *moral*, is not a sufficient warrant^{1*}

for interfering in his liberty. More to the point, it suggests that, in sanctioning state interference in such purely private matters as how much alcohol an individual should drink in his own home, the application of Mill's principle could have extremely illiberal results involving encroachments on "the most unquestionably legitimate liberty of the individual"³⁶. Ten seeks to portray Mill

* Emphasis added.

as a "consistent liberal", but his *interpretation* suggests that he is neither. Of course, Ten's interpretation may be wrong**. But the very fact that he and Professor Hart, both defending Mill, are capable of reaching such diametrically opposed views - as to whether the very simple principle would sanction interference in private morality - is eloquent testimony to the principle's chronic ambiguity.

** On the question of alcohol Ten's interpretation almost certainly is wrong, to judge from Mill's specific remarks on drunkenness in *On Liberty*¹⁴⁴.

2.5. Several principles

Even if their attempts to redefine "harm to others" are not wholly successful, Rees and Ten are responsible for one very important and valuable contribution to the debate on this subject. Both are at pains to highlight something which earlier critics, in their haste to point out the illiberal implications of the "harm to others" formulation, all too often overlooked. For although it is true that the interdependence of individuals in society means that a vast number of actions may cause harm to others - and possibly almost every action does so - Mill never says in *On Liberty* that all such actions automatically require state intervention. He says merely that these are the *only* types of action in respect of which state intervention may even be contemplated. Where there is no harm to others the state is absolutely forbidden by the principle to intervene; where there is harm to others, this absolute prohibition is removed, but it does not follow that the state should or will intervene. Both Rees and Ten express this in the same way. Rees writes that

Mill says that only harmful conduct should be subjected to social control, be made subject to punishment. He stipulates a necessary but not a sufficient condition for restricting liberty⁹⁰.

Likewise Ten:

"harm to others" is a "*necessary*" not "*sufficient*" condition for intervention^{94*}.

In other words, applying the principle need not have the illiberal implications which some have suggested, because the amount of state interference will not necessarily be commensurate with the amount of activity in society causing harm to others: as Ten puts it, "prohibition is an *issue* only *after* it has been shown that an action is harmful"^{95**}.

* Ten's emphasis.

** Ten's emphasis.

This implies a two-stage test. First, does an action cause harm to others? If not, there may be no interference. If so, a second question arises: is state intervention justified? Only if *both* questions are answered in the affirmative may the state intervene.

Textual evidence from *On Liberty* wholly supports the Rees/Ten case in this regard. In chapter 1, just a couple of paragraphs after introducing the very simple principle, Mill explains:

the subjection of individual spontaneity to external control [is authorised] *only* in respect of those actions which concern the interests of other people. If anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law⁶³⁺.

In chapter 4 he writes:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and *the question* whether the general welfare will or will not be promoted by interfering with it becomes *open to discussion*^{64*}.

And finally, at the beginning of chapter 5:

It must by no means be supposed that because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it *always* does justify such interference^{55.**}

+ Emphasis added.

* Emphasis added.

** [AUTHOR'S NOTE: Reflecting on this passage since I first wrote it, I am now less sure that I accept the view of Rees and Ten that Mill only posits "harm to others" as "a necessary but not a sufficient condition for restricting liberty". The wording of the very simple principle itself seems to suggest otherwise. Mill writes that

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is

The trouble with this two-stage test is that, once again, it complicates what was supposed to be a simple, clear, unambiguous, practical principle. It converts "one very simple principle"¹ - the "single truth" of which Mill intended *On Liberty* to be "a philosophic text-book"⁹⁶ - into two. Mill is quite candid about this by the time he reaches the final chapter of *On Liberty*. He writes of

the two maxims which together form the entire doctrine of this essay⁹⁰

and he specifies them thus:

The maxims are, first, that the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself... Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment *if* society is of opinion that the one or the other is requisite for its protection^{90*}.

Some commentators^{96A} have attempted to minimise the significance of Mill's statement that *On Liberty's* doctrine comprises "two maxims", arguing that the two maxims are merely a verbal reformulation of the same one very simple principle. Whether this is true or not

to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant¹.

Mill here is defining the proper grounds for interference in individual liberty, and is specifically contrasting other-regarding conduct ("harm to others") with self-regarding conduct ("his own good"). The latter, he states, is *not* "a sufficient warrant" for intervention. This carries the unavoidable implication that, by contradistinction, the former - preventing harm to others - is "a sufficient warrant" for intervention. Not just a necessary, but a sufficient, warrant. Of course this is inconsistent with the other extracts from *On Liberty*, cited above, which support the "necessary but not sufficient" interpretation. But the inconsistency is Mill's rather than mine, and is one more example of the ambiguities which riddle *On Liberty*. - MPG]

* Emphasis added.

depends on what exactly they mean. If they are saying that the "two maxims" are really only one idea divided into two sentences - in other words, that the duality is merely a matter of syntax rather than substance - then this is patently false. The two maxims, as has been seen, represent two quite discrete ideas: first, that there should never be interference where there is *no harm to others* and, secondly, that where there is harm to others there should not be interference *unless "society is of opinion that [interference] ... is requisite for its protection"*. However, if the commentators mean that there are indeed two discrete ideas, but that those ideas were already implicit in the very simple principle, they may well be right. But if they are, it was not "one very simple principle" at all, but two.

For Mill to have two principles of liberty instead of one is perhaps, as Lady Bracknell might have said, a misfortune. Yet - and here one begins to detect the signs of carelessness in Mill's analysis - a thorough reading of *On Liberty* reveals even more principles superimposed on the "two maxims". For instance Mill makes a distinction between the principle of freedom of expression and the principle of freedom of action. "No one", he writes at the beginning of chapter 3, "pretends that actions should be as free as opinions"⁵³. This is explained more fully elsewhere in his essay. Defining "the appropriate region of human liberty", Mill writes that it comprises

first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people, but, being almost of as much

importance as the liberty of thought itself and resting in great part on the same reasons, is practically inseparable from it²⁰.

Freedom of thought and freedom of expression, then, being "practically inseparable", the one does not fall under "a different principle" from the other. The apparent implication of this is that freedom of action, by contrast, *does* fall under a different principle, a second principle:

Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong²⁰.

It was necessary to reproduce these quotations in full so as to bring out precisely what is the difference between the first principle and the second, between Mill's principle of liberty of expression and his principle of liberty of action. Freedom of opinion and expression, it will be noted, are "absolute". No qualification or exception is set out. It is only freedom of action, by contrast, which is stated to be subject to the proviso "so long as what we do does not harm them".

To add to the complexity, Mill sets up yet another dichotomy - between the type of harm to others which is a sin of commission, and the type which is only a sin of omission. If an individual harms another by committing an assault on him, Mill's principle makes clear that the state is entitled to intervene, and that laws backed by penal sanction may compel him to desist. But what if the individual, passing down the street, sees an assault being attempted by someone else? If he just passes by, omitting to help the victim, the victim will be harmed, and so his omission is a form of "harm to others". Mill recognises this when he notes that

A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for his injury⁶³.

But that does not settle the matter. Mill makes clear that the same principle does not apply equally to "either case". In the latter case, harm to others by inaction, Mill says that there must be "a much more cautious exercise of compulsion"⁶³ than in the former. In other words a different, more cautious, principle of intervention applies for harms of omission than for harms of commission. Yet, compounding the confusion and ambiguity, Mill is extremely vague about what that more cautious principle is. Intervention is permitted in cases of active, "committed" harm to others. But Mill does not specify in which cases of passive, "omitted" harm to others intervention is permitted. Ten explains helpfully that

the harm prevented is always grave⁹⁷.

"Grave harm" is hardly a very definite concept on which to base a "very simple principle" - but Mill is even less specific. He merely informs the reader that to make an individual answerable for "not preventing evil" is

comparatively speaking, the exception⁶³

and depends on

the special expediencies of the case⁶³.

But such a resort to expediency, and to deciding on a case-by-case basis whether the state should interfere, is exactly what the principle was supposed *not* to do. On the contrary, it was supposed to replace the pragmatic practice of assessing each case on its merits. In the paragraph immediately before spelling out the very simple principle, Mill bemoans the lack of any rule or principle to which people

consistently adhere, as to what things are fit to be done by a government

leading them to

range themselves on one or the other side in any particular case¹.

Yet by the time he comes to deal with harms of omission, Mill's own attempt at a principle of liberty has succumbed to the same kind of arbitrariness and uncertainty.

Uncertainty piles on uncertainty, and ambiguity on ambiguity. There is in fact another modification of the very simple principle in *On Liberty*, another pair of maxims into which it subdivides. For the test of whether interference is prohibited is apparently not, as first seemed, based on the simple criterion of whether the action to be prevented causes harm to others (or even violation of their interests or their security). After determining whether an action harms others, a further test has to be applied: if it does harm others, does it *primarily* affect others, in which case intervention is permitted; or does it primarily affect the agent, with the harm to others being merely ancillary and secondary, in which case intervention remains prohibited? This complication is alluded to in Mill's reference to harming others "directly and in the first instance"²⁰ (as to which, see section 1.6. of this chapter), and it recurs at the beginning of chapter 4 of *On Liberty*:

What, then, is the rightful limit to the sovereignty of the individual over himself? ... How much of human life should be assigned to individuality, and how much to society? Each will receive its proper share if each has that which *more particularly* concerns it. To individuality should belong that part of life in which it is *chiefly* the individual that is interested; to society, that part which *chiefly* interests society^{64*}.

In each case, then, one is supposed to decide not just whether the action causes harm to others, but how much, and whether that harm to others is the more important consequence of the action or merely a secondary by-

* Emphasis added.

product. No clue is suggested by Mill as to how this calculation is to be made: no simple criterion or principle "entitled to govern absolutely the dealings of society with the individual". Even Rees, among Mill's staunchest defenders in the matter of harm to others, appears to despair at this point. He concedes that

it requires little imagination to foresee the immense complications that would be bound to arise in the application of such a formula⁹⁸.

Although he attempts to construct a "revised version" of the very simple principle which, he believes, explains and clarifies it^{48**}, Rees's honesty compels him to observe forlornly in a footnote that in doing so

I am leaving out the complications concerned with "primarily", "chiefly" and "directly"⁴⁸.

There are, then, many principles of liberty, not "one very simple principle", which Mill presents to the readers of *On Liberty*. Whether or not the state should intervene depends not only on the existence of harm to others, but on whether intervention is "requisite"⁸⁰ if there is harm to others, on whether freedom of expression or freedom of action is at stake, on whether the harm done would be by commission or omission, and on whether it would primarily or only secondarily affect others. It takes a great deal of ambiguity indeed for even Rees to find that applying the very simple principle can create "immense complications".

** See section 2.1. of this chapter.

2.6. No principle

It is the contention of this thesis that the existence of so much ambiguity about when the state may or may not restrict an individual's freedom makes the principle a quite ineffectual safeguard of liberty. Having several principles, embodying "immense complications", means that the clear guidance which the principle was supposed to provide is lost, and any benefits accruing to the cause of liberty are lost with it.

To this, Mill's defenders believe they have an effective riposte. They return to the question of the two-stage test: if no harm to others, no intervention; if harm to others, a *prima facie* case subject to a number of complicating factors. Even where, like Rees, they concede that the second limb can pose difficulties and ambiguities, the first limb is clear and unequivocal. Whatever uncertainty about state intervention there may be where there is harm to others, there is a clear and inviolable sphere of liberty where there is no harm to others. Mill may not have precisely defined the sufficient conditions for intervention but, his defenders insist, he left no doubt about the necessary condition. As Gray puts it:

In laying down as a necessary condition of justified restriction of liberty that it apply only to actions which harm others... Mill's Principle sought to guarantee a sphere of self-regarding action entirely immune from social control⁹⁹.

This, Mill's defenders believe, is the crucial point, and the real guarantee of liberty. Rees is particularly explicit:

From Mill's point of view the important thing was to check the growing tendency to interfere in cases where intervention should be totally banned, and for this purpose what had to be done was to

demarcate the area of non-intervention from that in which a *prima facie* right to control could only be overridden by an appeal to the "general welfare". We have seen that *with all its indefiniteness* Mill's principle is emphatic on *one* point, namely that when the interests of others have not been affected society should not intervene^{100*}.

Rees thus abandons the defence of the second limb of the two-stage test, and retreats to the first limb. His entire defence rests on the first limb alone: the inviolable sphere of liberty and non-intervention that applies to conduct which causes *no* harm to others.

The weakness of this defence is apparent from a brief recapitulation of the arguments advanced in this chapter so far. People in society are interdependent, and what any individual says or does almost invariably affects others. This is true even of actions done at home or entirely alone: smoking cigarettes at home can make life unpleasant for the rest of the family, while the impairment to an individual's health from even solitary smoking affects those who depend on him to be healthy, such as colleagues, employers, customers, friends and so on. Moreover, given that people's preferences are so varied, it is virtually inevitable that the desire of one person to do something will conflict with the wishes of others, and thus harm them. This may happen in relatively trivial ways, such as when different families compete to enjoy the same "peaceful" and "unspoilt" picnic spot on midsummer's day (although for the families it is not necessarily so trivial); or it may harm others financially, as in the example of the dumping of a large block of shares on the stock market, profiting the vendor but causing losses to others who hold shares in the same company. Various attempts to narrow the range of activities falling within the "harm to others" definition,

* Emphasis added.

by redefining it as violation of others' interests or security or freedom, are simply not supported by textual evidence in *On Liberty* or in Mill's other works: the most that can be said is that Mill is ambiguous and inconsistent in his terminology. Moreover even if there were grounds for accepting the redefinitions they would not make much difference, since it is by no means clear what is meant by "interests" and, in any case, a perfectly legitimate action such as Toscanini resigning as conductor can still affect the interests of others. In short: there are very few actions indeed which can definitely be said to cause *no* harm to others. That being so, there are very few actions which unambiguously fall within the inviolable sphere of liberty which Mill's principle delineates.

The vast majority of human actions, if not all, therefore pass through the first stage of the two-stage test, and fall to be considered under the second stage. For most of human activity, the necessary condition for state intervention under the very simple principle is satisfied. Most human activity, accordingly, is not immune from social control under Mill's principle, and is afforded no inviolable sphere of liberty by the principle. Of course this does not mean that the state *will* intervene in this vast majority of cases. That depends on whether the sufficient conditions for intervention in any particular act are satisfied. But when it comes to defining the sufficient conditions for intervention - the second limb of the two-stage test, applicable to most human activity - Mill's principle is hopelessly confused. Rees, as has been seen¹⁰⁰, gives up trying to defend Mill on this point. Mill himself says that it is "open to discussion"⁶⁴. There is some reference in *On Liberty* to the second limb being a matter of ascertaining "the general welfare", which carries with it the suggestion that utilitarianism rather than individual liberty might be the criterion for deciding whether the state should

intervene in the vast majority of cases; but this is not explored further. Ten's admission is more telling with regard to Mill's comment that the second limb is "open to discussion". Mill, he writes,

thereby lost the opportunity for formulating more precise general principles for justifying actual intervention¹⁰¹.

That is to say, Mill left the second limb - the question, if there is harm to others, should the state intervene? - to *ad hoc* decisions, to pragmatism and expediency rather than principle. For the vast majority of human actions, on the question of whether the state should restrain the individual's freedom, the "very simple principle" offers no principle at all.

3. WHY DOES IT MATTER?

3.1. A principle of serious and practical moment

Mill's principle, as has been stated often enough in this thesis, was not intended merely to be an exercise in philosophical speculation. It was supposed to be applied in practice to determine when individual liberty should and should not be restrained. The formula "to prevent harm to others" was to answer

the practical question where to place the limit - how to make the fitting adjustment between individual independence and social control²³.

Mill insists on this point again and again throughout *On Liberty*. In chapter 4 he declares that

the principle I maintain is of serious and practical moment³⁶.

It is designed to solve real problems, not "imaginary evils"³⁶, since

there are, in our own day, gross usurpations upon the liberty of private life actually practised, and still greater ones threatened with some expectation of success⁵⁹.

Yet in the midst of all this gloom about the threats to liberty, Mill evinces a somewhat more sanguine disposition on one point: the existence of freedom of *expression* in the England of his day. Introducing chapter 2 of *On Liberty*, regarding "the liberty of thought and discussion", he writes that

speaking generally, it is not, in constitutional countries, to be apprehended that the government... will often attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public¹⁰².

In more recent times Gertrude Himmelfarb has likewise opined both on the practical relevance of Mill's principle and on the state of free expression in England. Although the times have changed, she sees little reason to differ from Mill's assessment. On the question of the principle's applicability in practice, she writes that *On Liberty* has become

the gospel of our own time even more than of Mill's day¹⁰³.

Indeed in her optimism she surpasses Mill. "The essential doctrine of *On Liberty*", she writes,

has become so much a part of our intellectual heritage that we are no longer aware of its assumptions, we no longer regard it as problematic¹⁰³.

3.1.1. The Satanic Verses

In the spring of 1989 the opportunity arose to test both these points. As if from nowhere, the issue of freedom of expression in England suddenly became a matter of heated and (literally) violent controversy. A serious and respected British author, Mr Salman Rushdie, had written a novel called *The Satanic Verses* which had just been published. The novel was widely felt, particularly by Muslims, to impugn and even to mock some of the central tenets of Islam. Initially there were demands for publication of the novel in Britain to cease, and copies of the book were publicly burned in one or two English cities. Then, in February, the Muslim leader of Iran, Ayatollah Khomeini, called on British Muslims to kill Mr Rushdie for having written his novel. The danger to Mr Rushdie's life was felt to be sufficiently great for him to go into hiding.

In the lively debate which ensued in England - via newspaper columns, literary and political journals, radio and television - there was much to depress defenders of

Mill's principle of liberty. First and foremost was the fact that, more than a century after Mill had written that the "liberty of publishing and expressing opinions" must be "absolute"²⁰, the issue should be a matter of debate at all. Secondly, it was notable how little mention was made in public debate of either Mill or his principle, even though they might be thought to have a direct practical relevance to the issue*. And thirdly, there was the fact that, on this starkest of questions relating to liberty - whether or not Mr Rushdie should be permitted freely to publish - anyone seeking to apply the very simple principle in practice would not have found that it offered a wholly unambiguous answer.

For there is no doubt that publishing *The Satanic Verses* could be said to have caused "harm to others". It was common ground among contributors on all sides of the debate that the publication of Mr Rushdie's book had caused considerable pain and anguish to many Muslim believers. Mill's very simple principle permits the curtailment of liberty in order to prevent harm to others; on one interpretation, this means that the principle would not serve as a bar against attempts to curb Mr Rushdie's freedom of expression on the grounds of the pain and anguish it had caused. In other words, the principle would be on the side of those attempting to silence Mr Rushdie, of the book-burners and of those who issued death threats - and directly opposed to the idea that a man is

* A striking illustration of this was provided by the publication, in summer 1989, of a book called *The Rushdie File*. This was a collection of articles, speeches and other public comments on the Rushdie affair, which claimed to provide "documentation from all sides of the controversy". Although it was some 200 pages long, there was only one reference in the index to "Mill, John Stewart" (*sic*) and that related to the following extract from a statement made by Leon Wieseltier at a public meeting:

"In the past we read More and Milton and Galileo and Spinoza and Locke and Voltaire and Jefferson and Mill and Mann and Tucholsky and Koestler a little smugly, because they won"²⁰⁴. In this context Himmelfarb's assertion that *On Liberty* is "the gospel of our own time" seems somewhat hollow.

entitled in his own country to express himself in whatever way he chooses. As such the principle can scarcely be regarded as an effectual safeguard of free speech; it is hardly a principle of liberty at all. Of course, however, that interpretation of the principle may not be correct. As we have seen, the expression "harm to others" is so riddled with ambiguity that it is not at all certain whether it includes the undoubted distress suffered in this case. The principle is thus open to alternative interpretations; and on the crucial question of whether *The Satanic Verses* should have been published or banned - a question "of serious and practical moment" - the very simple principle is quite incapable of providing a clear, practical answer.

This can be seen, by way of example, in public comments on the Rushdie affair made by three prominent individuals at the time. One was a Member of Parliament, and the other two were professors of politics at British universities. In attempting to weigh Mr Rushdie's freedom to publish against the pain and offence to Muslims which this caused, the three were unable to derive much assistance at all from Mill's principle. Far from the principle being the integral "part of our intellectual heritage"¹⁰³ which Himmelfarb suggests it to be, only one of the three even so much as mentioned Mill⁴⁴. Among the three there was absolutely no consensus about how to balance the conflicting rights of Mr Rushdie and the offended Muslims. One, the Member of Parliament, Mr Keith Vaz, was of the view that

It would be appropriate for it [the book] to be withdrawn¹⁰⁵

- while the two professors, Raymond Plant of Southampton University and Bhikhu Parekh of Hull University, argued that Mr Rushdie should be free to publish.

Moreover, even between the two professors there was no agreement on the grounds for taking the views they did. Professor Plant wrote that he opposed the banning of the book

as a liberal and a Christian⁴⁴.

Professor Parekh, by contrast, was rather scornful both of liberalism and of any liberty principle:

liberals rightly remembered the principle of liberty but forgot the equally important principles of fairness, compassion and humanity¹⁰⁶

- and his argument against a ban was based on reasons of pragmatic expediency rather than of principle. His reasons were, first, that

Once a literary work is published it is permanently in the public realm. No expedients can prevent its circulation or diminish its impact¹⁰⁶.

And secondly:

Anyway, the law is too blunt an instrument to deal with creative literature, and bans and censorship have always done more harm than good¹⁰⁶.

Professor Parekh's opposition to a ban, in short, was not motivated by any principled commitment to freedom such as might be derived from the sentiments in *On Liberty* or its "intellectual heritage"*.

* Later Professor Parekh was to write that the Rushdie affair was a lesson that the traditional liberal defence of every individual being entitled to free speech is "too elitist and paternalist to carry conviction in a democratic society". Freedom of expression, he said, is not "necessarily" good for society as a whole, and one should "look at the question of free speech from the standpoint of the community... and show if, how and why it is in its interest to allow maximum freedom ... to its iconoclastic individuals"^{106A}. These sentiments, from someone *opposed* to a ban on *The Satanic Verses*, are in stark contrast to the precepts of *On Liberty*: Mill's demand that individual freedom should enjoy "protection ... against the tyranny of the prevailing opinion and feeling"²³, and his conception of "the peculiar evil of silencing the expression of an opinion", which silencing is "as noxious, or more noxious, when exerted in accordance with public opinion that when in opposition to it"^{106B}.

Professor Parekh's opinion was not even influenced by the question of the nature of the "harm to others" caused by *The Satanic Verses*. His pragmatic argument against prohibition was made *in spite of his being convinced* that the harm caused was very grave indeed, that "some of the passages in *The Satanic Verses* demean Muslims in their own and others' eyes" and that those passages "perpetuate prejudices about them and give grounds for a few more into the bargain"¹⁰⁶. However, the disagreement between Mr Vaz, the MP, who supported a ban, and Professor Plant, who opposed a ban, was essentially a difference of opinion as to whether the offence caused to Muslims did in fact constitute a grave enough "harm" to justify curbing Mr Rushdie's free speech. Mr Vaz believed that it did:

It cannot be right that people should be able to publish views that *offend and seriously affect* the religious beliefs of the community^{105**}.

Professor Plant believed that it did not: at the end of a somewhat long and tortuous piece of reasoning in which he first argued that "offended sensibility is an inherently subjective matter", then conceded that sometimes offended sensibility could nevertheless justify a curb on free expression ("if advertising hoardings depicted a religion in a way which its adherents regarded as offensive there would be a case [for prohibition] since the presumed offence would be public and unavoidable"), Professor Plant finally came down in favour of the statement that

we should resist the view that *indirect* knowledge of something - such as other people reading a book one would find *offensive* - is an argument for seeking to proscribe it^{44***}.

Does "seriously affecting" beliefs constitute sufficient harm to justify a ban? If so, does it have to be "direct" offence, or will "indirect" offence suffice?

** Emphasis added.

*** Emphasis added.

These questions are not merely theoretical, but serious and practical: a novelist's basic freedom to publish his own work in his own country in 1989 apparently depended on the answers to them. But Mill's ambiguity on precisely these questions, revolving around the central issue of what constitutes "harm to others", means that his very simple principle cannot provide the guidance necessary to resolve the disagreement between Mr Vaz and Professor Plant. In section 1.3.2. of this chapter, it will be recalled, the question was posed whether, if people read or hear about books which are shockingly offensive to them, those books should be banned. In 1989 it was made clear that Mill's principle can provide no answer.

3.1.2. Religion and sex

As it happens, it is possible to divine with some certainty what Mill's position would have been in the Rushdie affair. As was noted in section 1.6. of this chapter, Mill in *On Liberty* specifically considers the case of the effect caused to religious Muslims (or "Mussulmans") by the eating of pork in their midst. There are, he writes in chapter 4, few acts regarded "with more unaffected disgust than Mussulmans regard this particular mode of satisfying hunger":

It is in the first place, an offence against their religion... The practice is really revolting to [them]¹⁰⁷.

Notwithstanding the grave offence to their religion thus caused, Mill states that Muslims would have "no business to interfere"¹⁰⁷ in anyone's freedom to eat pork, even in a society where they formed the majority. By the same token, it may be inferred, as a minority Muslims would have no business to interfere in any freedom of expression which was "an offence against their religion" or "really revolting" to them.

But this inference is not derived from Mill's *principle*; the inference can only be drawn because of the coincidence that *On Liberty* fortuitously contains a practical example which is closely analogous to the Rushdie affair: both cases happen to deal with the particular question of whether causing religious offence to Muslims constitutes "harm to others". There is nothing about the way the principle itself is formulated and expounded which enables equally clear inferences to be drawn in other contexts where there is no exactly parallel illustration in *On Liberty*. And Mill's inconsistency in expressing the principle - at one moment using the criterion of conduct which "affects prejudicially the interests of others"⁶⁴, and at another conduct which merely "affects others"²⁰; at one moment stating that "any act hurtful to others" is *prima facie* punishable by law⁶³, and at another that an act "hurtful to others" which does not violate their constituted rights may be "justly punished by opinion, though not by law"^{64*} - renders futile any attempt to infer generally applicable maxims from isolated passages in the text of *On Liberty*.

This matters a great deal. In recent decades western society, and particularly British society, has on several occasions been confronted with dilemmas in which its traditional behavioural norms have been rudely challenged and there has been uncertainty as to whether to grant freedom of expression to the challengers. These challenges have generally come in the form of works of art and literature (of varying quality) which have shattered fundamental social taboos, chiefly religious and sexual taboos. An instance of a religious taboo being challenged was Martin Scorsese's film *The Last Temptation of Christ*; when first screened, in 1988, its depiction of Jesus Christ in lascivious reverie on the Cross provoked - throughout the western world - loud and violent

* See the textual analysis in section 2.1.1.C of this chapter *passim*.

denunciations and demands for it to be banned forthwith, a controversy uncannily resembling (albeit in milder form) the Rushdie affair which was to erupt less than a year later. So, too, with the storm over the first publication in England of *Lady Chatterley's Lover* (in 1960) - and the many controversies about various forms of pornography which over the years have offended the sensibilities both of traditional defenders of "Victorian values" and of modern feminists who object to the degradation of women which (they say) pornography entails. Sometimes it has proved possible for a publication to break religious and sexual taboos in one go: thus in 1980 the magazine *Gay News* printed a poem which portrayed Christ committing homosexual necrophilia (publication was held to be unlawful by the English courts). In each of these cases the dilemma over whether to permit publication has been: does the possible danger to the social fabric arising out of a permissive approach to religious and sexual questions justify the imposition of constraints on people's liberty? And in each case controversy has raged because there has been no clear or unambiguous principle of liberty to resolve the dilemmas. Mill's "very simple principle" will not do - simply because it is unclear whether the possible danger to the social fabric in each case does or does not constitute "harm to others". Consequently, the "very simple principle" has not, contrary to Mill's claims for it, proved to be "of serious and practical moment"³⁶. On these "social" questions it has failed to serve its purpose.

This is strikingly demonstrated in the deliberations of the Wolfenden committee in England in 1957. The committee was appointed by the British Government to examine the delicate relationship between state interference and individual liberty in sexual matters - and in particular the extent to which the criminal law should prohibit prostitution and homosexuality. Here again, Mill's principle of liberty, designed to solve "the

practical question - how to make the fitting adjustment between individual independence and social control"²³, ought to have been able to provide clear guidance on these issues. In fact, the Wolfenden committee *did* make use of Mill's principle, and the committee's report specifically referred to it and endorsed it. But, once again, the ambiguity of the principle - the lack of clarity as to when freedoms should be curtailed, as to what is meant by "harm to others" - meant that the guidance was anything but clear. The report spelled out the theoretical basis for its practical recommendations in a paragraph which, by all accounts¹⁰⁸, was meant to be a re-statement of Mill's principle. But this "re-statement" described the law's functions as not merely

to provide sufficient safeguards against exploitation or corruption of others

but also

to preserve public order and decency, to protect the citizen from what is offensive or injurious...¹⁰⁹.

It is a confusing picture. It is hard to know what conclusions could be drawn from it in deciding whether to ban *Lady Chatterley's Lover*, *The Last Temptation of Christ* or *The Satanic Verses*, all of which were "offensive" to many people, and regarded by many people as a violation of "decency". Moreover, the committee's "re-statement" of Mill's principle cannot easily be reconciled with much of what Mill actually says in *On Liberty*. He observes in chapter 4 that liberty requires that marriage by Protestant clergy be tolerated, even in the Roman Catholic countries of southern Europe where Protestantism itself is considered

offensive in the highest degree³⁷

and where the very notion of a married clergy is thought by the general public to be

unchaste, indecent, gross, disgusting¹¹⁰.

That the Wolfenden committee, attempting to re-state Mill's principle, should believe that offensiveness and indecency are legitimate grounds for the state restricting individual liberty, when Mill specifically insists that they are not, says everything that needs to be said about the sort of practical guidance that Mill's principle was able to provide.

3.2. Socialism and harm-prevention

But the ambiguity of Mill's "harm to others" criterion also matters in terms of what has been the central question of politics, in England and throughout the world, virtually since the time *On Liberty* was written. That question is, essentially, whether society should function along liberal free-market lines, with minimal state interference in people's freedom to run their own lives, earn, invest and spend their own money, and make agreements as they please - or whether, as socialists advocate, the state should adopt a more interventionist role for the good of the people, even at the cost of curtailing some of their individual liberties. Mill's principle ought to be able, indeed purports to be able, to delineate the scope and limits of the state's functions, and therefore to answer this central political question. But it is not able to do so. The line is stated to be drawn at the point where freedom of action would cause harm to others. But because "harm to others" is such a fluid, indefinite concept it becomes impossible to draw the line - and therefore impossible to know how much scope for individual freedom there can be where Mill's principle is applied in practice. At the beginning of this thesis it was asked: is the principle a prescription for liberalism and laissez-faire, for socialism, or for what? The ambiguity of the expression "harm to others", like the ambiguity (discussed in chapter

one) about whether the principle is subject to utilitarianism, makes it impossible to tell the answer.

This is not the case with what was called earlier in this chapter the "Berlin principle"* - that is, the principle that the state may only restrain individual liberty to prevent infringements of liberty. A person's liberty to walk in the street must not be infringed. Therefore the state must use the criminal law, the police, the courts and a range of penal sanctions and deterrents to protect that liberty from thieves, muggers, murderers. The state must also have armed forces to protect its citizens' liberty from foreign attack. For the reasons set out in section 1.5.1.A of this chapter**, protecting liberty necessarily also entails providing the prerequisites of being free - health, education, shelter and clothing - and, under the Berlin principle, the state must ensure that these are provided. Of course there may still be disputes about what will be the precise levels of provision (about what standard of housing, for example, the state should provide), but the Berlin principle does nonetheless serve as a ceiling on the functions which the state may assume. Under the Berlin principle the state is entitled (and obliged) to ensure, so far as is possible, that its citizens have everything necessary to be free to do the things they want. It is not, however, obliged (or entitled) to ensure that they are able to do the things they want (unless "freedom" is re-defined in a socialist way, to mean "ability" or "power": as to which, see chapter three of this thesis, *passim*). This is the ceiling or limit of the state's functions under the Berlin principle. That is to say, it is not the state's role to enable people to be as rich as their neighbours - by "redistributive" taxation aimed at promoting equality. It

* So named, it will be recalled, not because Isaiah Berlin actually advocates this principle himself, but because he believes (mistakenly) that Mill does.

** and in section 1.2.1. of chapter three.

is not the state's role, either, to invest people's money for them - through nationalisation - or to manage their businesses or to provide them with employment. Neither is it the state's role to decide on people's behalf what agreements they should or should not make - through economic regulation and *dirigisme*. It is up to people themselves to do these things. In short, the application of the Berlin principle does not, and cannot, entail a socialist state.

It was argued in chapter one* that socialism is a species of paternalism. Like a father to his children, the socialist state assumes responsibility for the welfare of its citizens, and takes control of a large proportion of the running of their lives. On the face of it, the Mill principle of intervention only to prevent "harm to others" could never be used to justify such a state. After all, the distinction made between actions that harm *others*, over which the state does have jurisdiction⁶⁴, and *self-regarding* actions, over which it does not, carries strongly anti-paternalistic implications: matters which regard oneself are one's own business. And, indeed, Mill appears to have believed that his principle most decidedly is not a prescription for socialism. In his *Autobiography*, as already mentioned, he describes the very simple principle as "diametrically opposed"⁶⁵ to socialist doctrine; and in the only reference to socialism in *On Liberty* he expresses the view that "a considerable diffusion of Socialist opinions"¹¹¹ would be thoroughly detrimental to the cause of liberty which he espouses.

The problem is, as has been expounded in this chapter, that the distinction between "harm to others" and "self-regarding actions" is by no means sufficiently clear-cut to preclude the application of Mill's principle entailing paternalism or socialism. Society is so

* See section 3.3.3.B.

interdependent, and "harm" such an indefinite word, that many of the "most unquestionably legitimate"³⁶ exercises of liberty may be characterised as causing harm to others - and hence proper subjects for paternalistic or socialistic state intervention. In this way, the very simple principle is ambiguous enough to justify much of the philosophy and practice of state socialism.

Thus for example it is a characteristic of a free-market liberal society that people compete against each other. In doing so, those who succeed might be said to cause harm to those who do not, with the implication that free competition causes "harm to others", entitling the state to curtail it. Two types of "harm to others" may be identified here. First is the way that those who succeed are likely to - and very often do - inspire resentment and envy among the less successful. If commentators such as Rees and Professor Plant are to be believed, this kind of "harm" can be ignored, since the Mill principle is only concerned with preventing violations of others' interests and pays no regard to offended sensibility*. However there is a second type of harm to others arising out of free competition which cannot so easily be discounted, since it involves not merely offended sensibility and resentment but real loss - real harm to others' interests. Through the (often random) operation of market forces in a free economy, competition between people can mean that some people can sustain actual loss *as a result of* the success of others. Nozick offers a very commonplace example of this whereby there might be two cinemas in a town, and because people choose to see the film being shown in one rather than the film being shown in the other, the former cinema-owner profits at the expense of the latter. The exercise by the former cinema-owner of his freedom to compete against the latter is a direct cause of the latter's failure to attract audiences, and

* See section 2.1. of this chapter.

hence of his failure to make profits (or even of his sustaining losses). But, as Nozick asks,

if I go to one movie theater [*sic*] rather than to another adjacent to it, need I justify my different treatment of the two theater owners?¹¹²

Should the cinema-goers not be free to see whichever film they prefer? Should the cinema-owners not be free to show whichever film they choose? Or should the state intervene - by benign, paternalistic planning - to redress the inequality between the two cinema-owners (an inequality which can plausibly be characterised as arbitrary, unfair or unjust)? Applying the Berlin principle of intervention only when the freedom of others is infringed, there can be no doubt. Neither the exercise of the cinema-goer's freedom to see his preferred film, nor the exercise of the cinema-owner's freedom to screen his preferred film, infringes anybody else's freedom. Accordingly, under the Berlin principle, these "unquestionably legitimate" liberties are unqualified and uncurtailed. Under the Mill principle, however, the position is rather more equivocal. It is true that Mill says, in chapter 5 of *On Liberty*:

Whoever succeeds in an overcrowded profession or in a competitive examination, whoever is preferred to another in any contest for an object which both desire, reaps benefit from the loss of others, from their wasted exertion and their disappointment. But it is, by common admission, better for the general interest of mankind that persons should pursue their objects undeterred by this sort of consequence. In other words, society admits no right, either legal or moral, in the disappointed competitors to immunity from this kind of suffering...¹¹³.

But this is not a conclusion which flows from the "one very simple principle" itself. It is another maxim altogether, a comment thrown in by Mill about the utilitarian benefits of competition ("better for the general interest of mankind"¹¹³). Applying the principle

itself cannot yield such a certain answer: on the contrary, the competitive success of one cinema-owner harms the other, and indeed harms his interests. Thus the principle itself furnishes *no* grounds on which to stop the state intervening to prevent such harm, and *no* effective guarantee of the freedom of cinema-owner or cinema-goer. Mill's justification of the freedom to compete on *other* grounds - such as utilitarianism, and also public opinion ("it is, by common admission, better"¹¹³) - is an implicit acknowledgement of the inadequacy of the very simple principle at upholding that freedom.

Another way in which free-market liberalism might be said to cause harm to others, and hence to justify socialistic state intervention under the Mill principle, is through the price mechanism: the freedom to agree prices and wages. It is important to be precise about this. Himmelfarb appears to believe that the very simple principle's distinction between self-regarding and other-regarding actions is useless to prevent paternalism in this context, since an employee's acceptance of a certain wage need not be regarded as a self-regarding action immune from state intervention: Mill's principle (she writes) can be used to justify the argument that

social intervention is required because the individual is not in control of his situation and therefore may be injured by the actions of another: ... an employer who offers less than a prescribed wage¹¹⁴.

Himmelfarb is almost certainly wrong here; and, however ambiguous Mill's principle may be, it is not capable of yielding the interventionist interpretation which she is outlining. As noted above (in section 1.4.1. of this chapter), Mill does specifically exclude from the realm of intervention harms caused to others "with their free, voluntary, and undeceived consent"²⁰. That is to say, if a party to a contract consents to its terms - if an employee consents to a wage prescribed by his employer, or

if a purchaser consents to a price set by the vendor - Mill's principle will *not* allow the state to intervene. So the Himmelfarb argument cannot be thrown at Mill. On the other hand, the free operation of the price mechanism can cause harm not only to the parties to a contract who consent to certain prices, but also to *third parties whose agreement or consent is not obtained...* and, in this respect, Mill's principle is rather more ambiguous. Two examples of this have already been cited in this chapter. If a person sells a substantial block of a company's shares, the price of shares in that company is likely to fall, so that the wealth of other people who continue to hold those shares will accordingly be depleted*. If a person lets his home "run to seed", the consequence may well be that the attractiveness of his next-door neighbour's house - and hence its price, and hence the value of that neighbour's assets - will suffer**. In both cases, harm has been caused to other people, third parties, who never gave their consent or agreement to the price movements. The price mechanism causes losses to the remaining shareholders and to the next-door neighbour. Does this mean that freedoms should accordingly be curtailed - that people should not be free to sell their shares as they please, or that people should not be free to maintain (or not maintain) their own houses as they like? Applying the Berlin principle, the question does not even arise. To find the value of one's shares or of one's house falling is not an *infringement of one's liberty*, so that under the Berlin principle there are no grounds for interfering in the actions which caused such price falls: no grounds, that is, for restraining people's freedom to buy and sell shares and to keep their houses in whatever way they choose. But the Mill principle, which justifies interference when harm to others is caused, would be different: to find the value of one's shares or of one's house falling is harm, and

* See section 1.5.2. of this chapter.

** See section 2.1.3. of this chapter.

indeed it is *harm to one's interests*. This would not of course be *sufficient* grounds for intervention under the Mill principle (see sections 2.5. and 2.6.); but it means that the principle offers no grounds to protect people's freedom to buy and sell shares, or to decide how to maintain their own houses, from socialistic state interference. If a socialist state wanted to eliminate those freedoms, or to regulate or totally suppress the operation of the price mechanism, the very simple principle - which makes liberty subject to preventing harm to others - would offer a theoretical justification for doing so.

Finally, and underlying all this, is the fact of inequality: the uneven spread (or, as socialists like to say, "distribution") of wealth in a market economy. Socialists believe that it is the function of the state not merely to guarantee people's liberty, or even to guarantee such prerequisites of liberty as health, shelter, clothing and education, but to "redress" inequality and to "redistribute" wealth. As has been seen, inequality of wealth is produced by the exercise of various freedoms - the freedom to go to one cinema rather than another, the freedom to buy and sell shares, the freedom to bequeath money, the freedom to pay whatever salary an employee agrees to accept and to earn whatever income an employer agrees to pay. It is implicit in the socialist objective of "redressing" inequality by state action that the state is entitled both to interfere in and curtail such freedoms, and also to "remedy" their effects (by, for example, redistributive taxation, nationalisation, expropriation, confiscation and other compulsory transfers of wealth). The Berlin principle, of course, would have none of this. It sanctions state intervention to protect liberty (and, by implication, its prerequisites) but nothing more. The Mill principle, however, is less clear-cut. As noted above* Mill seems in

* Section 2.5. of this chapter.

On Liberty to consider sins of omission, as well as sins of commission, to be - in certain circumstances - "harm to others":

There are... many positive acts for the benefit of others which... [an individual] may rightfully be compelled to perform... A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make anyone answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively speaking, the exception⁶³.

In chapter 5 of *Utilitarianism*, Mill expands on this conception of "harm", and gives some idea as to what sort of sins of omission he has in mind. While the worst types of injustice are acts of wrongful aggression or wrongful exercise of power over someone (he writes), the next are those which consist in

wrongfully withholding from him something which is his due⁸¹.

Both cases involve "inflicting on him a *positive hurt*"**, either in the form of direct suffering, or of

the privation of some good which he had reasonable ground, either of a physical or of a social kind, for counting upon⁸¹.

So on this definition, privation can be as much a "positive hurt" as direct suffering is: "harm", therefore, can include not only theft of what a person has, but the privation of what others have. And one is entitled not to be so deprived if one has "reasonable ground, either of a physical or of a social kind", for counting upon having what others have. By now the very simple principle has dissolved, and the argument has moved onto very uncertain terrain. For who is to say that it is

** Emphasis added.

unreasonable for someone to expect a certain standard of living, or even to be no poorer than his neighbours? That being so, Mill supplies the grounds for contending that the privation of such a standard of living, or of such financial equality with one's neighbours, is a "positive hurt" and a "harm" - so that it becomes easy to argue that, in adopting whatever socialistic measures are necessary to remove such privation, the state is merely applying the very simple principle of preventing harm to others. Such is the almost infinite flexibility of Mill's principle. Such are the implications for freedom of the principle's ambiguities.

These, then, are the practical consequences of attempting to apply Mill's principle. It professes to be anti-paternalistic, declaring that a person "cannot rightfully be compelled to do or forbear because it will be better for him to do so"¹. Furthermore, the principle insists that

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 sovereign²⁶.

However, as has been seen, the interdependence of people in society, and the elasticity of the concept ("harm to others") which makes a person amenable to society, renders this grand declaration almost meaningless. So many of an individual's actions which concern himself also concern, and harm, others. There is little, if anything, which "merely" concerns himself - and therefore little over which, under Mill's principle, the individual will certainly be sovereign. For the remainder, there is plenty of scope for paternalistic intervention. "Harm to

others" is an ambiguous, and therefore a potentially overwhelming, qualification of liberty.

Mill's professions of anti-paternalism are matched by his claims regarding the relationship of the very simple principle with socialism. The two doctrines, he writes, are "diametrically opposite"⁶ to each other. Yet the same ambiguities in the principle which give considerable scope for paternalism could also be used, as we have seen, to justify the most thoroughgoing socialist state. The practical application of the principle, by virtue of its intrinsic ambiguity, is thus an extremely hazardous enterprise: there is no knowing what it can entail. A free market society or a socialist state? It is anybody's guess*.

Faced with these criticisms, Mill's scholarly defenders adopt the curious posture of arguing that Mill's claims for the principle are more modest than in fact they are. R.J. Halliday, for instance, points out that

The one single, absolute and "very simple" principle turns out to be rather more complex than some commentators have imagined¹¹⁷.

(It might be felt that the reference to "some commentators" is a little unfair, in view of the fact that it is *Mill himself* who claims that his principle is "one very simple principle... entitled to govern absolutely".) In similar vein, Rees offers the "defence" of Mill that

it would be uncharitable to reject Mill's principle out of hand merely because it fails to provide an automatic and definite solution in an extensive range of cases... For how many of the actions we constantly wield in everyday life provide us with quick and certain answers?¹⁰⁰

* See, as evidence of this, Gray's view that Mill's principle "contains no commitment to any principle of laissez-faire"¹¹⁵, by contrast with Halliday's comment that Mill had a "pragmatic commitment to laissez-faire"¹¹⁶. There are many similar examples.

And, as has been mentioned, Ten insouciantly acknowledges that Mill "lost the opportunity" to formulate "more precise general principles for justifying actual intervention"¹⁰¹ - but does not seem to think that this significantly reduces the value of the principle Mill did formulate!

Reading these defences one could be forgiven for forgetting that Mill's principle is *not* supposed to be "complex" (*pace* Halliday), that it *is* supposed to "provide an automatic and definite solution in an extensive range of cases" (*pace* Rees), and that it *is* supposed, also, to provide "precise general principles for justifying actual intervention" (*pace* Ten). So it is worth recalling one of the opening paragraphs of *On Liberty*, in which Mill complains:

There is, in fact, no recognized principle by which the propriety or impropriety of government interference is customarily tested. People decide according to their own personal preferences... And men range themselves on one or other side in any particular case... very rarely on account of any opinion to which they constantly adhere, as to what things are fit to be done by a government. And it seems to me that in consequence of this absence of rule or principle... the interference of government is, with about equal frequency, improperly invoked and improperly condemned¹¹⁸.

There the paragraph ends. The next paragraph begins with the words: "The object of this essay is to assert one very simple principle"¹.

The "defences" of Mill offered by Halliday, Rees and Ten are thus in effect admissions that Mill has failed in the very object of his essay. It is supposed, in Mill's own words, to provide an answer to a "practical question"²³ about delineating the proper limits of individual liberty. Yet it fails to deliver. Mill's

answer to the practical question is to set forth a resounding trumpet call, a very simple principle, a neat formula. "Harm To Others" is where the line should be drawn. But - as even Mill's defenders admit - the trumpet, when played, sounds an uncertain note.

* * *

SOURCES: CHAPTER TWO - PREVENTING HARM TO OTHERS

All page numbers are, unless otherwise indicated, references to:

John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974/1859).

1 Page 68.

2 Isaiah Berlin; "Two concepts of liberty" - in: Isaiah Berlin; *Four essays on liberty*; Oxford University Press (Oxford 1969/1958); page 127.

3 Robert Nozick; *Anarchy, state and utopia*; Basil Blackwell (Oxford 1974); page 26.

4 Nozick; page ix.

6 John Stuart Mill; *Autobiography* in the *Collected Works of John Stuart Mill*; University of Toronto Press (Toronto 1981/1873); page 260.

7 Page 72.

8 Page 71. See also this thesis: introduction (first page) and chapter one, section 1.1.

9 John C. Rees; John Stuart Mill's "On Liberty" (constructed posthumously from published and unpublished sources, by G.L. Williams); Clarendon Press (Oxford 1985); page 31.

10 John Stuart Mill; "Utilitarianism" - in: J.S. Mill and Jeremy Bentham; *Utilitarianism and other essays*; Penguin (Harmondsworth 1987/1861); page 286.

11 Mill; "Utilitarianism"; page 287.

12 Mill; "Utilitarianism"; page 289.

13 Mill; "Utilitarianism"; page 288.

14 Pages 142, 148, 151 and 168.

14A Page 167.

15 Mill; "Utilitarianism"; page 333.

16 John Donne; *Devotions*.

17 Page 69 and *passim*.

18 C.L. Ten; *Mill on liberty*; Clarendon Press (Oxford 1980); page 10.

- 19 *Ten*; pages 5 to 6.
- 20 Page 71.
- 21 *Ten*; page 9.
- 22 Page 173.
- 23 Page 63.
- 24 Pages 170 to 171.
- 25 J.W.N. *Watkins*; "John Stuart Mill and the liberty of the individual" - in: David Thomson; *Political ideas*; Penguin (Harmondsworth 1969); page 158.
- 26 Page 69.
- 27 Page 176.
- 28 Ferdinand *Mount*; *The subversive family: an alternative history of love and marriage*; Cape (London 1982).
- 29 George *Orwell*; *Nineteen eighty-four*; Penguin (Harmondsworth 1983/1949); pages 25 to 26.
- 30 Page 175.
- 31 Pages 148 to 149.
- 31A Alan *Ryan*; *The philosophy of John Stuart Mill*, second edition; Macmillan (London 1987); pages 248 to 249.
- 32 *Watkins*; page 165.
- 33 Page 72.
- 34 See, for example: *Ten*; page 11; and *Rees*; pages 140 and 145.
- 35 Page 147.
- 36 Page 152.
- 37 Page 153.
- 38 *Ten*; page 53.
- 39 Robert Paul *Wolff*; *The poverty of liberalism*; (Boston 1969); page 24.
- 40 John *Gray*; *Mill on liberty: a defence*; Routledge and Kegan Paul (London 1983); page xi. See also this thesis: chapter one, section 2.2.

- 41 *Rees*; page 145.
- 42 G.L. *Williams*; "Preface" - in: John C. *Rees*; John Stuart Mill's "On Liberty" (constructed posthumously from published and unpublished sources, by G.L. *Williams*); Clarendon Press (Oxford 1985); page ix.
- 43 *Rees*; page 143.
- 44 Raymond *Plant*; "Sense and sensibility" - in *The Times* (London), 13th March 1989.
- 45 *Gray*; *Mill on liberty: a defence*; page 35.
- 46 *Gray*; *Mill on liberty: a defence*; page 52.
- 47 *Rees*; page 142.
- 48 *Rees*; page 150.
- 49 *Rees*; page 148.
- 50 *Rees*; pages 139 to 140.
- 51 *Rees*; page 144.
- 52 *Rees*; page 150.
- 53 Page 119.
- 54 Page 142.
- 55 Page 163.
- 56 Page 143.
- 57 Page 148.
- 58 Page 151.
- 59 Page 156.
- 60 Page 172.
- 61 Page 179.
- 62 Pages 71 and 147.
- 63 Page 70.
- 64 Page 141.
- 65 Page 145.
- 66 Page 146.
- 67 Page 149.

- 68 Pages 119 and 150.
- 69 Page 128.
- 70 Rees; page 151.
- 71 John Stuart Mill; "*Thoughts on parliamentary reform*" (London 1859) - quoted in: R.J. Halliday; John Stuart Mill; George Allen & Unwin (London 1976); page 130.
- 72 See: John Gray; *Liberalism*; Open University Press (Milton Keynes 1986); page 73.
- 73 Mill; "*Utilitarianism*"; pages 326 to 327.
- 74 Maurice Cowling; Mill and liberalism; Cambridge University Press (Cambridge 1963); page xii.
- 75 Rees; page 152.
- 76 Gray; *Mill on liberty: a defence*; page 50.
- 77 H.J. McCloskey; John Stuart Mill: a critical study; Macmillan (London 1971); page 109.
- 78 Nozick; page 269.
- 79 Rees; page 163.
- 80 Rees; page 168.
- 81 Mill; "*Utilitarianism*"; page 334.
- 82 Mill; "*Utilitarianism*"; page 323.
- 83 Mill; "*Utilitarianism*"; page 327.
- 84 Rees; pages 165 to 166.
- 85 Rees; page 166.
- 86 John Stuart Mill; "*Employment of children in manufactories*" - in: *The Examiner* (29th January 1832), pages 67 to 68.
- 87 Mill; "*Utilitarianism*"; page 324.
- 88 Ten; page 55.
- 89 Patrick Devlin; *The enforcement of morals*; Oxford University Press (London 1959).
- 90 Devlin; page 24.
- 91 Devlin; page 13.

- 92 H.L.A. *Hart*; *Law, liberty and morality*; Oxford University Press (London 1963); pages 75 and 76.
- 93 *Ten*; pages 40 to 41.
- 94 *Ten*; pages 66 to 67.
- 95 *Ten*; page 55.
- 96 *Mill*; *Autobiography*; page 259.
- 96A See, for example: *Rees*; page 139;
Eugene August; *John Stuart Mill: a mind at large*; Vision Press (London 1976); page 158;
Gray; *Mill on liberty: a defence*; page 48; and
John Skorupski; *John Stuart Mill*; Routledge (London 1989); page 363.
- 97 *Ten*; page 64.
- 98 *Rees*; page 149.
- 99 *John Gray*; "*John Stuart Mill: the crisis of liberalism*" - in *Brian Redhead* (editor); *Political thought from Plato to NATO*; BBC (London 1984); page 153.
- 100 *Rees*; page 154.
- 101 *Ten*; page 65.
- 102 Page 76.
- 103 *Gertrude Himmelfarb*; "Editor's introduction" - in *John Stuart Mill*; *On Liberty*; Penguin (Harmondsworth 1974); page 49.
- 104 *Lisa Appignanesi* and *Sara Maitland* (editors); *The Rushdie file*; ICA/Fourth Estate (London 1989); page 178.
- 105 *Keith Vaz*, MP for Leicester East (Labour) - in *New Statesman & Society* (London), 23rd March 1989, page 21.
- 106 *Bhikhu Parekh* - in *New Statesman & Society* (London), 23rd March 1989, page 33.
- 106A *Bhikhu Parekh*; *The Rushdie affair: research agenda for political philosophy*; *Political Studies* (Guildford 1990); volume XXXVIII; page 708.
- 106B Page 76.

- 107 Pages 152 to 153.
- 108 See, for example: *Hart*; page 14; and *Simon Lee; Law and morals*; Oxford University Press (Oxford 1986); page 26.
- 109 Report of the committee on homosexual offences and prostitution (CMD 247) 1957, section 13.
- 110 Page 154.
- 111 Page 155.
- 112 *Nozick*; page 223.
- 113 Page 164.
- 114 *Himmelfarb*; page 47.
- 115 *Gray; Mill on liberty: a defence*; page 17.
- 116 *Halliday*; page 116.
- 117 *Halliday*; page 120.
- 118 Pages 67 to 68.

CHAPTER THREE - THE REAL MEANING OF "LIBERTY"

CHAPTER THREE - THE REAL MEANING OF "LIBERTY"

1. WHY DOES IT MATTER?

1.1. Freedom and free will

1.2. "Negative" and "positive" liberty

1.2.1. "Negative" liberty

1.2.2. "Positive" liberty: democracy

1.2.3. "Positive" liberty: self-realisation and ability

1.2.3.A: Autonomy and the good life

1.2.3.B: The rights of autonomous people

1.3. Ability

1.3.1. A different phenomenon altogether

1.3.2. The value of classical liberty

1.3.3. Ability at the expense of liberty

1.4. Property

1.4.1. The problem

1.4.2. The absence of property is unjustifiable

1.4.2.A: The absence of property is slavery

1.4.2.B: The absence of property is inhumanity

1.5. Basic propositions

2. WHAT MILL SAYS

2.1. Mill and autonomy

2.2. Mill and property

2.2.1. Limited property rights

2.2.2. Contingent property rights

2.3. Mill and taxation

CHAPTER THREE - THE REAL MEANING OF "LIBERTY"

The only freedom which deserves the name is that of pursuing our own good in our own way...

John Stuart Mill, *On Liberty*¹.

It is only too easy to pass from defining liberty as the absence of restraint to defining it as the "absence of obstacles to the realisation of our desires",... the physical "ability to do what I want", the power to satisfy our wishes, or the extent of the choice of alternatives open to us... Only since this confusion was deliberately fostered as part of the socialist argument has it become dangerous. Once this identification of freedom with power is admitted, there is... no end to the tricks by which people can be exhorted in the name of liberty to give up their liberty.

F.A. von Hayek, *The constitution of liberty*².

It is nonsense to assert... that freedom is simply the absence of restraint, and protection from the coercion of the state. That is only the beginning of liberty. Real freedom requires possession of the economic power that enables the choices that a free society provides to be made in practice, not just in theory. Once freedom is defined as the real ability (rather than the notional opportunity) to make choices, it becomes a socialist issue... Socialism is about liberty.

Roy Hattersley MP, deputy leader of the Labour party,

*The real meaning of liberty*³.

1. WHY DOES IT MATTER?

In spite of all its contradictions and ambiguities, one thing at least is certain about Mill's very simple principle: the principle is - to use Mr Hattersley's expression - "about liberty". The essay in which it appears is unambiguously titled *On Liberty*. The essay's first sentence declares: "The subject of this essay is...

civil or social liberty"⁴. After summarising in general terms the sort of activities which would be permitted under the principle, Mill states in his introductory chapter:

No society in which these liberties are not, on the whole, respected is free; and none is completely free in which they do not exist absolute and unqualified⁵.

But "free" in what sense? What kind of "liberty" is Mill speaking of? In the context of the very simple principle, what (borrowing Mr Hattersley's words again) is the *real meaning of liberty*?

As the quotations in the epigraph show, freedom means different things to different people. What for Mr Hattersley is "real freedom", is regarded by F.A. von Hayek as a "dangerous confusion". Safeguarding the freedom favoured by Mr Hattersley entails socialism; safeguarding the freedom favoured by Hayek implies its very opposite.

From this it will be apparent that the difference between the two definitions of liberty, and the question of which one Mill means when he uses the word, is absolutely crucial to resolving the central issue of this thesis, posed in the introduction: is the very simple principle a prescription for liberalism and "laissez-faire"* , or for socialism, or for what?

The purpose of chapter three of this thesis, therefore, is to examine what exactly Mill means by liberty and freedom - whether, as it were, he is using Hayek's definition or Hattersley's. But before proceeding to a textual analysis, it is probably helpful first to set the question in context and to consider its significance.

* as to which, see the Note on Terminology at the beginning of this thesis.

Accordingly, reversing the order of previous chapters, this chapter will begin by asking: why does it matter?

1.1. Freedom and free will

Even before that, however, we can fairly simply dispose of one red herring. It has been suggested⁶ that it is relevant to *On Liberty* to consider the metaphysical question of whether human beings have free will or are subject to determinism. In fact, it is irrelevant, and Mill could not make this plainer. There is no denying that Mill's writings include reflections on the free will issue, most notably in chapter 26 of his *Examination of Sir William Hamilton's philosophy*. But he emphasises the disjuncture between freedom in its political sense and free will. In *Examination* Mill expresses considerable sympathy for determinism, or "the doctrine of necessity", and opposition to the doctrine of free will - notwithstanding his commitment to political liberty. He insists that determinism is merely a *description* of what makes people think and act and desire. It is "a truth of experience"⁷. It has nothing to do with what social or political arrangements *ought* to be in place. Moreover the operation of "necessity" in no way signifies compulsion⁸. The two are entirely separate issues. And to dispel any doubts, Mill dispenses with the question in the very first words of *On Liberty*, writing:

The subject of this essay is not the so-called liberty of the will, so unfortunately opposed to the misnamed* doctrine of philosophical necessity; but civil, or social liberty: the nature and limits of the power which can be legitimately exercised by society over the individual⁸.

* "misnamed", because it can be taken to imply compulsion⁸.

1.2. "Negative" and "positive" liberty

But within the framework of "civil, or social liberty" there remain various different concepts of liberty. Mr Hattersley's (socialist) concept, and Hayek's (anti-socialist) concept, have already been mentioned and, given the subject of this thesis, they will obviously be central to the analysis which follows. However it is impossible to go further without referring to another classification: Isaiah Berlin's celebrated "two concepts of liberty", "negative" freedom and "positive" freedom. The terms have already been used in this thesis - in section 2.2.2. of chapter one - and no modern examination of the meaning of liberty can sensibly ignore them. Their chief value lies in the fact that, since Berlin's 1958 essay⁹, they have been adopted by numerous commentators as a major tool of theoretical analysis**.

But this is a tool which must be handled with some caution, since the definitions of the two concepts are not as clear or precise as they might be. At one point in his essay *Two concepts of liberty*, Berlin defines "negative" liberty as "not being interfered with by others"¹⁵, and contrasts this with "positive" liberty which (he says) derives from "the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind"¹⁶. Yet it is hard to see what, logically, is the difference between the two when expressed this way: to the extent that others do not interfere with what I do and the decisions I take, so accordingly my life and decisions depend on myself. Berlin readily acknowledges that:

The freedom which consists in being one's own master, and the freedom which consists in not being

** Examples include: Noel Annan¹⁰, John Gray¹¹, Roger Scruton¹², Joseph Raz¹³ and David Miller¹⁴. The terminology, however, is older, and was used as early as 1891 by T.H. Green in his essay *Liberal legislation and freedom of contract*^{14A}.

prevented from choosing as I do by other men, may, on the face of it, seem concepts at no great logical distance from each other - no more than negative and positive ways of saying the same thing¹⁶.

Interestingly, although he implies that the allegation of "not much difference between the two" is superficial and misleading ("may, on the face of it, seem..."), Berlin does not actually attempt to refute it. Instead he merely observes that "the 'positive' and 'negative' notions of freedom *historically developed* in divergent directions not always by logically reputable steps, until, in the end, they came into direct conflict with each other"¹⁷*. That may be so; but it does not follow that the pair of definitions he offers are logically opposite, or even very different.

All of this gives us a clue about the best way to utilise Berlin's analytical tool. He does not provide a precise definitional formula by which one kind of freedom, "negative" liberty, can be distinguished from another, "positive" liberty. But in his article he does offer many interesting insights about the uses of the word "liberty", and he makes us conscious that the term is used to mean very different things**. Not just two different things, but several; for under the blanket label "positive" liberty, Berlin identifies a number of distinct concepts of liberty, all of them different from each other, and different from the concept he calls "negative" liberty. In short, Berlin's achievement is not to have defined two concepts of liberty, but to have defined several.

* Emphasis added.

** to the extent that one must beware when one sees the word "liberty" that it is not just "a specious disguise for brutal tyranny"¹⁶.

The following paragraphs will consider some of those concepts - first, the concept which Berlin calls negative liberty; and then three concepts which, though distinct, he subsumes under the heading "positive" liberty: namely, democracy, "self-realisation" and "ability".

1.2.1. "Negative" liberty

"Negative" liberty, Berlin explains, is "simply the area within which a man can act unobstructed by others"¹⁸. This, it can readily be seen, approximates to the non-socialist conception of liberty which both Hayek and Mr Hattersley describe (in the epigraph to this chapter) as "the absence of restraint". There is nothing particularly new about this definition of liberty. In the mid-seventeenth century, Hobbes wrote:

by liberty is understood, according to the proper signification of the word, the absence of external impediments¹⁹;

and Berlin is more than happy to acknowledge that "this is what the classical English political philosophers meant when they used this word"¹⁵. Consequently, it is perhaps preferable to call this concept "classical liberty" (not least because of the potentially pejorative connotations of the word "negative").

What rights are implied by the classical/negative conception of liberty? Joel Feinberg's definition of liberty as

not the absence of just any kind of constraint or any kind of constraint that can prevent me from doing something, but rather the absence of constraints... imposed by enforced rules or commands^{20*}

* Feinberg's emphasis.

is actually too *narrow*, in that it excludes from its ambit the absence of constraints or impediments which are not implied by rules or commands: in other words, it includes the right not to be constrained or interfered with by the state and its laws, rules and regulations; but excludes the right not to be constrained or interfered with by one's fellow citizens, be they muggers or hijackers or rapists. Feinberg maintains that rights not to be interfered with by one's fellow citizens are something altogether different from liberty:

No one [he writes] has a duty of noninterference derived simply from another's being at liberty²¹.

Rights of noninterference from fellow citizens he calls "claim-rights", and he argues that an individual may have claim-rights to noninterference from fellow citizens in certain specific circumstances, but that such rights are wholly unrelated to the individual's right to liberty. By way of illustration, Feinberg cites two cases of individual liberty: first, a person's liberty to keep one hundred dollars in his pocket; and, secondly, a person's liberty to pick up one hundred dollars from the street. In the first case, the person's liberty to keep one hundred dollars in his pocket is accompanied by an obligation on others not to interfere by taking the money. That, says Feinberg, is a claim-right held by the individual. However, in the second case - a person's liberty to pick up one hundred dollars from the street - there is no accompanying obligation on others not to interfere by taking the money. Accordingly, Feinberg concludes, the individual in the second case has no claim-right to noninterference - thus demonstrating (to Feinberg's satisfaction) the disjuncture between liberty and rights to noninterference from fellow citizens²².

The flaw in the illustration is that Feinberg is not comparing like with like. In the second case (of the individual's liberty to pick one hundred dollars from the street) the claim-right which is properly analogous to the

claim-right in the first case is *not* an obligation on others not to pick up money themselves, but rather an obligation not to restrain the individual from bending down to pick up the money himself. *That* claim-right is coextensive with the initial liberty to pick the money up - insofar as the individual really is entitled to pick the money up, so likewise other people are obliged not to restrain him from exercising that entitlement - and is derived precisely from the liberty. Contrary to Feinberg's view, therefore, *for every act which a person is at liberty to do, he has a corresponding right not to be restrained, either by the state or by his fellow citizens.* (The alleged claim-right in Feinberg's second case was non-existent only because it was *not* a *corresponding right*: the right to pick up one hundred dollars in the street corresponds with a right not to be restrained from doing so, not a right to prevent others doing so.) Commonsense ought to yield the same conclusion. If a person cannot walk in the street without interference from muggers, kidnappers and so on, he cannot sensibly be said to be at liberty. The infringement of his liberty is equivalent to that endured by any citizen of a police state who cannot walk in the street without risking arbitrary arrest or police beating. For this reason, a state which respects the rights of its individual citizens to enjoy classical or negative liberty will not merely accept limits on government interfering in their lives - but will also protect them from interference from their fellow citizens, with laws against assault, theft, rape, murder and so on, backed by the state's resources of police, courts and prisons.

From this it is possible to derive a tentative definition of classical/negative liberty. It consists in not being subject to external interference, whether from the state or from fellow citizens*. I am free to the

* or, indeed, from foreign conquerors.

extent that I am entitled to take my own decisions, rather than having them taken for me by other people.

If the classical/negative concept of liberty is not so narrow as to exclude the right to noninterference from fellow citizens (*pace* Feinberg), neither is it so wide as to include the "right" to a secure job or the "right" to recreational facilities. Secure employment and the availability of recreational facilities are often regarded as rights by those who conceive liberty in terms of ability (as we will see in section 3.1.). Yet although not having a job - and not having (say) a local swimming pool - may be unfortunate or unpleasant, it does not prevent the individual from taking his own decisions. Undeniably it is good to have low unemployment, and good to have swimming baths up and down the land; but people can still sensibly be said to be free without them.

On the other hand, an individual *cannot* sensibly be said to be free unless he has the essential prerequisites to liberty outlined in section 1.5.1.A of chapter two of this thesis. He *is* prevented from taking his own decisions if he is not alive and well. That requires adequate health care, shelter and sustenance by way of food, clothing and so on. Moreover, he is not in a position to take decisions in any meaningful sense unless he has had the benefit of at least a basic education. Consequently, a state committed to safeguarding negative/classical liberty will be responsible (no less than a state committed to "ability") for ensuring that its citizens enjoy those "welfare" provisions - health care, shelter, sustenance, a basic education - which are prerequisites to liberty. Classical liberty does not imply the right to a secure job or to recreational facilities, but it does imply the right to the prerequisites of liberty, as well as to noninterference from either the state or one's fellow citizens.

[AUTHOR'S NOTE: From comments I have received on this section of the argument, it is clear that readers, particularly non-socialist readers, will have grave doubts about the way I have aggregated various welfare entitlements with the entitlements which normally go under the umbrella of classical/negative liberty: freedom of expression, freedom of association and freedom to trade. The concern is that I have thus blurred the distinction which chapter three is supposed to be arguing for - that between negative and positive liberty, or (as I prefer to call it) between classical liberty and ability. Correspondingly, it is thought, once a state charged with the responsibility of protecting the individual freedom of its citizens is deemed to have certain duties to provide for their welfare, we are on a "slippery slope" to social-democracy and socialism. I have, it is suggested to me, "sold the pass" to the socialist argument. Having conceded that much responsibility to the state, I have deprived myself of the grounds for resisting further accretions to the functions of the state.

My answer is that the concept of "prerequisites" to classical/negative liberty offers a distinction of *principle* between, on the one hand, the state being responsible for ensuring that its citizens have adequate health care, shelter, etc, and, on the other hand, the state taking on "socialist" responsibilities such as reducing inequalities, ensuring full employment, elevating the consciousness of the people, or whatever (all of which require a far greater role for the state in society, and correspondingly far more scope for intruding on the liberty of individuals). Not only that; but, I would contend, any coherent view that the state should ensure its citizens' (classical/negative) liberty *commits* one to the proposition that it should also ensure that the prerequisites are also provided.

The point - which I have tried to sketch out in section 1.5.1.A of chapter two as well as here - is this. It is *impossible* to be free (in the classical sense) without being alive: conceptually impossible and physically impossible. It is impossible to be alive without sustenance. Although the conditions for sustenance will vary from society to society, for various contingent reasons (geographical, historical, technological), in all societies with which we are concerned they can broadly be defined as comprising adequate health care, shelter, food, drink and clothing. *Ergo*: it is impossible to be free in the classical sense without having adequate health care, shelter, food, drink and clothing: at least, enough of those things as ensures sustenance. A state responsible for protecting the liberty of its citizens, in the classical sense, *must* therefore be responsible for ensuring that they all have these things.

Perhaps more controversial, but (I think) equally true, is the proposition that it is impossible to be free (in the classical sense) without the benefit of a basic education. At least, not free in any meaningful sense. Classical liberty, as we have seen in this section, involves being free to take one's own decisions, rather than having them taken for one by other people. But it is impossible to speak meaningfully of being free to take one's own decisions if one is simply incapable of taking one's own decisions. What does it *mean*

to say that a five-month-old baby is entitled to freedom of movement? Or that an eight-year-old is entitled to freedom to trade? Or that the insane are entitled to political freedom of expression? These classical freedoms are meaningless - conceptual and physical impossibilities - without a basic education. Presumably this is why, in modern western societies, persons under certain defined ages (14,16,18,21) are not accorded the freedom (say) to buy alcohol, to vote, to consent to sexual intercourse, or to spend their time as they choose (in England people up to 16 years of age must by law attend schools) - and why, correspondingly, they are not held legally responsible for their actions (people whose actions cannot meaningfully be described as free, accordingly cannot meaningfully be described as responsible for those actions). Likewise the insane - or whatever euphemism is currently used - are denied many basic freedoms and legal responsibilities in most western societies. This is presumably also the background to Mill's contention, in the opening paragraphs of *On Liberty*, that the principle of liberty "is meant to apply only to human beings in the maturity of their faculties"³⁰. There is obviously an element of arbitrary line-drawing in all of this. At what particular age does a person become mature in his faculties? Many 17-year-olds (who in England are disenfranchised from voting) are better capable of exercising mature judgements in a general election than many 37-year-olds (who are entitled to vote). How does one define insanity? But the law has to draw a line somewhere and, however arbitrary, it does not detract from the basic principle: it is impossible to speak meaningfully of people as free (in the classical sense) unless they are possessed of certain educational capabilities - the "maturity of their faculties".

Again, the conditions for a basic education vary from society to society according to contingent factors. In close-knit primitive societies, families and tribal elders may be able to provide basic education. But in modern western societies - where there is division of labour, parents go out to work, and the knowledge necessary to equip people to take decisions is relatively specialised and technical - schooling is required. If classical liberty is impossible without a basic education, a state committed to ensuring the classical liberty of its citizens must also, in modern western societies, ensure the provision of schooling to all its children. Mill asks rhetorically, in chapter 5 of *On Liberty*: "Is it not almost a self-evident axiom that the State should require and compel the education, up to a certain level, of every human being who is born its citizen?".

In summary: it is impossible to have (classical/negative) liberty without sustenance and without a basic education. These are the prerequisites of (classical) liberty. A state responsible for ensuring the (classical) liberty of its citizens must also assume responsibility for providing them with sustenance - adequate health care, shelter, food, clothing - and a basic education.

Of course there are grey areas here. There is room for legitimate argument about precisely what standard of shelter or what level of "basic" education - as well as about how they are to be provided in the manner which is both most effective and most consistent with liberty (for instance, through direct provision by the state or through "voucher schemes").

But there is no slippery slope to socialism. There is a hard difference of principle between those state welfare provisions (no matter how generous) which are prerequisites of classical liberty, and those which are not. It is *not* impossible to be free if one does not have a job (so long as one's sustenance is otherwise assured, where necessary by state social security). It is *not* impossible to be free if one's standard of living is one-tenth, or even one-hundredth, of the Duke of Westminster's (so long as one's sustenance is assured). Therefore, the responsibilities accorded the state in order to protect its citizens' classical liberty *and the prerequisites to such liberty*, do not require government subsidies to inefficient or failing industries in order to avoid redundancies and unemployment, for example, or government policies which redistribute wealth so as to reduce inequality. The pass has not, I believe, been sold. - MPG]

1.2.2. "Positive" liberty: democracy

According to Berlin, there is "no necessary connection" between individual liberty and democratic rule:

The answer to the question "Who governs me?" is logically distinct from the question "How far does government interfere with me?" It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists²³.

Here, then, is an example (just one example) of what Berlin means by positive liberty. Positive liberty, in this sense, is the claim that liberty is achieved when the government is elected by the people, or at least the majority or largest portion of the people. This, Berlin believes, is a confused and mistaken view of liberty, since the "source" of government control is by no means the same as its extent. Thus, it is "perfectly conceivable" that a liberal-minded despot might allow his subjects a large measure of freedom²⁴. On the other hand, where a government interferes excessively in the liberties of the people, denying them the right to take their own decisions in large areas of their lives, it is no comfort to know that the government was democratically elected (the case of Hitler in Germany is instructive): why should a man deeply care whether "he is crushed by a popular government or by a monarch"²⁵?

But, as Berlin points out²⁵, this is not a confusion of which Mill is ever guilty. Whatever other ambiguities there may be in Mill's conception of liberty, however much he might flirt with other elements of what Berlin calls "positive liberty", on this point he could not be clearer. Democracy, according to Mill, is emphatically not the same as liberty; indeed, the very simple principle is needed to protect people from the illusion that it might be. In

the opening chapter of *On Liberty*, Mill chronicles how, over the centuries, people had believed that they only needed to control the government to avoid being crushed by it. But then, with the advent of the United States of America, the opportunity arose to test this belief, and it was found wanting: "a democratic republic came to occupy a large portion of the earth's surface... and elective and responsible government became subject to the observations and criticisms which wait upon a great existing fact"²⁶. It became clear that "the 'people' who exercise the power are not always the same people with those over whom it is exercised... [but rather] the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, may desire to oppress a part of their number"* . Mill considers that:

The limitation... of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein.²⁶

Democracy could, unless constrained, become "the tyranny of the majority" which, in Mill's view, is "among the evils against which society needs to be on its guard". The liberty prescribed by the very simple principle is not part of such evil, but the remedy to it. In this sense at least, Mill's liberty is most certainly not positive liberty.

1.2.3. "Positive" liberty: self-realisation and ability

1.2.3.A: Autonomy and the good life

The term "autonomy", as used by John Gray, has already been mentioned in this thesis, in section 2.2.2. of chapter one. It is a concept of freedom, but a freedom

* Mill's emphasis.

very different from classical or negative liberty. The concept of classical liberty requires only that people should not be interfered with and should be left free to take whatever decisions they like. The content or quality of those decisions, what motivates them and what their consequences will be, is *immaterial* to the advocate of "negative" liberty. (Which is not to say that the content, reasons and consequences of people's choices do not matter; only that they have no bearing on the *rights* involved. The point made by those who support negative liberty is that, even if an individual exercises his freedom in ways which are wrong or wrongheaded, however undesirable this may be, he should *nonetheless* be entitled to do so. See the distinction drawn between liberty and licence in section 3.1. of chapter one.)

By contrast, the quality, reasons and consequences of decisions are *highly relevant* to the concept of liberty embodied in the term "autonomy". It is not enough just to make any old choice; rationality enters the equation. This is a liberty which is not "empty" or "neutral" or "negative"; it is "positive".

Both Gray and the late S.I. Benn write of "autonomy" as the higher of two steps "up" from negative liberty. The first step they call "autarchy". *Autarchy*, according to Gray, involves not just having classical liberty, but being capable of rational self-direction as well²⁷. In Benn's view autarchy is the characteristic of a person whose conduct is effectively governed by a set of reasons - rather than merely impulse or *post-hoc* rationalisation²⁸. *Autonomy* is the second step up, and involves rather more than autarchy. In Benn's terminology, a person is autonomous if he reflects on his beliefs and, where he discovers inconsistency, decides which beliefs are the less defensible and ought therefore to be abandoned²⁸. To Gray, similarly,

an autonomous agent will possess all the defining features of an autarchic agent: but, in addition... an autonomous agent must also have distanced himself in some measure from the conventions of his social environment and from the influence of the persons surrounding him. His actions express principles and policies which he has himself ratified by a process of critical reflection²⁹.

An autonomous agent, moreover, is "one who, in Rousseau's expression, acts in obedience to a law he has prescribed for himself"³⁰. Joseph Raz echoes Gray on this, saying that "one is autonomous if one determines the course of one's life by oneself"³¹.

It is evident that the concepts of autarchy and autonomy are of a piece with the aspect of positive liberty which Berlin calls "self-realisation". The quest for "self-realisation", according to Berlin, derives from the "desire to be self-directed - directed by one's 'true' self"³². It embodies the rationalistic notion that "to understand the world is to be freed":

What you know, that of which you understand the necessity - the rational necessity - you cannot, while remaining rational, want to be otherwise³².

The reason that the promoters of the concept of autonomy attach such importance to the quality of decision-making is, of course, the hope that beneficial consequences will ensue; that decision-making of good quality will produce what Raz calls "the good life"³³. This kind of "freedom" is valued for its capacity to deliver a certain quality of life. As Raz puts it, with admirable candour: "our concern for autonomy is a concern to enable people to have a good life"³⁴.

1.2.3.B: The rights of autonomous people

Classical or negative liberty, it will be recalled, entails the right to take one's own decisions without interference from either the state or one's fellow citizens (or, indeed, from foreign powers, against which governments must defend their subjects), and implies the prerequisites to the exercise of that right in the form of health, sustenance and education. When we come to look at the rights entailed in the "positive" concept of autonomy, it becomes clear that this is a concept with implications which are inimical to liberty, and possibly authoritarian and even totalitarian.

Two major implications which flow from the idea of liberty as autonomy are, first, that only certain people - autonomous people - are entitled to exercise choices; and, secondly, that choices are only valuable if they are "autonomous" choices: that is, if they produce "the good life". These two propositions will now be examined in turn.

First, the proposition that, implicit in the notion of autonomy, is the idea that only some people may exercise free choices. It is plain from the definitions of autonomy offered by Benn, Gray and Raz that not everyone in society is, or even can be, an autonomous person. As Gray says, autonomous agency should be regarded as "something which must be achieved... rather than as a natural human endowment or original inheritance"²⁹. It is not, then, a human right, which people have by virtue of their very existence as human beings. Unlike classical liberty, it is not the birthright of every Englishman. It is something which has to be "achieved"; and that means that some people have it, while others do not. As Gray admits:

the moral right to autonomy is possessed, not by all men, but by those possessing in some minimal degree the capacities of an autonomous agent³⁵.

Freedom as autonomy thus means freedom granted to some people but denied to others. A principle of liberty founded on the notion of autonomy could therefore be used to justify the kind of authoritarian state depicted by Berlin as flowing from rationalistic positive liberty: a society "obedient to the directives of an elite of Platonic guardians"³⁶.

Attempts have been made to show that Mill's principle of liberty is just such a principle: one which, in this way, excludes certain people from the right to exercise free choices. John Skorupski, for example, writes that under Mill's principle "none but a person of confirmed rationality is completely free"³⁷. But the textual evidence for this is slender. Gray cites Mill's "exclusion of children, the mentally unbalanced and backward peoples from the sphere of application of the Principle of Liberty" and says that this suggests strongly that Mill regarded the *autarchic* status as a necessary condition of the application of the principle^{38*}. If "the autarchic status" is taken to mean (adopting Benn's definition) that which appertains to people whose conduct is governed by reason rather than impulse²⁸, then clearly it excludes a considerable number of people. Yet Mill makes plain that he means the very simple principle to apply fairly universally. In the passage to which Gray refers, Mill writes that the principle

is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against

* Emphasis added.

their own actions... For the same reason we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage... Despotism is a legitimate mode of government in dealing with barbarians³⁹.

What he is saying is little more than the situation which exists in England today. Minors and the insane do not enjoy full civil rights (to vote, or to drive motor cars, for example), and full legal responsibilities do not attach to them. But this does not mean that liberty can sensibly be regarded as selective in present-day England, still less that the country is obedient to "an elite of Platonic guardians". (Mill's reference to "barbarians" is of course somewhat more embarrassing to modern readers.) Although Mill limits the liberty principle's applicability to the point where "mankind have attained the capacity of being guided to their own improvement by conviction or persuasion"³⁹, he considers that this point has "long since [been] reached in all nations with whom we need here concern ourselves"³⁹, and adds later that "there is on the whole a preponderance among mankind of rational opinions and rational conduct"⁴⁰. Therefore, while it may be true that the concept of liberty as autarchy or (even more so) autonomy allows freedom to be denied to some people, it is false to claim that Mill's principle envisages this kind of discrimination.

The second implication of liberty as autonomy is, as noted above, the proposition that a choice only has value where it is an autonomous choice, that is to say, where it will produce "the good life". From this it follows that those choices which do produce the good life have value, and the freedom to exercise them should be protected. But those choices which do *not* lead to the good life - because they are bad, or irrational, or merely trivial - are regarded as having no value; and a liberty principle

based on the concept of autonomy will not respect the right to make such choices.

In this vein, Gray writes that "there is something at least problematic about counting as a freedom an opportunity to act which no reasonable man would ever take"⁴¹. Raz writes that "autonomy... supplies no reason to provide, nor any reason to protect, worthless let alone bad options"⁴² and, defending this kind of positive liberty, he blithely insists that

denying someone a certain choice of ice-cream is generally admitted to be insignificant to the degree of autonomy enjoyed by that person⁴³.

In much the same way, H.J. McCloskey argues that

the value of self-determination depends on how it is used; when used to seek good ends... it is right to foster it; when used to produce evil ends, no good is lost if coercion is used to prevent them⁴⁴

and affirms his view that there is

no special value in the liberty enjoyed by the aimless, shiftless drifter... *the situation would be better for [his] actions not being freely chosen*^{44*}.

The notion of liberty which aims at producing a "better... situation" or "the good life" - whether it be called autonomy or self-realisation or positive liberty - is thus one which allows people freedom to do some things, but not others. People are free to do what is "reasonable" or leads to "good ends". However, they are not free to pursue "bad options", or "evil ends", or "worthless" purposes. A liberty principle based on autonomy/self-realisation would not allow freedom to the

* Emphasis added.

"aimless, shiftless drifter"; it would not even safeguard people's right to decide their favourite ice-cream.

But, of course, freedom to choose what is good rather than what is bad, to choose one way but not the other, is a *contradiction in terms*. It is the very antithesis of what freedom really means, a recipe for monstrous intolerance and enforced conformity. Moreover, it raises the problem of who *decides* what is a "bad option" or a "worthless" choice or an "insignificant" decision. In the nature of things, opinions will differ on all these questions. Someone must be the arbiter: presumably the state. Here, again, is a role for an "elite of Platonic guardians".

To his credit Raz is sensitive to these criticisms of autonomy and the "good life". He acknowledges that it may all sound "paternalistic". It "conjures images of the state playing Big Brother, forcing or manipulating people to do what it considers good for them against their will". But, Raz adds:

Nothing could be further from the truth³⁴.

Unfortunately the arguments which Raz uses to support this bold denial are less than wholly convincing. Essentially there are two arguments. One is his insistence that the state will not need to play a Big Brother role because what it believes will have no bearing on whether or not people are to be allowed to make a choice. The fact that the state *considers* something to be valuable is irrelevant, Raz says. "Only its *being* valuable or valueless is a reason"³⁴. But this argument is unsatisfactory, because it does not explain how people are supposed to know whether something is, as a matter of objective fact, valuable or valueless. As noted above, such things are usually a matter of disagreement between people. Someone - whether the state or someone else - still has to decide. And we are back with Big Brother.

Raz's other argument is that, far from requiring enforced conformity,

autonomy means that a good life is a life which is a free creation. Value-pluralism means that there will be a multiplicity of valuable options to choose from³⁴.

But this also fails to meet the objections. Again freedom is limited. An individual is not free to choose whatever he likes, only what is "valuable". And again there is the problem of who determines what is valuable. If not Big Brother, who?

Benn, in his posthumously published work "A theory of freedom"⁴⁵, is rather less certain than Raz. He also finds "negative" liberty inadequate, but he is prepared to concede that traditional "positive" views of freedom based on rationalism often result in policy proposals "which, in the extreme, may be totalitarian in character"⁴⁶. He therefore seeks to develop a theory of positive freedom which does not have these consequences - a sort of "middle way" under which it would be possible to be discriminating about the aims and beliefs of agents without requiring that everyone should follow the same, universally valid, set of prescriptions. Benn's middle way turns out to be freedom as *consistency*: it does not matter what beliefs a person holds, so long as he holds them consistently as part of a coherent set of beliefs which are his own²⁸. This is Benn's account of what freedom consists in, and it supposedly avoids the totalitarian implications of the traditional "positive liberty" view. But a state protecting freedom on Benn's terms, although tolerant of different views, would not be required to permit *all* views to flourish: it would not necessarily entitle an individual to hold (or express? or act on?) views which he did not hold consistently with his other views. In such a society, there would be limited freedom only. More than that, Benn's account of freedom raises the practical problem of how anyone can tell whether the opinion

expressed by an individual is consistent or inconsistent with the rest of his views. Are individuals to be interrogated about their views? Or will someone *deem* whether an individual's opinion is consistent or inconsistent with the rest of his views? How else could his mind be read? Once again, the spectre of Big Brother looms, and Benn's compromise turns out to be scarcely less totalitarian than the "full-blooded" positive liberty which he repudiates. What his theory seems to show, contrary to what he intended, is that there is in fact *no* middle way, and that it is impossible to depart from classical liberty and go off in the direction of autonomy without seriously undermining freedom.

It follows from the notion of autonomy as a concern to enable people "to have a good life"³⁴ (as Raz puts it) that autonomy requires people to have more and more things available to them. Providing someone with rights of autonomy thus involves creating "an adequate range of options for him to choose from", according to Raz. If liberty is defined as autonomy, one arrives at Gray's conclusion that

a freedom-promoting policy is one which expands the options open to man⁴⁷.

This necessarily requires providing access to material resources, or wealth: the option of (say) visiting Australia is not open to me unless I can afford to buy the ticket. Accordingly, the concept of liberty as autonomy includes certain rights of *access to material resources*. In Raz's words:

autonomy is possible only if various collective goods are available⁴⁸.

This, it will be appreciated, involves rather more than the classical idea of liberty as being entitled to take one's decisions without interference from the state or from fellow citizens. It involves actually being able

and *empowered* to have what one wants; not merely that no-one stops me from deciding to do something, but that I *can* actually do it. As Skorupski says, autonomy

embraces the *capacity* and the freedom to make one's decisions^{37*}

and, in Raz's words,

one's positive freedom is enhanced by whatever enhances one's ability to lead an autonomous life¹³.

This, then, is the "positive" concept of freedom as *ability, or power, or capacity*.

It is not a new concept. As early as 1881, T.H. Green was writing of "what I call freedom in the positive sense"^{48A}. He insisted that "when we speak of freedom... we do not mean merely freedom from restraint or compulsion... We mean a positive power or capacity"^{48B}.

The two major implications of liberty-as-autonomy considered above - first, that only certain people (autonomous people) are entitled to exercise choices; and, secondly, that choices are only valuable if they are autonomous choices - apply equally to the concept of liberty as ability and access to material resources.

Under the classical conception of liberty people are generally entitled to access to material resources not by automatic right, but only through having received a gift or by way of contract. Typical examples of contracts include: I work for you, if you pay me money; or I pay you money, if you sell me a car. And, as discussed in section 1.4.2. of chapter two of this thesis, classical liberty respects people's freedom to enter binding contracts with each other on whatever terms they choose, provided that the contract is not induced by force or fraud.

* Emphasis added.

The exponents of the "positive"/autonomous view of liberty as ability take a different view. They believe that not everybody should be free to enter binding contracts, but only people with the requisite level of autonomy or ability; where that requisite level is absent, the state is entitled to interfere, rewriting or undoing or by-passing the contract and thus overriding the freely-expressed wishes of the parties. This is partly because ability implies that certain goods should be available to people by right, and not by contract. But it is also because a party with relatively little wealth is in a weak bargaining position when he enters a contract with someone much richer, so that the terms which result are "unconscionably" biased in favour of the party with greater wealth and bargaining power. If ability and access to material resources are a form of freedom, then their absence is correspondingly a form of subjection to coercion - so that, applying the "force or fraud" exception to freedom of contract, the weaker party is said to have agreed to the terms under duress or "force" or coercion, permitting the contract to be overridden. On this argument, the less wealthy party is not in control of his situation⁴⁹ - he is not "free" in the autonomous sense of the word^{49A} - and therefore his right to agree contracts need not be respected. The argument is often applied to employment contracts where the employee, in a weaker bargaining position than the employer, agrees to accept less than a prescribed wage⁴⁹, or to contracts for the sale of anything from washing machines to package holidays where the seller is an enormous company with the bargaining power to "impose" standard-form terms and conditions on the relatively weak consumer, terms which are said to be unconscionable**. Feinberg believes that

** The concept of "unconscionable" bargains is in fact known to English contract law. In a 1974 case, a standard-form contract between a young song-writer and a music publishing company was held by the House of Lords to be so biased in favour of the music company (which had drafted it) that its terms were held void and unenforceable. Lord Diplock explained this judgment by stating that

the justice of the argument is effectively demonstrated by J.G. Murphy's famous water well example:

Suppose I own the only water well within a two hundred mile radius of desert. A man, nearly dead from thirst, drags himself to my well and begs for water. Realising (a) that the well is lawfully owned by me and that I am entitled to all its water, and (b) that the thirsty man's predicament is no fault of mine... I say "I will sell you a glass of water only if you sign over to me all your worldly possessions"⁵⁰.

To Feinberg the injustice of the state upholding such a contract (the glass of water in return for all the thirsty man's worldly possessions), rather than overriding it, shows that "usurious agreements are indeed *coercive** in the manner of all 'unconscionable contracts'; ... their coercive character reduces the voluntariness of the consent of the weaker party whose position is very much like that imposed by the well owner on the man dying of thirst in Murphy's example"⁵¹.

the court will intervene to protect those "whose power is weak against being *forced* by those whose bargaining power is stronger to enter into bargains which are *unconscionable*" (emphases added: *Schroeder v Macaulay* [1974] 3 All ER 616 at 623). A year later the Court of Appeal refused to enforce another, not dissimilar, contract between song-writers and a music publishing company, Lord Denning holding that "there was such inequality of bargaining power that the agreement should not be enforced" (*Clifford Davis v WEA* [1975] 1 All ER 237 at 240).

However, the predominant strain in English law is that of classical freedom of contract: not intervening to override the expressed wishes of the parties. Although there are now statutory and common law grounds for overriding certain contractual clauses which exclude or limit the liability of companies in standard-form contracts etc, the text-books emphasise that, even in this context, "Inequality of bargaining power... in itself is not a ground for invalidating such a clause at common law" (*Chitty on contracts* (26th edition); Sweet & Maxwell (London 1989); paragraph 941).

* Feinberg's emphasis.

But it is not at all clear that this follows, or that Feinberg has drawn the right conclusion from the water well example. Certainly the well owner's behaviour is repellent and outrageous, displaying a degree of meanness and unkindness which is (almost) beyond belief. But does that mean that the state should intervene? When was it ever the business of the law to make people generous or kind? However objectionable the well owner's behaviour, the distinction between liberty and licence spelled out in section 3.1. of chapter one - a distinction essential to a truly free society - needs to be borne in mind here.

Nevertheless, to most people, there remains something unconscionable and repellent even about *permitting* the well owner to enforce the contract, quite apart from the mere disapproval that attaches to his behaviour. For the fact is that the thirsty man only agreed to the terms because otherwise the well owner would have denied him sustenance and *let him die*. But *that is precisely why the water well example cannot properly be used as an analogy* for other cases of contracts entered into by parties with unequal bargaining power, such as those between large employer and individual employee, or between major company and individual consumer. Obtaining the thirsty man's signature as the price of not letting him die is equivalent to obtaining it at gunpoint, and most theories of classical liberty would recognise that as being a contract made under duress or force, and hence as unenforceable. As already discussed (see section 1.2.1. of this chapter) it is consistent with a classical view of liberty to regard sustenance as a prerequisite of liberty, and thus something which people have by right, without conceding that people have rights to material resources generally (as the advocates of liberty-as-ability maintain). The water well example is an instance of a man entering a contract under duress, and not freely; but the unfreedom lies in the lack of sustenance rather in the lack of ability. It does not follow that an employee is

similarly unfree or coerced when he contracts with his employer, or that a consumer signs the company's standard-form terms under duress.

When it comes to contracts where there is no threat to life, and no water well example-type duress, but where the parties have unequal wealth and bargaining power - employment contracts, consumer contracts - there are good reasons for not allowing the law to intervene and override the agreement between the parties. Like other kinds of state interference, striking down such "unconscionable contracts" induces a lack of personal responsibility and encourages recklessness and ignorance. It is true, for example, that many consumers sign contracts without reading them properly, or are too easily persuaded by advertising, and often end up with bad bargains as a result. But so long as no force or fraud (such as dishonest advertising) is involved, that is no ground for saving them from their bad bargain, and so protecting them from the consequences of their actions. For if someone is so protected, what incentive is there to act more responsibly on future occasions, to be a more discriminating consumer, to read things before signing them? Moreover, to strike down contracts entered into by parties with unequal bargaining power is an affront to the basic liberties of *both* parties. If a man is unemployed and is offered a job at a low wage by a business unwilling to spend more on labour, why should he not be free to accept? It may be that his earnings would be barely more than he receives in unemployment benefit for doing nothing, but he might nevertheless prefer to keep himself occupied and to enjoy the dignity of labour. There is a choice to be made: what right has the state to decide for him? It is true that, being unemployed, he lacks the ability to extract a better bargain, but that should not imply that he be denied the freedom to contract. Yet just such an implication arises from a policy based on the positive conception of liberty as ability.

The second implication of liberty-as-ability is, as with autonomy generally, the proposition that the only worthwhile choices are those which are autonomous and lead to a good life. A free choice, on this conception, has no value unless it is accompanied by access to material resources, and people are only "free" to the extent that they have such access, can afford to do things and hence are "able" to do them. It will be apparent that a state committed to this kind of "liberty" will not leave people to themselves quite as much as a state safeguarding the classical/"negative" conception of liberty. It will have a more "positive", active role. Raz writes:

The principle of autonomy, as I shall call the principle requiring people to secure the conditions of autonomy for all people, yields duties which go far beyond the negative duties of non-interference³³.

Accordingly:

a government whose responsibility is to promote the autonomy of its citizens is entitled to redistribute resources, to provide public goods and to engage in the provision of other services on a compulsory basis⁵².

The socialistic connotations of this are evident. This kind of "positive" conception of liberty as autonomy/access to resources/ability is what Mr Hattersley means when he denies that freedom is "simply" protection from the coercion of the state and says (in the epigraph to this chapter) that "real freedom" requires "possession of the economic power" which enables choices to be made in practice³. It is also what Hayek regards as a "dangerous confusion" embodied in "the socialist argument": the identification of liberty with "the physical 'ability to do what I want', the power to satisfy our wishes, or the extent of the choice of alternatives open to us"².

Is Mill's very simple principle a prescription for liberalism and "laissez-faire", or for socialism? It is to answer this question, and to discover how effective a safeguard of liberty the principle is, that this chapter seeks to understand the sense in which Mill uses the term "liberty". Crucial to that understanding, it will be apparent, is an examination of the implications of the concept of liberty central to the socialist argument: freedom as ability and power.

1.3. Ability

What socialists mean by freedom is ability, or power. The welfare state, Alan Ryan writes, is tied to "enabling goods", those goods which allow their possessors to choose for themselves what life plans to try to implement and therefore property in the welfare state must give individuals access to the life of their society, *which is a matter of increasing freedom of choice*^{53*}.

H.J. McCloskey writes similarly of the argument for socialism from liberty... that the shortcomings and inequalities of capitalist systems are impediments or obstacles to freedom, and that socialism, by providing employment, reasonable minimum wages, and amenities such as health services, may foster and enlarge liberty⁵⁴.

And, within the realms of British domestic politics, Roy Hattersley as deputy leader of the Labour party told an interviewer in 1989** that freedom means

the ability to do those things which a free society says you can do in theory... It's that sort of freedom we're going to provide... [Mrs Thatcher] may have made this country more free, more libertarian for the people at the top of the income scale who can do more with their money... [but] she's depressed the amount of choice, the amount of ability to do what they want to do further down the

* Emphasis added.

** The interviewer was Mr Brian Walden, and the interview was broadcast on *The Walden Programme* on 22nd October 1989, by London Weekend Television. The author is grateful to London Weekend Television for providing the transcript of the interview, from which this and other quotations are taken.

income scale... If you're a pensioner living on £46 a week you can choose virtually nothing⁵⁵.

In the following paragraphs, three points will be made about "ability". First: that, contrary to Mr Hattersley's description of ability as a "sort of freedom", classical liberty and ability are not simply two aspects or variants of the same phenomenon. Ability is a different phenomenon altogether. Secondly: that classical or "negative" liberty is something of intrinsic value. Whereas advocates of "positive" liberty, and of socialism, often claim that freedom without ability is worthless, it will be argued that freedom has great value *in itself*, and is therefore worth protecting and promoting. The third point will be that this valuable phenomenon - freedom in itself, "negative" liberty - must necessarily be sacrificed if governments attempt to promote and enhance ability. The pursuit of ability can only be conducted at the expense of liberty.

1.2.1. A different phenomenon altogether

To be free to do something is not the same as to be able to do it. To be unable to do something is not the same as to lack the freedom to do it. In expounding his distinction between positive and negative liberty, Berlin provides a few neat illustrations of this:

If I say that I am unable to jump more than ten feet in the air, or cannot read because I am blind, or cannot understand the darker pages of Hegel, it would be eccentric to say that I am to that degree enslaved or coerced¹⁸.

And again:

If I stumble and fall, and so find my freedom of movement frustrated, I cannot, surely, be said to have suffered any loss of basic human rights⁵⁶.

Berlin is not the first to have made the point. Hobbes writes in *Leviathan* that when men are imprisoned, or restrained, with walls or chains... we use to say, they are not at *liberty* to move in such manner as without those external impediments they would. But when the impediment of motion is in the constitution of the thing itself, we use not to say it wants the *liberty*, but the *power* to move, as when a stone lies still, or a man is fastened to his bed by sickness^{57*}.

In similar vein, Feinberg has pointed out that the fact that he is unable to speak Russian, high-jump seven feet, write an original work in nuclear physics or give birth to a baby cannot sensibly be said to indicate that his liberty is thereby infringed²²; and Nozick has noted that if a man chooses to walk somewhere, the fact that he might prefer to fly there like a bird but is unable to do so does not make his choice to walk any less voluntary or free^{58**}. Conversely, Hayek has argued with the implication of the socialist/"ability" concept of liberty - that the degree of one's freedom is determined by the

* Hobbes's emphasis.

** These points might be thought uncontroversial, but, remarkably, one proponent of the socialist conception of freedom has recently argued - in an article in *The American Political Science Quarterly* - that such physical and mental human inabilities are the same as a lack of freedom. The writer, Larry M. Preston, declares that *someone untrained in music is, accordingly, "not free to play a piano composition even if a piano and sheets of music are present"*^{58A}.

The peculiar wickedness about using the word "free" in this way is that it renders nonsensical any objection to true infringements of liberty. Under communist rule in Czechoslovakia, no plays by Vaclav Havel were published, because the authorities banned them. At the same time, in England, no plays of mine were published, because I am untrained and unskilled as a playwright. Adopting Preston's terminology, both Havel and I were therefore "not free" to publish plays. Does this mean that the two situations are alike? Is the censorship of Havel's plays morally comparable to my inability to write plays? If both are deprivations of freedom, why should we condemn the former any more than the latter? Thus, by a linguistic sleight of hand, we no longer have the vocabulary with which to protest when freedom really is infringed. Perhaps this is congenial to socialists.

extent of one's wealth - by observing that "the courtier living in the lap of luxury at the beck and call of his prince may be much less free than a poor peasant or artisan"⁵⁹. This last illustration points to the essentially materialistic nature of the "ability" conception of freedom; it echoes the familiar objection of people in the former socialist states of eastern Europe, whose governments during the 1970s and 1980s offered them consumer goods as a substitute for freedom (of speech, of the press, of literature, and so on), that their mouths were being stuffed up with salami.

Another example from pre-1989 eastern Europe serves to clarify the distinction. In section 1.2.3.B of this chapter it was noted that the option of visiting Australia is not open to me unless I can afford to buy the ticket***, a truism if ever there was one. If I cannot afford to buy the ticket, I am unable to go. That would be the case regardless of whether I happened to live in England, or in East Germany while the Berlin Wall was still up. In neither case would I be able to visit Australia. But it is absurd to conclude from this that whether I lived in England or behind the Berlin Wall makes no difference to my *freedom* to go to Australia. Living in England, all I need to do is acquire the means to go. It all depends on me and on what becomes of me; *nobody is stopping me going*. Because of that, irrespective of my ability to go at any one time or another, I am always free to go. Behind the Berlin Wall, by contrast, it would *not* depend on me; no matter what I did, no matter what happened to me, I would still be prevented from going. I would face two, quite distinct, obstacles to going: not only the inability to go, but, in addition, a denial of my freedom to go. For an inhabitant of East Germany with the ambition to visit Australia, but without the means (in terms of material resources) to realise his ambition, the

*** or someone buys it for me, which is effectively the same thing.

significance of the Berlin Wall coming down in 1989 would not have been that he suddenly became able to realise his ambition, but that he suddenly became free to do so. Being able to go is a different phenomenon altogether.

1.3.2. The value of classical liberty

What is the good of being free to go to Australia if one cannot afford to go, if one is unable to go? Wherein lies the value of classical liberty? This question has been posed already in this thesis, in chapter one, where reference was made in passing to the view that "liberty only has any point when people have access to the material resources which enable them to use freedom". It was suggested that this view is typical of a socialist attitude to freedom, which finds expression in questions such as: "what is the point of having freedom of choice in education, with the ('negative') liberty of not being compelled to educate one's children in the state sector, if one cannot afford to pay the fees of an independent school?", or: "what is the point of being free to negotiate the terms of one's employment, if one is so poor that one is desperate for work and thus in a weak bargaining position to obtain good pay and conditions from the employer?"*. On this view liberty is only valuable if it is accompanied by ability; liberty without ability, liberty in itself - "negative" or classical liberty - is virtually worthless.

It is an attitude neatly encapsulated in a scene in Piers Paul Read's novel *A Season in the West*. The hero of the novel, Birek, is a dissident from another pre-1989 socialist state, Czechoslovakia, who comes to England to seek political asylum. Shortly after arriving he is

* Chapter one, section 2.2.2.

invited to a party where he meets Ben, an English intellectual socialist. Ben angrily tries to tell Birek

"what it's really like in this country... what our so-called freedom really means to people who can't get a job, or, if they can, don't earn enough to pay for a roof over their heads."

"I am sure there are such people," said Birek with a patient smile. "I am sure there are great inequalities, and much suffering, but isn't that the price of freedom?"

"Those who have the freedom don't pay the price."

"But surely," said Birek, "the freedom, even of the few, releases an energy and an inventiveness which leads in turn to a prosperity which benefits even the poorest citizen?"

"Tell that to your unemployed steel worker!"

"He may not perceive it," said Birek, "because no one, hit by a misfortune, can see beyond it. But, I should have thought, his conditions here, as an unemployed steel worker, are even on a material level superior to an employed steel worker in a socialist state; and spiritually the two have no comparison because in his leisure - in what he reads in the newspapers, or watches on television - he is the beneficiary of all the ferment which arises in a free society."

"*The Sun*," sneered Ben, "and *Blankety Blank*?"^{60*}

If Ben's comments seem a little exaggerated, the exercise by Piers Paul Read of excessive literary licence, it is perhaps worth turning to the words of a real English socialist and quoting again from Mr Hattersley's 1989 interview⁵⁵:

* Lest this should ever be read by anyone who needs it, perhaps it is worth repeating the explanation which the party's hostess proffers to a bewildered Birek. *The Sun*, she tells him, is "a newspaper - rather a vulgar newspaper. And *Blankety-Blank* is a silly television game".

... freedom is meaningless without the capacity to put that freedom into operation... Mrs Thatcher will say that this is a free country because you're able to buy aspects of health, you're able to buy a place in hospital, you're able to buy health for yourself and your family. Now, that may be one aspect of freedom but it's not an aspect of freedom that means very much to the people who can't actually afford a hospital bed.

And again, later in the interview:

The great principle of socialism has always been freedom and the great understanding of the principle of freedom is that it is meaningless unless you can exercise those rights and that requires more equality**.

This is, in effect, the same point as H.J. McCloskey's claim, cited earlier, that "the value of self-determination depends on how it is used" and there is "no special value in the liberty enjoyed by the aimless, shiftless drifter"⁴⁴. Liberty which leads to "the good life", which can be "put into operation", is worthwhile. But liberty on its own, for its own sake - the liberty of Ben's "unemployed steel worker" or McCloskey's "aimless, shiftless drifter" - has no value. As we have already observed, this is a highly materialistic view of freedom which places the greatest emphasis on *what freedom brings*, rather than on the thing itself: does it bring a good life? does it (in Ben's words) get people a job or a roof over their heads? It is an attitude which says: The freedom to buy health care for your family only matters if you can actually afford to "exercise those rights". The freedom to go to Australia only matters if you can

** In the same interview Mr Hattersley also proffers the view that he is "on the side of the philosopher John Rawls and I think all modern political philosophy now". He then comments helpfully: "Take it from me Mr Baker's [then chairman of the Conservative party] strong suit is not political philosophy, Mrs Thatcher is not one of nature's conceptual thinkers."⁵⁵.

actually afford to go to Australia. Only the material outcome matters.

What is being ignored in the "ability" conception of freedom is a spiritual dimension. Interestingly it is Mill, in book II of his *Principles of Political Economy*, who (albeit in a different context) provides one of the best illustrations of this. He writes:

Many a person remains in the same town, street or house from January to December, without a wish or a thought tending towards removal, who, if confined to that same place by the mandate of authority, would find the imprisonment absolutely intolerable⁶¹.

Either way, of course, the material outcome would be the same: whether freely and voluntarily, or by "mandate of authority", such a person would remain in the same house "from January to December". There is no difference in material terms: freedom would not bring, or lead to, anything different from compulsion. And yet a person would find the lack of freedom "intolerable", *regardless of the identity of material outcome*. Insofar as people do have the sense that being compelled not to move house for a year is something "absolutely intolerable", even where they would freely choose the same outcome, it is because they value something in freedom other than its outcome or how it is "put into operation" (to use Mr Hattersley's words). They value liberty in its classical or negative meaning: the sense of being in control of one's own destiny, rather than subject to the dictates of others. Maybe I will stay here from January to December, but that is *my* choice, and I could not bear having any other person (the state or my fellow citizens) interfering and taking the decision for me.

Whether the "mandate of authority" represented by the Berlin Wall is there or not, the material outcome is the same: if I do not have the money I am unable to visit

Australia. But the two situations are nonetheless vastly different. If the Berlin Wall is there, and I am forbidden (that is, denied the freedom) to go to Australia, then whatever I do can never change anything. I am an irrelevance. It is not up to me; it is the state's decision. On the other hand, without the Berlin Wall, without the *prohibition* on going, I am free to shape my own destiny and to direct my personal efforts to realising my ambition: by working harder, by saving up, by being inventive and resourceful (in, say, finding the cheapest way to travel). Of course it will not necessarily be entirely up to me. Luck may play a part (for instance, if I win free tickets in a competition or, conversely, if the value of my savings plummets in a stock market "crash"). In the end, I may never realise my ambition. But in that case, although ultimately unable to go, I will still have had the hope and the potential. It is that hope and that potential, rather than being "at the beck and call" of others and having one's future predetermined by somebody else, which - even in the absence of ability - gives classical/"negative" liberty its value. It endows people with human dignity; without it their lives would be "absolutely intolerable".

Contrary to the socialist view that conceives liberty in terms of ability, the material outcome is not everything. Being fed salami in abundance does not compensate for not being free to criticise. Piers Paul Read's character Ben measures freedom in terms of people having "a roof over their heads", but as council tenants know all too well, it also matters whether one can make one's own decisions about what to do with one's house: whether one is free to decorate it as one pleases, whether one is free to dispose of it and acquire something else in the neighbourhood*. People attach value to being entitled

* In council estates where some people have exercised the "right to buy" it is possible to find people living next door to each other in identical flats, where one (the owner) enjoys these freedoms while the other (the council tenant) does not. There is no difference

to take their own decisions; without that entitlement, regardless of what material goods they might be provided, their lives lack an essential component of what it is to be fully human. Here lies the meaning and the worth of the classical conception of liberty, liberty in itself and independent of "ability", and here is the reason for safeguarding it.

1.3.3. Ability at the expense of liberty

Liberty in its classical sense is endangered by policies which involve the state in promoting and expanding ability. If a government embarks on this course, it compromises its responsibility to safeguard liberty.

As was seen earlier, the case for governmental promotion of ability - and, indeed, what Hayek calls "the socialist argument" - is often advocated by the identification of ability with freedom. H.J. McCloskey's writings are a prime example of this. Using the language of ("positive") liberty, McCloskey writes that the state

can do much to enlarge an individual's *effective* enjoyment of his liberty^{62**}

and on this basis he argues for an active welfare state (which he calls a "liberal welfare state") in which the government has responsibilities which go beyond the protection of liberty in its classical/negative sense. Yet the arguments he uses do not really make out the case. He argues for state involvement in health care so as to secure "the good of health to many who would lack it" and for government relief of unemployment on the grounds that, without adequate means, the unemployed may suffer

between the rooves over their heads; the difference lies in the fact that one can take decisions for himself while the other's decisions are taken for him.

** Emphasis added.

malnutrition and disease⁶². These points seem reasonable but, as has already been discussed*, they are not in themselves grounds for the state to exceed its classical liberty responsibilities: having health care and sustenance are essential prerequisites of liberty in the "negative" as well as the "positive" sense, and it is perfectly consistent for a state committed to protecting its citizens' classical/negative liberty to try and ensure that their "good health" is secured and that they are spared malnutrition and disease (although it may legitimately be asked whether, in providing for its citizens' health, the state is necessarily obliged to use the medium of a nationalised health service).

McCloskey's points become less reasonable, however, as he argues that the state's responsibilities, above and beyond this, include ensuring that people have the standard of living that *enables* them to do certain things that are not essential prerequisites of classical liberty. He considers the case of a man who, "because of his poverty", is unable to "be active in his chosen career as a builder" or to "marry the woman he loves"⁶². The state, he says, should supply the money to relieve the poverty which engenders these inabilities; otherwise (and here McCloskey's attempt to identify ability with liberty is at its most conspicuous) the man's poverty will make him "a slave" by comparison with "the well-paid worker in the modern liberal welfare state"⁶².

But why should the state do any such thing? The question may seem heartless**, for it is undoubtedly nice and good when men can pursue their chosen careers and marry the women they love. Yet it is absurd to imagine that people should be entitled to these things by right in

* See section 1.2.1. of this chapter, and section 1.5.1.A of chapter two.

** If so, McCloskey is to be congratulated for choosing his examples well.

the same way that they are entitled to the classical liberties of taking their own decisions without interference from others (and to the essential prerequisites of those liberties) - or that the state is correspondingly obliged to provide them. A few analogies make the absurdity all too clear. Is the state also obliged to enable me to pursue my chosen career - as a film star? (If not, why not?) What if the man is unable to marry the woman he loves not because of his poverty, but because she does not love him, or because she is married to someone else? Does he still have a right to marry her? (Again, why not?) The absurdities would not matter so much in themselves - were it not for the fact that, as will be explained below, these pseudo-rights can only be accommodated at the price of infringing real rights to liberty in its classical sense.

In his 1989 interview (already extensively quoted), Mr Hattersley also advances the case for ability by couching it in the language of freedom. He offers a graphic example when he recalls that

when one of the defendants in the Guinness trial or the pre-trial came out of court, newspapers said to him "Do you enjoy being a millionaire?", and not surprisingly he said that he did... and then... they said "Why do you enjoy being a millionaire?", and he said "*Because it makes me free, I've got so much money that nobody can tell me what to do*".^{55*}

The inference which is supposed to be drawn from this is that wealth or access to material resources is what makes people free, so that a government concerned with the freedom of its subjects ought correspondingly to give them greater access to material resources which, wherever there are people who do not enjoy such access, requires the state to engage in the "redistribution of wealth". Or, as

* Emphasis added.

Mr Hattersley puts it in the interview: "If we can spread it about a bit, there'll be more people who can't be pushed around"⁵⁵.

The argument is beguiling, but it is fallacious. For it is only true that millionaires "can't be pushed around" in societies where they have liberty in its classical or negative sense. It is this, rather than their wealth, which makes them free. So long as people with money are entitled to take their own decisions about how to use that money without interference from the state or their fellow citizens - the definition of classical liberty - they will, indeed, be free and nobody can tell them what to do. But in, for example, a socialist command economy, when the state interferes with people's use of their money, millionaires are pushed around and told what to do, and being wealthy clearly does not entail being free. The defendant in the Guinness trial enjoyed freedom for the simple reason that he lived in a society which respected the "negative" liberty to take his own decisions with his money: in other words, a free market society based on classical principles of economic liberty, rather than on the promotion of ability. By contrast, in a society where the state was committed to ability and to the policy of "spreading it about a bit", that freedom would be eroded.

Partly this is because the impulse to spread it about a bit, to enhance people's ability and their material well-being through state action, is in essence a desire to promote "the good life". The implications of this were considered earlier*. Where the government's job is to promote the good life, actions and choices and decisions taken by people which fail to advance the achievement of the good life, or which retard it, are inimical to the objectives of policy. For this reason, the freedom to exercise such choices and to take such decisions is

* See above, section 1.2.3.B of this chapter.

accorded no value. This is the basis for Raz's view of "autonomous"/"positive" liberty as supplying no reasons to protect "bad options"⁴² and for McCloskey's belief that "the value of self-determination depends on how it is used; when used to seek good ends... it is right to foster it; when used to pursue evil ends, no good is lost if coercion is used to prevent them"^{44*}. But, as already noted, being free only to make good rather than bad choices, to choose one way rather than another, is not freedom at all but *its very antithesis*. The point is well put by Mill in *On Liberty* when he describes as characteristic of freedom the idea that "diversity [is] not an evil, but a good, until mankind are much more capable than at present of recognising all sides of the truth"⁶³, and that a person's "own mode of laying out his existence is the best, *not because it is the best in itself, but because it is his own mode*"^{64**}.

The socialist objective of promoting the good life through greater access to material resources represents a rejection of this conception that a person's choice is valuable "not because it is best in itself, but because it is his own mode". The crucial criterion of policy becomes instead McCloskey's concern for whether "good is lost": choices are valuable if, and to the extent that, they promote the good life. The *outcome* is all-important - rather than the *processes* by which it is achieved; what matters is that people should be provided with material resources, rather than that they should determine their lives for themselves. The spiritual dimension of being in control of one's life - Mill's criterion of whether "it is his own mode" - is of, at most, secondary concern. Under

* See also T.H. Green's view that "when we speak of freedom... we do not mean merely freedom to do as we like irrespectively of what it is that we like... We mean a positive power or capacity of doing or enjoying *something worth doing or enjoying*"^{48B}.

** Emphasis added.

socialism, ability and access to material resources are paramount; freedom is disposable.

In addition, there is the simple fact that, in order to achieve "the good life" and ensure that more people have access to material resources, governments committed to promoting ability must take a more active *dirigiste* role in the way material resources are allocated, infringing people's entitlement to take economic decisions on their own and without interference. In this way, through greater state economic intervention, the socialist pursuit of ability diminishes classical liberty.

There are many people who would readily accept that those pre-1989 totalitarian states which called themselves "socialist", such as East Germany or Czechoslovakia, did, indeed, violate people's liberty, but that this was only insofar as they censored the press, jailed dissidents, restricted travel and so on. Such people would regard as irrelevant to the issue the fact that those states interfered in economic life through (for example) nationalised industries, restrictions on private enterprise and centrally-determined wages. Similarly, they would see no connection between, on the one hand, the denial of liberty implied in press censorship and, on the other, the kinds of state economic interventionism (in the form of nationalised industries, restrictions on private enterprise, incomes policies and minimum wages) advocated not only in eastern European socialist states but also by western "democratic socialist" and social-democratic parties. In short, they would see nothing inimical to liberty in socialism *per se*; only in the specific circumstances of eastern Europe's "Soviet" or "Stalinist"* regimes.

* or "state capitalist"

The argument which will be put forward here is that it is false, or at least exaggerated, to draw such a distinction between state interference in, say, press activity and state interference in economic freedom; it will be contended that the latter ought just as much to be considered a restriction of liberty as the former. This, then, is an endorsement of the view that, to quote Margaret Thatcher in the very month when she first became Britain's prime minister:

There can be no liberty unless there is economic liberty⁶⁵

and that it is intrinsic to socialist policies, by virtue of their sanctioning state interference in the economy, that they should in fundamental ways violate people's freedom. That is to say: policies which seek to enhance ability - by trying to ensure that more people are able to use material resources (whether the precise goal be equality or "social justice" or any other so-called "redistribution of wealth") - are inevitably conducted at the expense of liberty.*

To support this argument, four examples of policy involving state economic interference, all of which are typically advocated by western socialists and social-

* None of this should be taken to suggest that socialism does not also threaten *political* freedoms (the free press and so on). The Marxist theories of "false consciousness" and historical inevitability have a propensity to breed intolerance of "dissident" opinions: why should respect be given to the expression of views which are merely the product of class interest and which detract from the onward march of progress? Moreover, the concentration of economic power into the hands of the very person who wields political power (namely, the state) serves to give government a "hands-on-the-purse-strings" power to coerce subjects into conformity; the temptation to abuse such power will, in the nature of things, always be hard to resist. Thus the experience of socialist states in eastern Europe, the USSR, China, south-east Asia, Africa and central America has been that political liberties were violated no less than economic liberties. Likewise western "democratic socialist" parties have often been attracted by the devices of totalitarian control - in England, for instance: the trade union closed shop; the confusion of party with state by left-wing local authorities which have used public authority and public funds to promote partisan political causes; etc.

democrats, will be considered:- (i) taxation; (ii) minimum wages; (iii) nationalisation; and (iv) restrictions on, or the abolition of, private health care and education.

Taxation: It is a truism to observe that money is not everything, that it cannot guarantee happiness, and so on. But (as the advocates of positive liberty are the first to point out) money does enable people to do various things: to go to Australia, to decorate their homes, to provide for their children, to give to charity. When people spend their money, they are making decisions and exercising choices between these various options: if someone has, say, £1000 and spends it all on a holiday to Australia so that he is left with no money to redecorate his home, he has in effect taken a decision to visit Australia rather than to redecorate his home. Someone else in his position might have preferred to redecorate his home and, if so, would have spent his money on that. Someone else might have decided that he would rather provide for the future, and in that case would have put the money into savings. Each of these spending choices is a decision about what the person in question wants to do with his life, and to the (limited, but obviously not insignificant) extent that money is important to a person's life, the right to spend it is the way by which each individual determines his own life and his destiny.

Taxation is nothing more or less than the state taking people's money and spending it for them - which is to say removing from them the right to make those decisions and appropriating that right for itself. If the £1000 is levied from each person in taxation, it may well be spent on something for their benefit. (On the other hand, it might not.) But, whether it is or not, they will not have chosen it: the state will have chosen it on their behalf, regardless of whether they would rather the money had gone on a visit to Australia, or an encyclopaedia for

their children, or a gift to charity. Taxation, then, is the state saying to the individual: *although that is your money, you cannot decide what to do with it, we shall decide for you.* The higher the level of taxation, the greater the control of people's decisions lies with the state, and the less the individual is in charge of his own destiny. The less, that is to say, he is free.

This is not a new point. It has been made many times before, often with greater force. More than a century ago Herbert Spencer wrote that levying taxation is tantamount to the state declaring: "Hitherto you have been free to spend this portion of your earnings in any way which pleased you; hereafter you shall not be free to spend it, but we will spend it for the general benefit"⁶⁶. And, to the extent that an individual's money is derived from his wages, it is impossible to disagree with Nozick's view that taxation is "on a par with forced labour;... taxing the earnings of n hours labour is... like forcing the person to work n hours for another's purpose"⁶⁷.

But, as Nozick observes⁶⁷, however obvious this point is to some people, to others it remains virtually incomprehensible. The incomprehension finds expression in arguments that, surely, taxation is necessary - to provide for an army and a police force, for old age pensions, and so on - and therefore one cannot possibly have a political system without taxation. Such arguments miss the point. It is not the purpose of this thesis to deny the proposition that one cannot have a functioning political system without taxation; on the contrary, this thesis would argue that taxation is sometimes justified, *in just the same way as other restraints on liberty are sometimes justified* (laws prohibiting people from planting bombs in the street, for example). The point is merely that, justified or not, taxation quite simply *is* a restraint on liberty, and should be so regarded.

Minimum wages: Much as taxation involves the state deciding for people how to spend their money, so likewise legal minimum wages are, in effect, the state making people's contracts for them - whether they like it or not. It may be that I have no job, but someone offers me work at a certain wage. Although the wage is low, I agree to accept it, either because it will make me better off than I am at the moment, or because I want to spend my day usefully, or for whatever reason. The employer agrees to take me at that wage, I agree to work at that wage. But if there is a legal minimum wage, and what he has offered is below that minimum, then the fact that we both want to proceed is irrelevant. The state, imposing the minimum wage, says no: *you are not free to enter into contracts howsoever you choose, we decide what you may agree to.* Thus both his freedom and mine are curtailed.

Nationalised industries: Instead of using my money to go on holiday or to redecorate my house, I may decide to save or invest it. That being so, I could decide to put the money under my pillow, or in a bank, or in industry (in the form of shares) - or any combination of these, as I see fit. Because of my assessment of their likely relative profitability, or for whatever other reason, I may decide to put some of my money in steel making, rather more in the telephone company, and none at all in coal-mining. Yet when the state "nationalises" industry, it takes these choices out of my hands. It says, in effect: *we shall decide for you where to invest your money; we shall put this amount into coal-mining, regardless of whether you wanted to or not, or of what you might have wanted to do with the money.* The state tells me: *the choice is ours, not yours.*

Restricting private health care and education: It is the policy of many western socialist and social-democratic parties that people should be free to buy videocassettes for their children, but not to buy them schooling; and

that people should be permitted to spend their money on alcohol and cigarettes, but not on health care. Of all the four examples, this is perhaps the most perverse - and the most offensive - limitation on liberty. For here the state is saying to people: *you may spend your money on ice cream and holidays and fashionable clothes, and exercise choices between these things, but when it comes to two of the most important things on which you might want to spend your money, you cannot; THOSE decisions we shall take for you.*

In all four cases, people's liberty to take fundamental decisions affecting their lives is being denied. These are, of course, all *economic* decisions, and it may perhaps be objected that this emphasis on economic liberty is excessively materialistic - precisely the accusation which was levelled earlier at the socialist advocates of "ability"*. In response to that objection, two points need to be made. First, whereas the proponents of "ability" demand that people should have certain material things, the proponents of classical economic liberty, by contrast, demand only that people should be free to decide what to do with such material things as they may or may not have: in other words, it is not having the material thing which is crucial, but having the freedom. Secondly, the case for economic liberty is emphatically not that the *only* type of liberty should be economic liberty. It is not contended that freedom to spend money is the sole, or even the most important, liberty. Neither is it being denied that people should be free in other, non-material, aspects of their lives, enjoying (for example) freedom of expression and freedom of association. What *is* being contended, what this thesis is arguing, is that freedom should *also* apply to how people spend their money. It is an assertion that liberty is indivisible. Without exception, and to the greatest

* See above, section 1.3.2. of this chapter.

extent possible (that is, subject to not violating other people's liberties**), people should be entitled to take their own decisions, without interference from the state or their fellow citizens: *they should be free to do as they please with themselves and what they have.*

But there is a further objection which could be made. the argument which has been presented here - that policies aimed at promoting ability undermine liberty because they involve interference with people's economic decision-making - embodies a (so far) unspoken political assumption. It has been argued that taxation violates people's freedom by restricting their entitlement to decide how to spend their own money. But, it might be objected, by what right is it "their" money in the first place? It has been asserted that people should be free to do as they please with what they have. But why should they "have" things? In short, the implicit assumption in all this is that private property is justified: the argument presupposes that people are entitled to "have" material things (money, houses, cars, clothes), to call material things "theirs"⁶⁹. *That assumption is thus crucial to the claim that economic liberty is an essential component of liberty generally.* The basis for saying that the social and economic order which is variously described as "economic liberalism" or "capitalism"*** is necessary for the protection of liberty - and that socialism (by contrast) represents a major threat to liberty - is, then, the idea of a right to private property. It is that idea, therefore, which now needs to be examined.

** See chapter two of this thesis, *passim*.

*** or, in more recent times, "Thatcherism".

1.4. Property

1.4.1. The problem

Property is the name for just one type of relationship between people and material things. There is nothing inevitable about it - about people having material things, owning them, regarding them as theirs - and it is perfectly conceivable that there should be societies which do not recognise the legitimacy of this particular relationship and instead, for example, accord people common rights of access to and usage of material things. Indeed in most (if not all) societies, the air people breathe *is* held in common, with common rights of user; it *belongs* to no one. Under the laws of England the right of property is even today limited in respect of certain lands designated as "common lands", meaning that, although the soil is technically owned, non-owners are fully entitled to take or use what it produces. Nobody owns the right to the produce; it is held in common⁷⁰.

However in England, and in the other western liberal societies of the world, most material things are owned as property: houses, jewellery, cars and petrol, for example, together with the money which is used as a common currency to denote the value of those things and as a medium of exchange between any one of them and any other thing held as property.

What, then, does it mean to have property in a thing? In book II of his *Principles of Political Economy*, Mill offers as good a working definition as any. "The institution of property", he writes, "consists in the recognition, in each person, of a right to the exclusive disposal" of certain things⁷¹. This contains the two essential components of the right to property: the right

is one of *disposal* and, secondly, it is an *exclusive* right. Property implies a right to dispose of a material thing as one chooses, both in the sense of alienating, or of ridding oneself of, it however one pleases - by gift or bequest, or in exchange for something else (money, goods or services) which the recipient gives in return - and also in the sense of using it however one pleases. The owner of something is entitled to do what he likes with it, subject of course to the constraints which operate on every other right: that is to say, the right to use something so long as doing so does not (for example) cause "harm to others", or infringe the liberties of others*. In Nozick's graphic phrase: "My property rights in my knife allow me to leave it where I will, but not in your chest"⁷². The second element is that this right to dispose of the thing (in both senses) is held exclusively by the owner, which is to say that nobody else may dispose of it or use it without his consent. Locke identifies exclusivity as essential to property when he writes, in the *Two treatises of civil government*:

For truly I have no property in that which another can by right take from me, when he pleases, against my consent⁷³.

The right to property is thus an extraordinarily strong right. It gives its holder total and sole mastery over physical matter which is not part of him *almost as though it were part of him*. Yet it is an entitlement which has been considered fundamental by those who have sought to determine what are the rights to which people are entitled. Article II of the French *Declaration of the Rights of Man and of Citizens* of 1791 lists the "natural and imprescriptable rights of man" as being "liberty, property, security and resistance of oppression"⁷⁴. This of course raises the question of *why* people should be entitled to such a strong and apparently fundamental

* What were called, in chapter two of this thesis, the "Mill principle" and the "Berlin principle" respectively.

right. The question is posed not least by those who are most sceptical about the alleged virtues of economic liberty. Thus Tom Settle asks:

What is the problem about the grounds of rightness of property? In short, this: there do not seem to be any such grounds, and yet if there are [*sic*] none, there is no escape from force as the arbiter [of who should use or have what]⁷⁵.

Rather more cautiously, Ryan observes:

Anyone's property limits the freedom** of everyone else to acquire and use what he feels like acquiring and using. It is an institution which therefore requires justification⁷⁶.

Considering the importance of the question, and - as has been seen - how fundamental it is not only to understanding what is meant by "freedom"*** but also to assessing the merits of rival political and economic arrangements (socialism and communism versus free-market liberalism), it is remarkable how few political thinkers have been willing to confront it. There has been considerable reticence about attempting to justify the right to property, as opposed to holding things in common in the absence of ownership****. A number of political thinkers have made efforts to define property (Mill, as noted above⁷¹, and Kant⁷⁷) and others have described benefits which accrue from the institution of property

** He means the ability

*** i.e. does it embrace economic liberty and is it therefore undermined by policies which promote ability?

**** Everything said here about holding things in common applies a *fortiori* to "state ownership" - that is, the existence of property, but property vested not in individual people but in the state. Marxist-Leninist theory, of course, envisages state ownership (by nationalisation etc) of the means of production, distribution and exchange as a necessary precursor (while people are still psychologically attached to the notion of property) to the abolition of property altogether and the holding of things in common. Both holding in common and state ownership involve a denial of private property: that is, of a person's right to own things himself.

(for instance, Hegel⁷⁸ and Bentham⁷⁹). From Hume, there is an argument for property based on alleged considerations of expediency, but it does not serve as a justification. Hume argues that, in the context of a universal and insatiable "avidity" on the part of people to acquire material goods⁸⁰, the only way to avoid rival, greedy claims on the same (limited) resources degenerating into civil conflict and the destruction of society, is to establish a convention⁸¹ by which it is agreed who is entitled to use which resources. The institution of property, Hume contends, fulfils this function and is thus the "most natural expedient"⁸² for maintaining society⁸³. As an institution it can guarantee social peace because, by contrast with common ownership, it is - according to Hume - in everyone's interests to acknowledge each other's property rights:

I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me^{84*}.

The obvious flaw in this line of reasoning is that a poor man, enviously eyeing the possessions of his rich neighbour, will not necessarily observe there to be such a mutual interest between them: it will not be as much to the poor man's benefit as to the rich man's to respect property rights and to leave the allocation of material resources undisturbed and in the same hands. Property rights, then, are not quite the expedient that Hume makes them out to be; and, to repeat Settle's point⁷⁵, in the absence of some actual *justification* for people keeping what they have, there is nothing to stop brute force being the ultimate determinant.

Possibly the most celebrated attempt at a justification of property is Locke's "appropriation theory", set out in chapter 5 of his second treatise. This takes as its premise the notion that "the work of a

* Hume's emphasis.

man's body is truly his" and goes on to assert that "whatever he mixes that work with, becomes his"⁸⁵. Thus, although material goods were originally held in common, people can appropriate goods from the common stock by mixing their labour with them. When a man starts to eat an apple from a tree owned by no-one, the apple becomes his in the act of eating. When a man cultivates a piece of land which is owned by no-one, the land becomes his through the mixing of his labour with it⁸⁶. By these acts of original acquisition, Locke maintains, material goods legitimately and justifiably passed from being held in common to being owned by people. Subsequent ownership is justified to the extent that the original owners give their consent to the transfer: through bequest, gift or contractual exchange. Locke is conscious that there are limits to this: if one man were to use the profits from the land he owns to buy up everyone else's land, there would be the unsatisfactory (and hard to justify) consequence that no-one else had access to the food needed to sustain them. So Locke makes the right of property (through original "mixing" of labour plus transfer by owner's consent) subject to a "sufficiency rule", that the appropriator is only entitled to own goods if "enough and as good" is left for others⁸⁶.

The objections to Locke's argument are virtually as familiar as the theory itself, and effectively succeed in wrecking it. It is not clear, first of all, what is the extent of the ownership acquired when labour is mixed with goods. When the first man starts to eat an apple from a tree, does he thereby acquire just the apple, or the whole tree, or all the land on which the tree stands? If a private astronaut clears a place on Mars, has he mixed his labour with (so that he comes to own) the whole planet, the whole uninhabited universe, or just a particular plot?⁸⁷. Secondly, it is not explained by Locke why mixing one's labour with (say) a piece of land automatically implies that one acquires the land in which

one's labour is mixed, rather than simply having lost one's labour to the land. Nozick puts this point nicely: "If I own a can of tomato juice and spill it in the sea... do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"⁸⁸ Finally, and most crucially, Locke fails to give a satisfactory account of why it follows from the fact of a man owning his labour that he is entitled to own the land on which he labours: is it not more justifiable to assert that he owns the value added to the land by the labour (that is, at most, the crop, but not the land itself)?

Even Nozick, one of the most ardent champions of property rights (and economic liberty) in recent times, while skilfully exposing the failings in Locke's theory⁸⁹, fails to proffer an alternative justification. He does not even try. He criticises socialist policies of "redistributing" wealth on the grounds that they violate people's entitlement to keep what they own. Nozick insists that a person is entitled to own a thing if it has been legitimately transferred to him - that is, with the consent of the previous owner (bequest, gift or contractual exchange) - and, accordingly, the state is not entitled to take it from him. But this fails to answer the question of by what right the previous owner held the goods. By what right was it originally acquired from the common stock? On these fundamentals, Nozick is strangely silent:

To turn these general outlines into a specific theory we would have to specify the details of each of the... principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings... *I shall not attempt that task here.* (Locke's principle of justice in acquisition is discussed below.)^{90*}

* Emphasis added.

But - to repeat - the right to economic liberty, in contradistinction to socialistic economic interventionism, cannot be justified unless the right to property is justified.

1.4.2. The absence of property is unjustifiable

This thesis has no pretensions to improve on the work of Nozick, let alone of Hume and Locke. The problems which they encounter in trying to justify property seem to the present author unanswerable; certainly this thesis can do no better than they in answering them. But in the paragraphs which follow an attempt will be made to sustain the case that the right to property ought to be respected - for the simple reason that its absence carries necessary implications which are morally indefensible.

Two such implications of the absence of property will be discussed. First, it will be argued that, if there are no property rights, people who work will be in the position of slaves. And, secondly, it will be shown how, where there is no property, natural human sentiments are inevitably denied and overridden, so that the absence of property is a form of inhumanity.

1.4.2.A: The absence of property is slavery

Introducing his book on "property and political theory", Alan Ryan muses that "although liberty may sustain private property, the converse seems less plausible"⁷⁶. What will be argued here is not only that it *is* plausible that property sustains liberty, but also that the absence of property entails wholesale enslavement.

At the beginning of section 1.4.1., the point was made that, whereas the air people breathe is held in common and is not owned by anyone, other material goods - such as petrol - are the subject of property rights. I am entitled to use as much air as I like at any time, and so can everyone else. However, I am only entitled to use petrol if I own some, which I can do by having it transferred to me with the consent of another person who currently owns it: in practice that usually means going to a petrol station and buying it (that is, entering into a contract with a petrol station by which it consents to transfer petrol to me provided that I pay a sum of money in return).

It should be apparent that what distinguishes a commodity such as air from a commodity such as petrol is that it is freely and effortlessly available. Access to air requires no payment, because there is no difficulty in obtaining it. Access to petrol, by contrast, involves an enormous amount of effort and labour: someone (or several people) must first discover the oil, someone else (or several other people) must extract it, someone else (or several other people) must refine it. The finished product needs to be distributed by still more people, and marketed by still more people - until it is ready to be sold to me at the pumps. Hume expresses the point well in his analysis of property:

When there is such a plenty of any thing as satisfies all the desires of men... the distinction of property is entirely lost, and every thing remains in common. This we may observe with regard to air and water*, though the most valuable of all external objects⁸³.

* It is interesting to note how Hume categorises water alongside air as a material resource which is freely and effortlessly available, and therefore not something which should be the subject of property rights, buying, selling and so on. In the sense that water falls from the sky as rain, he is of course right. But in modern Britain most people are not prepared to drink rainwater, and only want to acquire water after it has been worked on - collected, purified and

The point about material resources such as petrol, then, is that nobody wants them without labour; labour is what turns (say) the undiscovered oil into something valuable. With the exception of air, the same is true of virtually every material thing, from diamonds to toilet paper. This does not, as Ryan seems to think⁹², imply the validity of the "revolutionary"⁹²/Marxist *labour theory of value*. The point is *not* that the value of something (petrol, a diamond, a toilet roll) lies in the worth of the labour put in it; after all, how can one possibly assess the value of some labour over others?^{**} Rather, as classical economists have always maintained, the value of a thing lies in what people are prepared to pay for it. The point is simply that, by contrast with air, people will not be prepared to pay for most goods unless labour has gone into producing them.

The finished product - petrol, for instance - is thus in most cases the fruit of a person's, or many people's, labour. If there is no property, but instead common ownership of goods, this means that the products of people's labour are held in common; the fruit of a person's labour does not belong to him, but to everyone. If I work all day, five days a week, my reward at the end will not be mine, to do with as I please, but will be owned by everyone in common. My labour will not be mine,

piped. Because that involves labour, there is property in the finished product, and people have to pay to be supplied with water from the tap (or in bottles). This was as true when the water industry was nationalised as it is since going into private ownership; yet a failure to appreciate this seems to have muddled a great deal of debate at the time of privatisation. Thus Neil Kinnock, the Labour leader, told his party's conference at the time of privatisation in 1989 that "Tories are the kind of people who start off promising you the earth and end up selling you water"⁹¹.

^{**} a difficulty which, sadly, never seems to daunt proponents of "comparability", "wages boards" and the other paraphernalia of arrogant economic planning.

but everyone's. (Where, instead of common ownership, there is state ownership, it will belong to the state.)

In the absence of private property, each person (or the state) has a claim to the activities and the products of other people⁹³. It follows that all those things in an individual which are productive and which constitute his labour - his personality, qualities and abilities, his mind and his body - are not *his* to dispose of, but, rather, are at the disposal of the community: they become, as Nozick puts it, "a collective asset"⁹⁴. The individual thus does not belong to himself, but to others. He is enslaved***.

Respect for property rights rests on the opposite view: that a person does belong to himself, and has a right to "dispose of himself" as he pleases - to decide what will become of himself and what he will do - so that, in consequence, he has a right to reap the benefits of what he does⁷². My person (my mind and my body) are mine to dispose of. If for the next hour I decide to devote myself to playing sport, or reading, or sleeping, I may reap the benefit of any of those uses of my mind and body. Of course I may choose to bestow all or part of the benefit of my activities on others - as when I read aloud, or play sport before a crowd of spectators, or make love to someone. But in each case the choice is mine; the benefit of my activities is mine to keep or to give away or to share as I please; I am mine to dispose of. By the same token, if I choose instead to spend the next hour working - engaging my mind and body in labour - I am no less *entitled to reap or to dispose of the benefit of that labour as I choose*. The petrol at the pumps is the fruit

*** Herbert Spencer is succinct on this point. On the basis that socialism idealises either the holding of goods in common, or their appropriation by the state through taxation (for the putative benefit of the community), he makes the bold claim: "All socialism involves slavery"⁹⁵. To the extent that socialism involves the abridgement of property rights, Spencer's claim seems incontestable.

of people's labour; it ought not therefore to be a collective asset. It belongs to the vendor, he has property rights over it, and he can dispose of it as he chooses. If the vendor wants to charge motorists money for using it, that is his right; by contrast with the air they breathe, they are not entitled to use as much as they like at any time at will. It is not theirs for the taking. Insofar as individuals are entitled to the fruits of their labour, the petrol - being the fruit of labour - ought to be subject to property rights, and not held in common.

Of course, in the real economy, things are a little more complex, but the principles are the same. A potter might take a lump of clay from the ground, turn it, let it dry in the sun - and when he claims the right to dispose of the finished vase (to keep it, to give it away or to sell it), it is indisputably *his* labour which has produced it. In the case of petrol sold to motorists at the pumps, however, the position is obviously different. The vendor has not produced the petrol himself. In all likelihood, he will have paid a distributor who paid a refiner who paid an extractor of oil. And at each stage, the person will probably not have put in the labour himself*; the refiner whom the distributor pays will not have done the work of refining himself, but will have employed other people (possibly hundreds or thousands) to do so, and will have paid them for their labour. It might be thought that this is where the theory of property rights as enshrining people's entitlement to the fruits of their labour breaks down. Thus Marxists contend that, in a system of private property, the workers employed do *not* reap the benefit of their labour; it is "alienated" to their capitalist employer, who himself profits from the fruit of the workers' labour when he sells the product of that labour (the refined oil to the distributor) and pays only a small

* "The person", of course, may not be a "he" or even a "she" but a company - a group of people deemed by the law to be a person.

portion of that profit in wages to the workers, pocketing the remainder for himself. But the "alienated labour" argument, although superficially attractive, rests on fallacious assumptions. It presupposes that the workers are entitled to all the value added to the raw material at the production stage - the difference in value between the unrefined oil and the refined oil - because their labour is what has "produced" the difference and is therefore "worth" the value added. In reality, of course, other factors will also have been essential contributories to the difference between the raw material and the product: not only machinery belonging to the employer but also risk (for the *worker*, failure of the business will at most mean redundancy; it could ruin the *employer*). It can never be possible to quantify the proportions in which these various factors make up the value added in the production process. The "alienated labour" argument presupposes, moreover, that a person's labour can be assigned a specific objective value which he "ought" to receive. But, as noted above, there is no meaningful way of assessing the value of labour or anything else other than what people are prepared to pay for it. The potter is entitled to as much for his vases as anyone is willing to pay for them; the petrol vendor is entitled to as much for his product as anyone is willing to pay for it; and, in exactly the same way, the employee is entitled to as much for his labour as employers are willing to pay. If he receives that much, he is reaping the benefit of his labour; neither more, nor less. It may well be that as a self-employed person or an employer he would earn more from producing the same thing; but, not incurring the risks involved in being self-employed or an employer, he is earning as much as his labour is worth *as an employee*. On a principle of private property, a person's labour is his, to use for himself or to sell, perhaps to an employer. Workers being paid the market rate reflects their right to sell their services to an employer (or not to do so), and thus enshrines the freedom to "dispose of"

themselves as they please (a person belonging to himself, not to others) - in a way that common holding never can.

On the other side of the equation, it is the same. The purchaser who pays for petrol is entitled to property rights over it: he has exclusive rights to dispose of it as he pleases. He obtains it in a free and voluntary exchange by which he hands over to the vendor "his" money: money over which he had property rights, having perhaps earned it from selling something he had produced or from selling his services to an employer. If he did not enjoy property rights over that money - the exclusive right to dispose of it as he chose (for example, by buying petrol) - this would be depriving him of property rights in the productive efforts or services or labour of his mind or body. It would be saying that his person was not his, but belonged to others. The absence of property rights would, again, be tantamount to enslavement. Contrary to Ryan's protestations⁷⁶, therefore, private property does indeed sustain liberty.

1.4.2.B: The absence of property is inhumanity

It hardly needs saying that, whereas (for the reasons just put forward) abolishing private property inevitably entails depriving individuals of the fruits of their own labour, not all the private property held by each individual is the fruit of his own labour. Private property cannot be justified entirely in terms of a person's rights over his labour - for the simple reason that labour does not account for all holdings of private property.

Earlier in section 1.4.1, private property was defined as the right to exclusive disposal of a material object, including the right to alienate the object from oneself. This obviously carries the implication that an

owner can voluntarily transfer ownership of a thing to someone else, so that the latter person becomes its owner. The doctrine of private property thus recognises a person's right to own a thing if it has been transferred to him by, or with the consent of, its previous owner. Without such consent there is no legitimate passing of ownership, so that (for instance) a thief is not recognised as enjoying property rights over the goods he has stolen. (On the contrary, he has violated the property rights - the rights of exclusive disposal - of the legitimate owner.) But people can legitimately acquire property rights other than through the fruits of their labour, including by way of gift or inheritance (as well, of course, as voluntary exchange).

To return to the example of the purchaser of petrol. It was argued above that he is entitled to property rights over the petrol he has bought, to treat it as "his", and to the exclusive right to dispose of it as he pleases*, because he freely and voluntarily exchanged it with "his" money. It was suggested that he might have earned the money from selling something he had produced, or from working for an employer. In that case, his property in the money, and hence in the petrol, would be justified by reference to his being entitled to the fruit of his labour. But, of course, he might have obtained the money in other ways which the doctrine of private property regards as legitimate - but which cannot be said to be the fruit of his labour. He might have been given it. He might have won it in a competition or in gambling. He might have speculated successfully on the stock market. He might have inherited it. He might, in short, own it by luck rather than labour.

* subject, as noted in section 1.4.2.A, to the constraints which operate on every other right: "My property rights in my knife allow me to leave it where I will, but not in your chest"⁷². The petrol owner is not entitled to douse the petrol over his neighbour's children.

So, likewise, in the case of the refiner who is paid for selling refined oil to the distributor. As has been seen, in all probability, he will not actually have done the refining himself, but will have employed other people to do the dirty work and, although he will have paid them wages for their labour, he obtains a much higher sum for the finished product and he thus profits from *their* labour. Even if, as was argued earlier, the workers cannot justifiably expect to earn more for *being employed* (that is, where they earn as much as anyone is prepared to pay for employing them), it may well be that the employer does much better financially from the arrangement than his employees - such that, given the opportunity, many would want to change places with him. Why, then, do they not become employers, like him? Why is he able to be the employer, and to derive (in all probability) more profit from the arrangement than they, while they are not? Usually the answer is simply that he starts off with more than they do. He has the refinery - the land, plant and equipment - and he has the money to pay lots of people's wages, to advertise and so on. In short, he has the capital, and because he has the capital he receives more money than they do as a result of their labour. This, of course, is the well-known Marxist distinction between "capital" and "labour", whereby those with capital are able to "exploit" the labour of others.

Hence, under a system of private property, the refiner's profits are largely the result not of his labour, but of his capital. It may be in fact that his capital is the fruit of his labour: the barrow boy made good and other, less dramatic, cases of self-made wealth. But, as a matter of observable reality, it is at least as likely that he obtained it by luck: inheritance, for example. To many people this aspect of private property seems unfair, unjust - and hence unjustifiable.

It is hard to see how there is anything "fair" about some people being richer than others by sheer luck. But what will be argued here is that private property ownership, even to the extent that it derives from elements other than the owner's labour, is nonetheless justified - because, were private property to be shorn of these elements, society would need to operate in a way not consonant with what is generally considered as morally acceptable. It would be inhumane, and intolerable.

The first, and most obvious, unfairness about property holdings is that, as the most rudimentary grasp of history makes clear, the initial allocations of property ownership - the point of departure for subsequent purchases and sales and other transfers of wealth, and from which the current pattern of ownership is ultimately derived - do not appear to have been made on any just, or morally justifiable, basis. This point is made with particular force by Mill in *Principles of Political Economy*:

The social arrangements of modern Europe commenced from a distribution of property which was the result, not of just partition or acquisition by industry, but of conquest and violence.⁹⁶

And it is surely such considerations - the appalling thought that the rich in society may owe their privileged position to pillage and murder by their forbears (truly living on immoral earnings) and that the poor are the continuing victims of monstrous crimes as yet unexpiated - which lie behind the obsession of Locke and others with the *original* appropriation of property. Even Nozick, one of the staunchest modern defenders of the institution of private property, gives thought to what steps, if any, should now be taken to "rectify" past injustices in the acquisition of holdings, and admits himself defeated by the problem⁹⁷.

Undeniably there is a problem here. But whether the probable arbitrariness and unfairness of original allocations of property are such as to render the current situation unjustifiable, or (which is the same thing*) are such as to justify "rectification", depends on how a number of factors are assessed. For there can be little doubt that if such a rectification were to be attempted - for instance by a single redistribution of capital from the "beneficiaries" of the original injustice to its "victims" - even on the (improbable) assumption that such a thing were practically feasible, the costs to society would be immense. It would be an administrative nightmare; it would entail immeasurable economic disruption and detriment; and it would involve enormous social upheaval, with deprivation and pain being unexpectedly inflicted on individuals who themselves bear no personal moral guilt. Maybe these are costs worth paying, and are outweighed by the greater moral outrage of leaving things as they are. In determining this, the degree of injustice involved in leaving things as they are, it is necessary to enquire how much the current holdings of wealth reflect the original unjust allocations, bearing in mind the manifold increase in overall wealth since then: the extent to which, for example, the current distribution of wealth in England can plausibly be accounted for in terms of the forcible allocation between Normans and Saxons that occurred in the aftermath of 1066. It is only insofar as such connections can plausibly be made that the original distribution of property has any moral significance**.

* assuming that *some* form of private property is justified for the reasons set out in section 1.4.2.A.

** And, as Norman Barry has pointed out, this makes it impossible to know what actually *would* be a fair "rectification". For if there is an obligation to reimburse the successors of the original "victim", should they be entitled only to the value of the original property holding when it was unjustly acquired, or also to the value added by the successors of the original acquiror? On the one hand, the acquiror's successors are entitled to the fruits of their labour on the holding. But, on the other hand, the victim's successors "might well claim that the original unjust acquisition denied them the right

But leaving aside the original unfair distribution, private property legitimises other apparently unfair transfers of property which continue to be carried on to this day. One of these is that people acquire property not through their own labour or by dint of their own efforts, but by the sheer good fortune of being given it. This is obviously the case when people inherit wealth, and it is also the case when - with equal unfairness - they receive gifts *inter vivos*. (There is no morally relevant difference between the two.) But would eliminating this unfairness make society better? Is it better to accept the unfairness - or to remove it such that no-one gives anything to, or receives anything from, anyone else, and that people keep for themselves everything they earn? For the implication of objecting to "unearned"/"given" property amounts, purely and simply, to this: the "problem" identified is in fact altruism, and the only way to "cure" it is to repress the human impulse for generosity and to maintain rigid self-sufficiency. The case against inheritance and gifts is an exaltation of selfishness. It is "individualism with a vengeance"^{98*}, and it is morally repugnant.

Finally, there is a category of property ownership which, despite being acquired by voluntary exchange (contract) rather than by gift or bequest, is nonetheless often felt to be unfair. It can be said about many people who own property that, even though they were not simply given it, they are still lucky to have it, and do not necessarily "deserve" it by virtue of effort or merit. It is frequently suggested, for instance, that pop stars or sportsmen do not deserve to earn as much as they do (and

to develop the land", so that they are in fact entitled to at least some of the value added^{97^}.

* which is ironic, since it is most often socialists who profess themselves repelled by "excessive individualism".

certainly do not deserve to earn more than, say, nurses). They are lucky to be so well-off.

It is in the nature of luck that it operates unfairly: luck is, almost by definition, the opposite of fairness. But this does not necessarily make it *unjustifiable* that property rights should attach to the fruits of luck, or that people should only own what they deserve. Pop stars and sportsmen may not deserve their wealth but, as Nozick points out, they earn so much as a *result of people's free choices*. Nozick cites the case of a basketball player who contracts to play for a team on condition that, in each home game for a season, twenty-five cents for each ticket sold goes to him. (The team members agree to this because the player is such a star attraction that he will pull in more crowds and increase *their* income.) When the season starts, the team raises the price of its tickets by twenty-five cents, so that the public are in effect paying a "levy" to see the star player. (The public are willing to pay the higher price because they are so keen to watch him play.) Nozick writes:

Let us suppose that in one season one million persons attend his home games, and [the player] winds up with \$250,000, a much larger sum than the average income and larger even than anyone else has. Is he entitled to this income? Is this... unjust? If so, why?⁹⁹

Brian Barry takes great exception to what he calls this "now notorious argument of Robert Nozick [that] if a large number of people voluntarily pay... to watch some star performer, they can obviously have no valid objection to whatever distribution arises from it":

You might as well say that every time we turn on a light we consent to nuclear reactors and acid rain, or that by not between us putting some arbitrary amount of money per year into a public call box

somewhere on the Yorkshire moors, we consent to its being carted away¹⁰⁰.

But this is to miss the point. Nozick's example, drawing attention to the fact that the basketball star's wealth derives from people's free choices, has significance not because it suggests that people consented to his "undeserved" wealth and hence legitimised it, but because it highlights a contradiction between, on the one hand, the demands of "fairness" and, on the other, the harmless and legitimate exercise of freedom (to pay twenty-five cents of one's own money to go to a basketball match). Nozick's point is that, if the "unfairness" of the basketball player acquiring so much wealth so easily were to be removed, it could only be at the expense of freedom.

A more sustained criticism of Nozick's basketball player example is made by Robert Young, in a 1988 article in the journal *Political Studies*. Young claims that the liberty-based arguments used to justify the unfair transfer of wealth from the one million spectators to the star player are "unconvincing"^{100a}. However, Young makes no attempt to refute the proposition that the spectators' liberty would be infringed if they were prevented from going to the player's matches; instead he asserts that their liberties are infringed *to a greater extent* by the inequalities resulting from their going to his matches. "Serious inequalities", Young writes, "can and do undermine the effectiveness of the civil and political liberties of individuals"^{100a}. Winding up with \$250,000, the star player would command "a large financial resource which would enable him to exercise power over the lives of fellow citizens", putting him in a position where "he can interfere with the autonomy of his fellow citizens"^{100a}.

What kind of "interference" is Young speaking of here? It turns out that his case depends on using the word "liberty" to mean power or ability (a confusion which he tries to mask by the terminological fudge word

"autonomy"). Clearly, the transfer of \$250,000 from spectators to player means that they will have less power than he to do certain things (although they presumably always had less power than he to play basketball, and some of them may have *more* power than he in other respects - for instance, to seduce members of the opposite sex, or to persuade in argument). But this does not mean that their *liberties* are thereby interfered with: as was shown earlier in this chapter, power and ability are not the same as liberty. In a state which respects and enforces classical liberty (including property rights and freedom to contract), the player will *not* be allowed to infringe his fellow citizens' liberty: he cannot coerce them to attend his matches, he cannot imprison them, he cannot kidnap them or steal from them. No matter how much wealth or power is transferred to the player, *nobody's liberties are infringed*. The only infringement of liberty would be if they were prevented from attending his matches and voluntarily paying what he asks for, or if he were prevented from accepting.

To reiterate: however "unfair" it might be for the basketball player to obtain property without deserving it, the "fair" distribution of holdings could only be achieved by infringing freedom. Removing the unfairness from property is not justifiable - indeed, is unjustifiable - simply because *it requires the abridgement of freedom*. It may be unfair and undeserved, but the basketball star in Nozick's example is wealthy because people have chosen to go to his matches. They want to do so. It would perhaps be fairer, and he would have less undeserved wealth, if a large proportion of those people did not go to his matches. But if they want to, why should they not go? It may be unfair if a beautiful woman whom I want to marry rejects me in favour of another man - even if it is on account of his better looks and keener intelligence; after all, he did not *earn* his good looks and fine mind. But

what relevance has fairness to her entitlement to make the choice?¹⁰¹

It is normal, natural, human to want to make choices which discriminate between people, advantaging some and disadvantaging others, even where that discrimination is unfair. It would be inhuman to deny people the right to do so: to deny the beautiful woman the right to marry whom she wants, to deny the basketball player's fans the right to spend their twenty-five cents each to see him. In another of Nozick's illustrations, already cited in chapter two of this thesis*, filmgoers in a town are faced with a choice between two cinemas next to each other¹⁰². If they choose to go to one rather than the other, its owner will take more money than the owner of the other. This inequality may be unfair, unearned, undeserved: maybe the fact that one film would prove more popular than the other could not have been predicted. But it does not follow that the unfairness should be rectified, that half the cinema-goers should be forced, against their will, to go to the second cinema. Applying that policy consistently, and ensuring that property is never unfairly or undeservedly acquired, would have the result that the state continually interfered in people's lives¹⁰³ and determined their choices. It might remove the unfairness, but it is morally unacceptable.

Contemplating these examples, the objection might be made that there is another solution to the "unfairness" problem which has so far been overlooked, and that freedom need not be curtailed in the way described. Stopping people attending the basketball star's matches or forcing them to go to the second cinema are, of course, *not* the only ways to remove the unfairnesses of wealth distribution which result from those people's free choices. An alternative solution would be to

* Section 3.2. of chapter two.

"redistribute" the income after it has been acquired, for example by means of taxation - so that, in the case of the cinema owners, the unfairness is removed and they receive the same. But the same as what? Just the same as each other, or the same as everyone else - basketball players, nurses, refinery workers, window cleaners, pornographic video stars? At this point the difficulty with the alternative solution should become apparent: as noted already, there is no *objective* standard for assessing the value of labour, and how much a person deserves. So, how does one decide who receives what?

If the decision is left to the market, such that each person receives for his services what other people are willing to pay for those services, the result may be that star basketball players become fabulously and undeservedly rich. Therefore, *if unfairness is to be avoided, the decision must not be left to the market: that is, it must not be for ordinary people to decide.* Instead, the decision must be taken centrally, and *the state* must be given the power to decide what each person should receive. This of course involves according to the state enormous power over people's lives and, in the absence of objective standards, the exercise of that power must necessarily be arbitrary. It is unavoidable that the people who exercise most influence over the state - the vested interests with most "industrial muscle" or, in a democracy, the most sophisticated public relations - will be those best able to manipulate the state's enormous arbitrary power so that they receive the most. The "alternative solution" to unfairly acquired property turns out, then, to be no different: more power to the state, less freedom to people. The cure is worse than the disease.

1.5. Basic propositions

From the foregoing discussion of property rights, economic liberty, ability and autonomy, a number of basic propositions emerge. They are as follows.

In order that people's labour should not be enslaved¹⁰⁴, and in the interests of humanity (allowing people to be as generous and giving as they please, allowing people to make the choices they want rather than the choices which "fairness" dictates)¹⁰⁵, people are entitled to private property rights.

An entitlement to property rights entails an entitlement to exercise control and sovereignty over the things one has¹⁰⁶. A state which takes people's economic decisions for them - which prescribes how they must spend *their* money and arrogates to itself the right to allocate their wealth as it sees fit - thus assumes control over what they are entitled to control. It violates their sovereignty. It diminishes their freedom.

Policies which involve government in promoting "ability" have precisely this effect. Ensuring that people have access to material resources such as will enhance their ability requires the state to take on the role of allocating material resources and interfering in how people spend their money - through taxation, nationalisation, the setting of minimum wages. Such policies, albeit that they infringe people's liberties¹⁰⁷, are necessitated by a commitment to the "positive" ideal of autonomy, since that ideal implies increased availability of options, hence of ability, hence of material resources¹⁰⁸.

The pursuit of the "positive" conception of freedom-as-autonomy therefore unavoidably undermines people's sovereignty and diminishes their liberty. (Interestingly, even Gray, despite championing the cause of autonomy, appears willing to accept this: the promotion of autonomy, he writes, sometimes "encompasses adoption of policies that are illiberal in that they curb personal sovereignty"¹⁰⁹.)

It is in the light of these propositions that Mill's conception of liberty, embodied in the very simple principle, should now be considered.

2. WHAT MILL SAYS

In the epigraph to this chapter, two mutually incompatible uses of the term "liberty" were presented. One* - which has been called here the "classical" conception - involves a person being free to do what he pleases with himself and with what he has**. It assumes private property rights, the absence of which amounts to enslavement and inhumanity. Accordingly, it embraces economic liberty and implies that policies which entail the state taking people's economic decisions for them, such as taxation, infringe people's liberty (albeit sometimes justifiably, like any other constraint on liberty).

The other conception*** is socialistic in its implications. It involves the promotion of "ability". If it is pursued, that can only be at the expense of liberty in its classical sense.

Mill's very simple principle is intended to promote and safeguard liberty. But *which* conception of liberty does he mean? The one which involves ability and autonomy? Or the one which is based on a presumption of private property? The one which treats taxation as a violation of liberty, or the one which considers that

* Hayek's.

** It is not implicit in this that a person *should* necessarily be free to do whatever he pleases with himself and with what he has. This is merely a *definition* of what is meant by the term "liberty"; it is not normative. Thus, many people who use the term in its classical sense would contend that people should *not* be free to do what they please when doing so would either harm others or violate the liberty of others - in other words, that people's "liberty" (in the classical sense) should be subject to limitations.

*** Roy Hattersley's.

taxation enhances liberty (by spreading access to material resources more widely)?

Mill's words in the epigraph provide little by way of clarification. To say that "the only freedom which deserves the name" is that of "pursuing our own good in our own way"¹ does not give much of a clue. Or, rather, it is the most revealing clue to Mill's conception of liberty. For, once again, textual analysis of what Mill says reveals only ambiguity and ambivalence. It is impossible to know what kind of liberty is enshrined in the very simple principle - and whether its implications are free-market/liberal or socialistic - because, on this crucial point, Mill simply is not clear.

2.1. Mill and autonomy

This lack of clarity is all too apparent in the enormously varied - and contradictory - impressions which Mill's critics have of what he means by liberty. To Berlin, Mill's is a rigorously "negative" conception of liberty, a belief in "the rigid limitation of the right to coerce" such that men are "left free from interference by other men within a certain minimum area of their lives, which he regards as - or wishes to make - inviolable"¹¹⁰. To Noel Annan, also, *On Liberty* is an exposition of "the idea of *negative* liberty"^{111*}. But to Neil Thornton, on the other hand, it demonstrates "Mill's recognition that it is impossible to formulate a defensible 'negative' liberalism taking non-interference as the highest value... What Mill is demanding freedom *for*, is individuality and self-development"^{112**}.

* Annan's emphasis.

** Thornton's emphasis.

Alongside Thornton - and in sharp contrast to Berlin and Annan - Ryan and Raz regard Mill's conception of liberty as essentially "positive". From Ryan there is a portrayal of Mill as holding a thoroughgoing socialistic conception of freedom-as-ability:

Mill thinks that the "freedom" offered to those without resources is illusory, and that only a public and effective concern for freedom and diversity could really be relied on to secure them¹¹³

- words not dissimilar from Mr Hattersley's remark that "the great understanding of the principle of freedom is that it is meaningless unless you can exercise those rights and that requires more equality"⁵⁵. For his part, Raz interprets Mill's principle of liberty

not as a restraint on the pursuit of moral goals by the state, but as indicating the right way in which the state could promote the well-being of people¹¹⁴ and he regards Mill's principle as linked to "the principle of autonomy"¹¹⁵ (Raz's advocacy of "the principle of autonomy" is discussed in section 1.2.3.B of this chapter).

This last view - placing Mill in the ranks of those who conceive liberty as autonomy - is shared by John Gray. He writes:

Nor can J.S. Mill finally be characterised unequivocally as a negative libertarian. For, despite the classical-liberal subject matter of *On Liberty* in the grounds and limits of political obligation, the conception of freedom at work there is one... of which it is the notion of a free or autonomous man... which is essentially constitutive⁴⁷.

Elsewhere Gray writes that the argument of *On Liberty* is one

in which a strongly "positive" conception of freedom as autonomy figures centrally¹¹⁶.

As was seen earlier in this chapter*, the right to autonomy, as used by Gray, is something which, first of all, is "possessed not by all men, but by those possessing in some minimal degree the capacities of an autonomous agent"³⁵ and, secondly, implies not just the absence of restraint but an expansion of "the options open to man"⁴⁷. Gray sees Mill's concept of autonomy as designating

the capacities and opportunities involved in self-critical and imaginative choice-making³⁵

and a society of autonomous agents as one whose members had developed these capacities up to at least a minimum level¹¹⁷.

To his credit, Gray recognises that there is a problem in attributing this particular conception of freedom to Mill. He admits that

except in a letter to a correspondent, Mill never uses the term "autonomy" in the context of the argument of *On Liberty*¹¹⁸

and he acknowledges the need to find textual evidence in Mill's writing to support his claim¹¹⁹. "Much of the clearest evidence," Gray says, "occurs in the famous third chapter of *On Liberty*"¹¹⁹ - the one entitled "Of individuality, as one of the elements of well-being" - and he cites two passages from that chapter to support his argument. First:

The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice. He who does anything because it is the custom makes no choice¹²⁰.

And, secondly, a couple of paragraphs further in *On Liberty*:

A person whose desires and impulses are his own - are the expression of his own nature, as it has been developed and modified by his own culture - is

* Section 1.2.3.B.

said to have a character. One whose desires and impulses are not his own has no character, no more than a steam engine has character¹²¹.

In these two passages quoted by Gray, Mill does indeed seem to be exercised by a concern for what Gray calls the capacities of an autonomous agent - "the capacities and opportunities involved in self-critical and imaginative choice-making"³⁵ - with his emphasis on "perception, judgement, discriminative feeling, mental activity"¹²⁰ and, indeed, "character"¹²¹. As noted in chapter one of this thesis (section 2.2.2.) Gray's claims that Mill's idea of liberty has many of the characteristics of autonomy are plausible. The alleged concern with the capacities of an autonomous agent appears at the very beginning of *On Liberty*, where Mill declares that the very simple principle is intended to limit not only "physical force in the form of legal penalties" but also "the moral coercion of public opinion"¹²²: people's decisions being taken not simply in the absence of restrictions by the state, but with an independence of mind. Moreover, the stress laid upon expanding "the options open to man"⁴⁷ and enabling people "to have a good life"³⁴ which is implicit in the concept of autonomy, also finds expression in Mill's frequent identification, in *On Liberty*, of freedom with well-being. Thus, in chapter 2 of *On Liberty*, Mill writes of

the necessity to the mental well-being of mankind (on which all other well-being depends) of freedom of opinion¹²³

and in chapter 3 he claims that

If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a co-ordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all

those things, there would be no danger that liberty should be undervalued¹²⁴.

Yet - and this point was also made in chapter one of this thesis - the apparent presence of "autonomy"-type notions in Mill's conception of liberty is highly ambiguous. It is *not* possible to conclude that "a strongly 'positive' conception of freedom"¹¹⁶ is central to *On Liberty*. Indeed, it is quite unclear the extent to which Mill's conception of liberty in the very simple principle is either "positive" or, on the other hand, "negative"/classical. At times Mill's concerns do seem to be primarily the "negative" ones of preventing external interference. The wording of the very simple principle itself is highly suggestive of this, depicting the impediments to "liberty of action" in terms of "compulsion", "physical force", "legal penalties", "moral coercion" and so on (rather than, for example, the non-availability of options)¹²². The same view is expressed more forcibly in book II of Mill's *Principles of Political Economy* where he describes it as "the perfection of social arrangements and of practical morality" to secure to individuals "complete independence and freedom of action, subject to no restriction" save the prevention of harm to others¹²⁵. By complete contrast, however, just a page further on in *Principles* Mill appears to reject this kind of "negative"/classical liberty as valueless unless accompanied by ability (the Hattersley view that "freedom is meaningless without the capacity to put that freedom into operation"⁵⁵), writing that

the generality of labourers in this and most other countries have as little choice of occupation or freedom of locomotion, are practically as dependent on fixed rules and on the will of others, as they could be in any system short of actual slavery^{126*}.

* Mill adds that, in comparison with this, "the restraints of Communism would be freedom".

Elsewhere Mill seems to go even further, *equating* freedom with ability, when he writes that a day labourer has many of the anxieties which have not an invigorating effect on the mind, and none of those which have. The position of the peasant proprietor is the reverse... he is a free human being¹²⁷.

Mill's confusion on all this is epitomised by the notorious "bridge example" in *On Liberty* - already discussed in this thesis** - where Mill writes that it would be consistent with the very simple principle

if either a public officer or anyone else [who] saw a person attempting to cross a bridge which had been ascertained to be unsafe... [were to] seize him and turn him back¹²⁸.

Is this not a violation of the pedestrian's liberty, imposed for his own good, and hence contrary to the anti-paternalist stipulations of the very simple principle? No, Mill says, this does not involve "any real infringement of his [the pedestrian's] liberty"¹²⁸. What is interesting here is not Mill's conclusion, but the reasoning which leads him there. Mill does not argue that the state has a duty to protect people's lives, since life is an essential prerequisite of (classical/negative) liberty. Instead, he concentrates on the *definition* of liberty:

liberty consists in doing what one desires, and he [the pedestrian] does not desire to fall in the river¹²⁸.

It is as ill thought-out a definition of liberty as can be imagined, allowing for almost unlimited paternalistic intervention in people's decision-making (such that the scope for taking decisions oneself without interference - classical liberty - would be negligible)

** Section 3.3.3.B of chapter one.

without in any way departing from the terms of the very simple principle. Rejecting this allegation, Gray explains the "bridge example" as demonstrating Mill's commitment to just "a weak form of paternalism"¹²⁹, which treats decisions as invalid (and therefore not fully voluntary or free) if they are "clearly not the result of considered rational deliberation"¹²⁹. Ten likewise regards Mill as committed to "weak paternalism"¹³⁰ which, he says, allows for state intervention in an individual's decision "only when there is a defect in his decision"¹³¹ or his "decisions are impaired"¹³⁰, in contradistinction to "strong paternalism" which sanctions interventionism "even when [the individual's] decision is fully voluntary or totally unimpaired"¹³¹.

The totalitarian dangers implicit in limiting people's liberty to take decisions which are "irrational", "defective" or "impaired" ought to be obvious. By what criteria does one judge whether someone's choices (or votes) are defective? How can one tell whether someone's views are rationally reached? Who decides? The concept of "false consciousness", used by Marxists to deprive their opponents' views of legitimacy (and therefore to remove the value of the freedom to express them or realise them) provides a prime example of this kind of thing*.

But such dangers are unavoidable, given the reasoning employed by Mill in his statement that "liberty consists in doing what one desires, and [the pedestrian] does not desire to fall in the river"¹²⁸, so that the public officer is accordingly entitled to prevent the pedestrian crossing the bridge. The pedestrian's decision is deemed involuntary, just as if it had been made under force or as a result of fraud**, and therefore no liberty is lost by

* See also the traditional Soviet practice of consigning political dissidents to psychiatric hospitals, presumably to instil "reason" in them.

** See section 1.2.3.B of this chapter, and section 1.4.1. of chapter two for the rationale behind the "force or fraud" exception.

the interference in that decision. It is the same reasoning as that of Feinberg when he says (as quoted above, in section 1.2.3.B) that "usurious agreements are indeed coercive in the manner of all 'unconscionable' contracts,... their coercive character reduces the voluntariness of the consent of the weaker party"⁵¹. And it is the same reasoning which Himmelfarb notes in the oft-used argument that liberty requires "legislation and government intervention to promote economic security, or material welfare, or racial equality... because the individual is not in control of his situation"⁴⁹.

The fallacy in this reasoning is that it fails to recognise the crucial distinction between the decision and its consequences. When someone agrees to do something under duress of force - at gunpoint, for example - his decision is truly involuntary, because at that moment he does not want to do *the thing itself*: he does it only because he is being compelled to do it. But when the pedestrian in Mill's bridge example starts to cross the bridge (before being deprived of the freedom to do so), he does want to do the thing itself. He desires to cross the bridge, and if, as Mill says, "liberty consists in doing what one desires", refusing to let him cross the bridge IS - *pace* Mill - an infringement of his liberty. Mill points out that the pedestrian does not desire to fall into the river, but that is the *consequence*, not the thing itself. Many choices and decisions which people take have consequences which they do not desire. It is often the case that people who move home to a different town find themselves unhappier there than they were in their old town. Or that people who buy things discover later on that their purchase was a waste of money. Or that people who marry find that their marriage is not all they had hoped. Obviously in these instances, the people involved do not desire misery or to obtain a bad bargain or to have an unhappy marriage. But none of this means that their decisions and choices - to move home, to buy things, to

marry - are in any sense involuntary; still less that some public officer should interfere with their freedom to make those decisions and choices; still less that, if ever their freedom to do so were interfered with by the state it would make sense to say that this did not involve "any real infringement of [their] liberty"¹²⁸.

Yet this is precisely the logic employed by Mill in the bridge example, when he defines liberty so as to exclude the freedom to take decisions *whose consequences* one does not desire. A state which respected *that* kind of liberty would not respect the freedom to make a bad bargain, to enter an unhappy marriage, to do anything that would make the agent worse-off or unhappy. It is hard to conceive of a more repressive society.

None of this is meant to suggest that Mill *intends* such a situation. After all, it runs directly counter to Mill's claim, in the paragraph of the very simple principle itself, that an individual's "own good, either physical or moral, is not a sufficient warrant"¹²² for interfering in his freedom and that an individual

cannot rightfully be compelled to do or forbear because it will make him happier, because, in the opinion of others, to do so would be wise or even right¹²².

But this is exactly the problem. The contradictions in *On Liberty* are what make it so difficult to know what would be the practical outcome of applying the very simple principle - a very free society or a very repressive one, a liberal society or a socialist one. The point about the bridge example is not that it necessarily shows Mill's concept of liberty to be totalitarian, but that his imprecision in defining liberty - indeed, his almost cavalier attitude to it - makes his principle such an ambiguous, and unreliable, safeguard of it.

2.2. Mill and property

The significance of the concept of property rights in defining liberty was considered in section 1.4. of this chapter. It was argued that classical/"negative" liberty (the entitlement to do what one likes with oneself and with what one has) requires respect for property rights; whereas the "positive" pursuit of "autonomy", necessitating the enlargement of options and "ability", entails the infringement of property rights as material resources are allocated by the state to broaden access to material resources. Further, it was contended that respect for property rights is justified, on the grounds that their infringement puts men's labour at the disposal of others (which, to the extent that this happens, is tantamount to enslavement) and violates the realisation of human, and humane, impulses (generosity, and freedoms such as the freedom to see one's preferred sports star in action).

Mill's attitude to property rights is thus a crucial indicator of his conception of liberty. The first thing to note about this attitude is that Mill is not opposed to the continued existence of private property, at least for the time being. In his writings on socialism, published posthumously by the *Fortnightly Review* in 1879, Mill sees the "principle of individual property" surviving "for a long period to come"¹³² and he argues that the alternative to private property proposed by socialists requires such a transformation in human nature that it "is not available as a present resource"¹³³. The state which today adopts the very simple principle as its guiding light must, Mill is saying, respect property rights as well.

But Mill's is, at best, an ambiguous commitment to property rights. It is neither absolute nor unequivocal, and is far from being the firm commitment on which, as argued above, a classical conception of liberty rests. It is both *limited* in its scope, and *contingent* on circumstance.

2.2.1. Limited property rights

The case for private property as put forward in this thesis was based partly on the idea that people are entitled to the fruit of their labour. But that was only *part* of the argument. Much of the property people hold, it was pointed out, is not the fruit of their labour - it may be gifts from family and friends, it may be inheritance, it may be what they were lucky enough to receive because of the popularity of the service they provide (a cinema-owner who puts on a great box office success). If private property is limited to the fruits of labour, its extent is much reduced - and the causes of "unearned" property, in the form of human generosity and the exercise of free choice, are repressed.

Mill's adherence to property rights *is* limited in this way. In book II of his *Principles of Political Economy*, Mill states the "essential principle" of property to be:

to assure to all persons what they have produced by their labour and accumulated by their abstinence¹³⁴ and in the same work he insists that "the only unequivocal property... anyone could claim was in what he had made by his own efforts"¹³⁵. Mill's refusal to give any greater, or more unequivocal, status to property rights appears to lie in his unease at the way property was originally appropriated: the suggestion, already quoted, that it was "the result, not of just partition or acquisition by industry, but of conquest or violence"⁹⁶.

The implications of this are spelled out by Mill. He is strongly critical of unearned property which, as he puts it in a *Vindication of the French revolution of February 1848*, permits some people to

be born to the enjoyment of all the external advantages which life can give, without earning them by merit or acquiring them by any exertion of their own¹³⁶.

And, in *Principles*, he calls for restrictions on inheritance:

If it be said, as it may with truth, that those who have inherited the savings of others have an advantage which they have in no way deserved, over the industrious whose predecessors have not left them anything; I not only admit, but strenuously contend, that this unearned advantage should be curtailed¹³⁷.

Such a curtailment on the right to bequeath property must, by the same logic, apply to the right to give property *inter vivos* - leaving a "right of property" which only recognises as legitimate each person keeping what he has earned for himself: in Nozick's words, "individualism with a vengeance!"⁹⁸. More than that, the limitation of legitimate property rights to what is "deserved" and "earned" raises questions about the distribution of property - does a property tycoon "deserve" to have more than a doctor? - which could allow for a lot more *dirigiste* interference in property ownership than is apparent from Mill's stated rejection of the socialist alternative to private property¹³³.

Mill's justification of property solely in terms of labour leads him to postulate a further limitation on property rights: they should not extend (or at least not completely) to *land*. "No man made the land," Mill argues in *Principles*, and therefore

when the "sacredness of property" is talked of, it should always be remembered that such sacredness does not belong in the same degree to landed property... Landed property is felt... to be a different thing from other property¹³⁸.

The point here is that, since "the essential principle" of property is to assure to people the product of their labour¹³⁴, that principle

cannot apply to what is not the produce of labour, the raw material of the earth¹³⁴.

Accordingly, Mill says, any justification for giving people property rights over land must lie elsewhere - if they improve the land, with benefits for the economy - and this makes Mill doubt whether property over land should be recognised under English law:

Landed property in England is... very far from completely fulfilling the conditions which render its existence economically justifiable¹⁴⁰.

Mill's reasoning here gives rise to two observations. First, it is hard to follow the logic of his singling out land as "a different thing from other property"¹³⁸ on the grounds that it is the "raw material of the earth"¹³⁴ and "no man made the land"¹³⁸. For land is not the only "raw material of the earth". So, too, are oil, gold, coal. Indeed, as noted earlier, the very meaning of property is that it endows people with rights (of exclusive disposal) over material resources - which, *by definition*, are part of the earth and not of themselves. Of course, whereas "no man made the land", people "make" petrol in the sense of extracting oil, refining it, and so on. They "make" gold rings in the sense of mining the gold, melting it down, crafting the ring. But the property right which a person has in a tankful of petrol or in a gold ring does not just extend to the value added by such labour. The value of petrol sold at a garage or a gold ring sold at a jeweller's is not just its labour value (to repeat a question asked several times before: how can one possibly

assess the value of people's labour?), but rather the amount that people are prepared to pay for it. And that, of course, is determined not only by the labour put into "making" the finished product, but by the commodity itself. Petrol is more in demand from motorists than nettle-juice - and gold rings are more in demand than tin rings - and this would remain the case even if exactly the same labour went into changing the raw material into the finished product. It follows that there is value in the commodity element of petrol and gold rings - the oil and the gold respectively. If people are entitled to full ownership of a tankful of petrol or a gold ring, this gives them property rights in raw material commodities over and above their property rights in the fruits of labour (that is, in the full value of a gold ring less the full value of a tin ring which required the equivalent labour to produce) - that is to say, property rights in things which "no man made". But Mill does not question such property rights; illogically, he specifically distinguishes land from "other property". Of course, it may be the case (though Mill does not say this) that property rights in raw material commodities such as oil and gold, as well as in land, require special justification. Why should a man own an oilfield or a goldmine? Perhaps he inherited it, or was given it (the result of altruism or free choice again). Perhaps he bought it with money which he earned from his labour (and/or which he inherited or was given). This still leaves the vexed Lockean problem of what justifies the original owner appropriating it from the earth *ab initio*; however, as argued in section 1.4.2.B above, that question only has moral significance insofar as, given the manifold increases in wealth over the centuries since then, the original allocation of property holdings can plausibly be said to have a bearing on the current state of affairs*.

* As it was put earlier: to what extent can the present distribution of wealth in England plausibly be attributed to the division of property between Normans and Saxons following the conquest of 1066?

The second observation to be made about Mill's attitude to property rights in land is that he is not absolutely opposed to them. His opposition to landed property in England rests only on his view that it does not fulfil the conditions which render its existence "economically justifiable"¹⁴⁰. If, however, the land were being "improved" that would be a different matter. Mill argues that idle landlords should be bought out by compulsory purchase, and their land then resold, or leased, to tenants who would thereby have an incentive to improve their property¹⁴¹. In the hands of "improving" tenants, therefore, property rights are justifiable in Mill's eyes. This, then, is a contingent right to property - contingent on whether it brings economic improvement. As Mill says in *Principles*, ownership of land is

wholly a question of general expediency. When private property in land is not expedient, it is unjust¹³⁸.

Curiously, it appears that even Mill's justification of non-landed property - that it assures to all persons what they have produced by their labour¹³⁴ - might likewise be based not on the idea of a man's *right* to the fruit of his labour, but (as in the case of land) on expediential considerations. This view has been fairly persuasively argued by F.R. Berger, who quotes a passage from *Principles* where Mill describes an individual's labour as at least partly the result of an investment which society has put into him, through education, training and the inculcation of appropriate mental and physical qualities:

this labour and outlay must be regarded as part of the advance by which society effects its productive operations, and for which it is indemnified by the produce¹⁴².

The inference which Berger draws from this is that, in Mill's eyes, an individual's labour is not fully "his", but is to some extent the product of society. It follows that the fruits of his labour cannot be said to be "his" either, and he is not *entitled* to property. If society rewards him with property to incentivise him, that is one thing; but if society deprives him of property by taxing him (or, presumably, lays claim to his labour by enslaving him*), he has no grounds for complaining that his rights are being violated or that something is being taken from him to which he has "clear and exclusive title by virtue of its being the reward for an exclusively individual effort"¹⁴². What the individual keeps as property is not a moral entitlement, but something which society has conferred on him as a matter of expediency, which is contingent on it bringing the benefits sought (higher productivity as a result of incentivisation), and which is violable.**

2.2.2. Contingent property rights

Whether Berger's interpretation of that particular passage in *Principles* is correct or not, there seems little doubt from a reading of other passages of Mill's that he sees property (property of any sort, including the fruit of one's labour) less as an absolute right or entitlement, and more as a matter of expediency. It is justifiable so long as it brings ulterior benefits, and is contingent on its capacity to bring such benefits.

* [AUTHOR'S NOTE: This is my comment, not Berger's. - MPG]

** See also O. Kurer's comment that, for Mill, "property is one of the central institutions which is evaluated in terms of its social benefits and social costs". (O. Kurer; "John Stuart Mill on government intervention"; *History of Political Thought* (London 1989); volume X; page 473.)

Mill does not appear to accept that the proposition that property rights are necessary for liberty (the proposition made in this thesis, and elsewhere, that *in the absence of property a person's labour is a collective asset*⁹⁴, meaning that he is at the disposal of others and not himself, and hence unfree). As Ryan notes¹⁴³, when Mill defends property (as in his rejection of the socialist alternative "for a long period to come"¹³²), it is not as a corollary to his very simple principle of liberty "entitled to govern absolutely the dealings of society with the individual"¹²². Indeed, in *Principles* Mill actually depicts property as potentially inimical to liberty, writing that the property of the owners of capital gives them power over people who have to sell their labour, and asking whether this is not in fact a threat to, rather than a safeguard of, freedom^{144*}.

On what grounds, then, does Mill base his justification of property? He says that "individual property has presumably a long term before it"¹³² and insists that a new basis of society, involving alternatives to private property, is "not available as a present resource"¹³³. In *Principles*, as already noted, Mill claims that the justification for property ownership lies in its being "deserved", and he argues that only "unearned" property should be curtailed¹³⁷. Gray sees the concept of desert as crucial to Mill's view of property¹⁴⁵. But this is a very flimsy basis for rejecting alternatives to private property. It has already been seen how difficult, if not impossible, it is to assess desert; and, more importantly in terms of how free society would be if Mill's principle were applied, it has been shown how illiberal a state which attempted to allot private property according to desert would be (section 1.4.2.B above). Moreover, as a matter of

* Mill here appears to be using freedom in the sense of "power" or "ability" rather than in its classical sense. It is not the only time he does so, but he is not consistent in doing so. See section 2.1. above.

observable fact, it is the case that much of property ownership is based on factors other than desert: inheritance, luck, earning more than one "deserves" (because the service one provides happens to be in high demand). Mill himself considered that in his own time property ownership bore little relationship to desert; and he pointed out that, although property is supposed to be "the means by which labour and frugality are insured their reward"¹⁴⁶,

an immense proportion of the industrious classes [are]... at some period or other of their lives... dependent, at least temporarily, on legal or voluntary charity¹⁴⁷.

Take away the property acquired other than through "desert", ensure that the industrious are given the "reward" they deserve - and you make property rights very frail indeed. There are plenty of grounds here for violating property rights; few grounds for respecting them.

Elsewhere in Mill's writing, however, an altogether different justification for property is offered - a consideration wholly unrelated to (and inconsistent with) Mill's concern for "desert". It is the same consideration on which, as shown in chapter one of this thesis, a large part** of his argument for liberty itself appears to rest: namely, utilitarianism and the promotion of the general welfare. Private property is preferable to socialism or communism, Mill writes, because of the incentive it provides to produce more, and thus economically benefit society as a whole: where the means of production are in private hands, the owners reap the whole profit of productive success or suffer the whole detriment of failure, giving them a

strong personal motive to do their very best and utmost for the efficiency... of the operations¹⁴⁸.

** although quite how much is unclear.

In the absence of private property, Mill says, this spur to productivity "would not exist"¹⁴⁸. That is to say, property rights have the expedient advantage that they promote the wealth of society, and on this ground Mill favours their continuing existence.

But it is, in Mill's words, a "provisional existence"¹³². It is contingent on its ability to carry on promoting the wealth and welfare of society; there is no commitment in principle to property rights. Mill is quite candid about this, stating that in deciding between private property and collective property, regard must be had to the "requisites of production"

... and the question is, which of these arrangements is most conducive to human happiness¹⁴⁹.

The point about a contingent right is that it is transient. It depends on circumstances, and if circumstances change, the right vanishes. In chapter one of this thesis we saw how Mill's ambiguity as to whether the very simple principle is contingent on its propensity to promote utilitarianism posed a similar problem. It was argued that, if the prospects for freedom flourishing depend upon its propensity to advance utilitarian goals, in any circumstance or situation where freedom does not have the consequence of advancing those goals there will no longer be any reason for having freedom, and it can (and should) be jettisoned. A "free society" which rests on such a fragile principle of liberty, it was said, cannot be assured of its freedom lasting for long*.

As with freedom, so with property rights. Mill's utilitarian concerns once again render his other commitments ambiguous and uncertain. He is in favour of keeping private property for the moment. But he does not

* Section 3.3.1. of chapter one.

rule out its eventual abolition, at a time when "self-interest is... replaced by conscience" as a "spur" to harmonious productive effort¹⁵⁰. Whatever produces the goods is thus acceptable to Mill: if private property does, so be it; if common ownership does, so be it. Mill's writing offers no assurance of property rights enduring, and hence no safeguard to the liberty which is based on property rights.

2.3. Mill and taxation

Classical liberty, incorporating recognition of property rights, means the entitlement of people to do as they like with themselves and with what they have without interference from the state or from anyone else (be they fellow citizens or foreign invaders). It follows that, as already noted, in the classical conception, taxation is an infringement of liberty (which, like other limitations of liberty, may or may not be justifiable): it involves the state interfering in the individual's freedom to do what he likes with what he has, by taking some of what he has - the taxed amount - and disposing of that amount as it (the state) pleases. If a person's income is taxed at, say, 33 per cent, this means that, in any calendar year that he works, it is only from May onwards that his labour is his to dispose of; for the first four months, he is at the service of the state, and the fruits of his labour are the state's to dispose of. It is this which prompts Nozick to describe taxation of earnings graphically (but not inaccurately) as "on a par with forced labour"⁶⁷.

By contrast, the project of promoting "ability" actually looks to taxation as an ally, a means by which the expansion of opportunities can be advanced. Socialists, who tend to conceive freedom in terms of ability, generally have no objection to taxation in principle; on the contrary, it is through taxation that

their various plans for redistributing wealth can often best be realised. If liberty is defined as "ability", taxation ceases to pose a problem: even as it encroaches on liberty, it can confidently be said to enhance it.

Where does Mill stand on this issue? The answer, as usual, is ambiguous. In purely pragmatic, utilitarian terms, he fully understands and sympathises with those who object to high taxation because of its disincentive effect on production. Thus, in *Principles of Political Economy* Mill expresses hostility to progressive income tax on the grounds that, by "relieving the prodigal of the expenses of the prudent", it imposes "a penalty on people for having worked hard and saved more than their neighbours"¹⁵¹. He evinces a similar concern for incentives in his posthumously-published chapters on socialism, writing that in a more egalitarian society the "strong personal motive [of individuals] to do their very best and utmost for the efficiency and economy of the [productive] operations, would not exist"¹⁴⁸.

But these are purely contingent arguments against high taxation, dependent on present circumstance and subject to revision should circumstances change (thus, while Mill thinks that "personal interest will *for a long time* be a more effective stimulus to the most vigorous and careful conduct of the industrial business of society than motives of a higher character", he does not believe that it will always necessarily be so, and he considers that, after years of moral education and improvement, people might one day be persuaded to work hard and produce more without personal financial incentives^{150*}). They are not, therefore, permanent grounds for resisting high taxation. They are not an objection in principle, and hence offer no reason, at a future date in different circumstances, for

* Emphasis added.

restraining the state from undermining people's (economic) liberty through high taxation.

Taxation infringes a person's liberty to do what he likes with what he has and, if that is the kind of liberty which Mill's very simple principle is meant to protect, the very simple principle must be understood as limiting the state's entitlement to impose taxes on people. This was certainly the understanding of Mill's contemporary James Fitzjames Stephen, who wrote that

paying a single shilling of public money to a single school in which any opinion is taught of which any single taxpayer disapproves... cannot be justified without infringing the principle of liberty as stated by Mr Mill¹⁵².

Support for this interpretation appears in chapter 5 of *On Liberty* where Mill explicitly makes the connection between liberty and low taxation when he declares that people's

choice of pleasure and their mode of expending their income... are their own concern and must rest with their own judgement¹¹³

(although he qualifies this by saying that it is subject to first "satisfying their legal and moral obligations to the State" - which of course begs the question of what those obligations should be). And when, in *Principles*, Mill speaks of the necessity of assuring to all persons "what they have produced by their labour and accumulated by their abstinence"¹³⁴ - this, he says, is the "essential principle of private property" - the implication is that taxation, which runs counter to that end, is in principle objectionable.

On the other hand, quite different signals, inconsistent with these principled grounds for opposing high taxation, are given out elsewhere in Mill's writing. It has been argued strongly both by A.L. Harris¹⁵⁴ and by Gray (among others) that Mill's very simple principle

offers no reason for opposing high taxation, or indeed any of the other *dirigiste* forms of economic intervention favoured by socialists; on their interpretation, Mill's principle of liberty is quite irrelevant to the issue, since *the liberty it is intended to protect does not include the economic liberty to dispose of what one has as one pleases without government interference*. In support of this ("Harris/Gray") argument, two passages from Mill's works are most often quoted. The first appears in the final pages of *On Liberty* where Mill lists a number of pragmatic "objections to government interference"¹⁵⁵ in the economy - namely, that many things are "likely to be better done by individuals than by the government"¹⁵⁵, that leaving things to individuals is "a mode of strengthening their active faculties... and giving them a familiar knowledge of the subjects with which they are thus left to deal"¹⁵⁵, and that "every function superadded to those already exercised by the government" constitutes "the great evil of adding unnecessarily to its power"¹⁵⁶ - but appears to regard these points as separate from the concerns of the very simple principle. He writes that, although they are "closely connected with the subject of this essay", they "do not, in strictness, belong to it"¹⁵⁵. They are cases in which

the reasons against interference do not turn upon the principle of liberty¹⁵⁵.

And the reason for this is that

the question is not about restraining the action of individuals, but about helping them¹⁵⁵.

This reason, distinguishing between government interference which "restrains" individuals and that which "helps" them, is the essence of the second main passage cited in support of the Harris/Gray argument. This is the distinction between "authoritative" and "non-authoritative" interference, set out in book V of *Principles*. "Authoritative" interference by the

government, Mill writes, occurs when the state accords itself the right to

interdict all persons from doing certain things; or from doing them without its authorisation; or [to] prescribe to them certain things to be done¹⁵⁷.

Mill contrasts that kind of intervention with "another kind which is not authoritative"

when a government, instead of issuing a command and enforcing it by penalties, adopts the course... of giving advice and promulgating information; or when, leaving individuals free to use their own means of pursuing any object of general interest, the government, not meddling with them, but not trusting the object solely to their care, establishes side by side with their arrangements, an agency of its own for a like purpose¹⁵⁷.

By way of example, Mill says that "there might be a national bank, or a government manufactory [non-authoritative, "helping", interference] without any monopoly against private banks or manufactories [which would be authoritative, "restraining" interference]" or that "there may be public hospitals [non-authoritative/helping], without any restriction upon private medical or surgical practice [authoritative/restraining]"¹⁵⁷.

Mill makes clear his preference for the non-authoritative/ helping type of interventionism over the authoritative/ restraining type, and insists, in the same passage in *Principles*, that the non-authoritative/helping type need not be limited by a principle of liberty in the way that the authoritative/ restraining type is:

It is evident, even at first sight, that the authoritative form of government intervention has a much more limited sphere of legitimate action than the other¹⁵⁸.

So it is more "legitimate" for the state to intervene in such a way as "helps" people. How much more legitimate Mill does not say. But it seems that the principle of

liberty which limits interference does not limit these forms of interference in the same way. It allows for public hospitals, nationalised banks and "manufactories" - and, Gray believes, the state's assumption of "a share of responsibility for poor relief, colonisation, scientific research and the financing of education, among other things"¹⁵⁹. Mill here is according at least some form of legitimacy to various measures of socialist or *dirigiste* economic interventionism; and he does so notwithstanding that nationalisation requires coercion in that the state compels people to invest their money according to its wishes, and publicly-financed services require higher taxation and hence less freedom for people to spend their money as they please.

But on what grounds? Support for state interference to "help" people is of course consistent with the "ability" view of freedom, which sees the expansion of opportunities by the state as an enhancement of liberty. As has been seen (in section 2.1. above), Mill is unclear whether he conceives liberty in its "negative"/classical sense or in its "positive" sense of autonomy and ability. As Raz notes, on the latter definition of liberty, it is "no objection" to a programme of heavy government subsidisation "to point out that the funds necessary for all these policies are raised by compulsory taxation... Tax is raised to provide adequate opportunities and is justified by the principle of autonomy... The principle merely restricts the use of coercion"⁵². It is possible, then, that Mill - like Raz - regards taxation not as a form of coercion or compulsion or a limitation of liberty, but as liberty-enhancing. That would be consistent with his ambiguous view of property rights (described in section 2.2. above). But it is inconsistent with his observation in book V of *Principles* that

There is, ... in almost all forms of government, one thing which is compulsory; the provision of the pecuniary means. These are derived from taxation;

or, if existing in the form of an endowment derived from public property, they are still the cause of as much compulsory taxation as the sale or the annual proceeds of the property would enable to be dispensed with. And the objection *necessarily** attaching to compulsory contributions, is almost always greatly aggravated by the expensive precautions and onerous restrictions, which are indispensable to prevent evasion of a compulsory tax¹⁶⁰.

If taxation is a form of compulsion, why then is it not limited in the same way as any other infringement of liberty by the very simple principle, "entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control"¹²²? Mill is completely unclear on this.

Rather more seriously, if Mill *does* regard socialist interventionism as outside the ambit of the very simple principle, *under what principle is it to be regulated?* Are there *any* reasons for limiting state interference in people's economic liberties, any objections in principle to the growth of state socialism? According to R.J. Halliday,

Mill preferred to avoid final principles and single ends¹⁶¹

- and Gray quotes Mill as saying in *Principles* that the range of necessary government functions cannot be identified

by any universal rule, save the simple and vague one, that it should never be admitted save when the case of expediency is strong¹⁵⁹.

Here, then, is the abandonment of principle in favour of expediency and, more to the point, the abandonment of the purpose of the very simple principle as expressed at the beginning of *On Liberty*: to meet the need for some

* Emphasis added.

"recognized principle by which the propriety or impropriety of government interference is customarily tested"¹¹².

As it turns out, the very simple principle is too riddled with ambiguities to fulfil this requirement. Contrary to the explicit intention of *On Liberty*, expediency - rather than an "opinion to which [people] consistently adhere, as to what things are fit to be done by a government"¹²² - triumphs in the end. On the crucial issue of what kind of "liberty" the principle is supposed to safeguard, Mill is painfully equivocal. Is he using liberty in Hayek's sense of the word, or Mr Hattersley's? Does his concept of freedom embrace economic liberty, or does it involve the expansion of economic opportunities? Does it require property rights to be protected? Does it entail high or low taxation, socialism or free-market liberalism? What degree of state interventionism is compatible with it? These are fundamental questions, on which the practical applicability of the very simple principle depends. But they are questions to which, despite Mill's claims for the principle, no clear answers are forthcoming.

* * *

SOURCES: CHAPTER THREE - THE REAL MEANING OF "LIBERTY"

All page numbers are, unless otherwise indicated, references to:

John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974/1859).

- 1 Page 72.
- 2 F.A. Hayek; *The constitution of liberty*; Routledge (London 1960); pages 16 to 17.
- 3 Roy Hattersley; "The real meaning of liberty" - in *The Observer* (London), 24th January 1988.
- 4 Page 59.
- 5 Page 71.
- 6 G.W. Smith; "J.S. Mill on freedom" - in: Zbigniew Pelczynski and John Gray (editors); *Conceptions of liberty in political philosophy*; Athlone Press (London 1984).
- 7 John Stuart Mill; *An examination of Sir William Hamilton's philosophy*; Longmans, Green & Co (London 1865); page 500.
- 8 Mill; *An examination of Sir William Hamilton's philosophy*; page 492n.
- 9 Isaiah Berlin; "Two concepts of liberty" - in: Isaiah Berlin; *Four essays on liberty*; Oxford University Press (Oxford 1969/1958).
- 10 Noel Annan; "John Stuart Mill" - in: J.B. Schneewind (editor); *Mill: a collection of critical essays*; Macmillan (London 1968/1964); page 41.
- 11 John Gray; "John Stuart Mill on the theory of property" - in: Anthony Parel and Thomas Flanagan (editors); *Theories of property: Aristotle to the present*; Wilfrid Laurier University Press (Ontario 1979); page 273.
- 12 Roger Scruton; *A short history of modern philosophy - from Descartes to Wittgenstein*; ARK Paperbacks (London 1984); pages 232 to 233.
- 13 Joseph Raz; *The morality of freedom*; Clarendon Press (Oxford 1986); page 409.

- 14 David Miller; "Autonomous" v "autarchic" persons (review of S.I. Benn's "A theory of freedom") - in *Government and Opposition* (1988), page 244.
- 14A T.H. Green; Liberal legislation and freedom of contract - in: R.L. Nettleship (editor); *Works of Thomas Hill Green*; Longmans, Green & Co. (London 1888/1881); pages 371 to 372.
- 15 Berlin; "Two concepts of liberty"; page 123.
- 16 Berlin; "Two concepts of liberty"; page 131.
- 17 Berlin; "Two concepts of liberty"; page 132.
- 18 Berlin; "Two concepts of liberty"; page 122.
- 19 Thomas Hobbes; *Leviathan*; *Everyman* (London 1914/1651); page 66. See also page 110.
- 20 Joel Feinberg; *The moral limits of the criminal law*, Oxford University Press; volume I (Oxford 1984), pages 8 to 9.
- 21 Feinberg; volume I (Oxford 1984), page 7.
- 22 Feinberg; volume I (Oxford 1984), page 8.
- 23 Berlin; "Two concepts of liberty"; page 130.
- 24 Berlin; "Two concepts of liberty"; page 129.
- 25 Berlin; "Two concepts of liberty"; page 163.
- 26 Page 62.
- 27 John Gray; *Mill on liberty: a defence*; Routledge & Kegan Paul (London 1983); page 73.
- 28 Miller; page 246.
- 29 Gray; *Mill on liberty: a defence*; page 74.
- 30 Gray; *Mill on liberty: a defence*; page 76.
- 31 Raz; page 407.
- 32 Berlin; "Two concepts of liberty"; page 134.
- 33 Raz; page 408.
- 34 Raz; page 412.
- 35 Gray; *Mill on liberty: a defence*; page 55.
- 36 Berlin; "Two concepts of liberty"; page 152.

- 37 John *Skorupski*; John Stuart Mill; Routledge (London 1989); page 354.
- 38 *Gray*; *Mill on liberty: a defence*; page 78.
- 39 Page 69.
- 40 Page 79.
- 41 John *Gray*; "On negative and positive liberty" - in: Zbigniew Pelczynski and John Gray (editors); *Conceptions of liberty in political philosophy*; Athlone Press (London 1984); page 337.
- 42 *Raz*; page 411.
- 43 *Raz*; page 410.
- 44 H.J. *McCloskey*; *John Stuart Mill: a critical study*; Macmillan (London 1971); page 128.
- 45 Stanley I. *Benn*; *A theory of freedom*; Cambridge University Press (Cambridge 1988).
- 46 *Miller*; page 245.
- 47 *Gray*; "On negative and positive liberty"; page 342.
- 48 *Raz*; page 247.
- 48A *Green*; page 372.
- 48B *Green*; pages 370 to 371.
- 49 Gertrude *Himmelfarb*; "Editor's introduction" - in: John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974); page 47.
- 49A *Green*; page 381.
- 50 *Feinberg*; volume III (Oxford 1986), page 250.
- 51 *Feinberg*; volume III (Oxford 1986), page 264.
- 52 *Raz*; page 417.
- 53 Alan *Ryan*; *Property*; Open University Press (Milton Keynes 1987); page 45.
- 54 *McCloskey*; page 137.
- 55 *The Walden Programme*; broadcast on London Weekend Television, 22nd October 1989.
- 56 *Berlin*; page xlix.
- 57 *Hobbes*; page 110.

- 58 Robert *Nozick*; *Anarchy, state and utopia*; Basil Blackwell (Oxford 1974); page 262.
- 58A Larry M. *Preston*; *Freedom, markets and voluntary exchange*; *The American Political Science Review*; volume 78; page 961.
- 59 *Hayek*; page 17.
- 60 Piers Paul *Read*; *A Season in the West*; Pan Books (London 1989/1988); pages 38 to 39.
- 61 John Stuart *Mill*; *Principles of Political Economy* books IV and V; Penguin (Harmondsworth 1970/1848); pages 365 to 366.
- 62 *McCloskey*; page 129.
- 63 Page 120.
- 64 Page 133.
- 65 *Time* magazine, Atlantic edition (Amsterdam/New York), 14th May 1979 (page 13).
- 66 Herbert *Spencer*; *The man versus the state*; Penguin (Harmondsworth 1969/1884); page 77.
- 67 *Nozick*; page 169.
- 68 See, for an argument along similar lines: John *Gray*; *Liberalism*; Open University Press (Milton Keynes 1986); page 76.
- 69 The point is made forcefully by F.R. *Berger*, a critic of economic liberty, in: Fred R. *Berger*; *Mill's substantive principles of justice - a comparison with Nozick*; *American Philosophical Quarterly* (Pittsburgh); volume XIX, number 4 (October 1982); page 377.
- 70 *Halsbury's laws of England* (4th edition); volume VI, paragraph 504.
- 71 *Mill*; *Principles*; page 368.
- 72 *Nozick*; page 171.
- 73 John *Locke*; *Two treatises on government*; Cambridge University Press (Cambridge 1967/1690); pages 378 to 379.
- 74 *Ryan*; *Property*; page 61.

- 75 Tom *Settle*; The grounds of morals and the propriety of property - in: Anthony Parel and Thomas Flanagan (editors); *Theories of property: Aristotle to the present*; Wilfrid Laurier University Press (Ontario 1979); page 320.
- 76 Alan Ryan; *Property and political theory*; Basil Blackwell (Oxford 1984); page 8.
- 77 Ryan; *Property and political theory*; pages 81 to 82.
- 78 Ryan; *Property and political theory*; pages 121 to 122.
- 79 Ryan; *Property and political theory*; page 108.
- 80 David Hume; *A treatise of human nature*; Clarendon Press (Oxford 1888/1739); page 492.
- 81 Hume; page 491.
- 82 Hume; page 503.
- 83 Hume; page 495.
- 84 Hume; page 490.
- 85 Ryan; *Property and political theory*; page 31.
- 86 Ryan; *Property and political theory*; page 17.
- 87 Nozick; page 174.
- 88 Nozick; page 175.
- 89 Nozick; pages 174 to 182.
- 90 Nozick; page 153.
- 91 *The Times* (London), 4th October 1989 (page 1).
- 92 Ryan; *Property and political theory*; page 1.
- 93 Nozick; page 172.
- 94 Nozick; page 228.
- 95 Spencer; page 160.
- 96 Mill; *Principles*; pages 358 to 359.
- 97 Nozick; page 152.
- 97A Norman P. Barry; *On classical liberalism and libertarianism*; Macmillan (London 1986); page 155.
- 98 Nozick; page 167.

- 99 *Nozick*; page 160.
- 100 *Brian Barry*; "The continuing relevance of socialism" - in: Robert Skidelsky (editor); *Thatcherism*; Chatto & Windus (London 1988); page 149.
- 100A Robert Young; *Autonomy and egalitarianism*; *Political Studies* (Guildford 1988); volume XXXVI; page 677.
- 100B Young; page 675.
- 101 *Nozick*; page 237.
- 102 *Nozick*; page 223.
- 103 *Nozick*; page 163.
- 104 Section 1.4.2.A of this chapter.
- 105 Section 1.4.2.B of this chapter.
- 106 Section 1.4.1. of this chapter.
- 107 Section 1.3.3. of this chapter.
- 108 Section 1.2.3.B of this chapter.
- 109 John Gray; *An epitaph for liberalism* (review of Joel Feinberg's "The moral limits of the criminal law") - in *Times Literary Supplement* (London), 12th to 18th January 1990, page 32.
- 110 Isaiah Berlin; "*John Stuart Mill and the ends of life*" - in: Isaiah Berlin; *Four essays on liberty*; Oxford University Press (Oxford 1969/1958); page 190.
- 111 *Annan*; page 41.
- 112 Neil Thornton; *The problem of liberalism in the thought of John Stuart Mill*; Garland (New York 1987); page 7.
- 113 *Ryan*; *Property and political theory*; page 158.
- 114 *Raz*; page 420.
- 115 *Raz*; page 417.
- 116 Gray; "*John Stuart Mill on the theory of property*"; page 273. Dr Gray expresses similar sentiments on page 264 of the same work, and also in: *Gray*; *Mill on liberty: a defence*; page 55.
- 117 Gray; *Mill on liberty: a defence*; page 77.

- 118 *Gray; Mill on liberty: a defence; page 54.*
- 119 *Gray; Mill on liberty: a defence; page 78.*
- 120 *Page 122.*
- 121 *Page 124.*
- 122 *Page 68.*
- 123 *Page 115.*
- 124 *Page 124.*
- 125 *Mill; Principles; page 360.*
- 126 *Mill; Principles; page 361.*
- 127 *Quoted in: Smith; page 207.*
- 128 *Page 166.*
- 129 *Gray; Mill on liberty: a defence; page 92.*
- 130 *C.L. Ten; Mill on liberty; Clarendon Press (Oxford 1980); page 113.*
- 131 *Ten; page 110.*
- 132 *John Stuart Mill; On socialism; Prometheus Books (Buffalo, New York 1987/1879); page 140.*
- 133 *Mill; On socialism; page 139.*
- 134 *Mill; Principles; page 380.*
- 135 *Ryan; Property and political theory; page 147.*
- 136 *John Stuart Mill; Vindication of the French revolution of February 1848, in reply to Lord Brougham and others - in: John Stuart Mill; Dissertations and discussions; John W. Parker & Son (London 1859); volume II; page 395.*
- 137 *Mill; Principles; page 369.*
- 138 *Mill; Principles; page 384.*
- 139 *Mill; Principles; page 382.*
- 140 *Mill; Principles; page 383.*
- 141 *Ryan; Property and political theory; page 141.*
- 142 *Berger; page 378.*
- 143 *Ryan; Property and political theory; page 144.*

- 144 *Ryan; Property; page 42.*
- 145 *Gray; "John Stuart Mill on the theory of property"; page 257.*
- 146 *Mill; On socialism; page 67.*
- 147 *Mill; On socialism; page 68.*
- 148 *Mill; On socialism; page 119.*
- 149 *Mill; On socialism; page 117.*
- 150 *Mill; On socialism; page 121.*
- 151 *Mill; Principles; page 45.*
- 152 *James Fitzjames Stephen; Liberty, equality, fraternity; Smith Elder & Co (London 1874); page 58.*
- 153 *Page 171.*
- 154 *Abram L. Harris; Economics and social reform; Harper (New York 1958); page 37.*
- 155 *Page 180.*
- 156 *Page 181.*
- 157 *Mill; Principles; page 305.*
- 158 *Mill; Principles; page 306.*
- 159 *Gray; "John Stuart Mill on the theory of property"; page 266.*
- 160 *Mill; Principles; page 307.*
- 161 *R.J. Halliday; John Stuart Mill; George Allen & Unwin (London 1976); page 96.*
- 162 *Page 67.*

CONCLUSION

CONCLUSION

This work... will be an effort to vindicate the traditional liberalism derived from Mill's *On Liberty*, not by slavishly adhering to its every contention and argument, but by salvaging a central part of it, qualified and reformulated in the light of the many accumulated difficulties and criticisms.

Joel Feinberg, *The moral limits of the criminal law*¹.

... the liberal hope that one day a satisfactory principle indicating either necessary and/or sufficient conditions for legal or social interference will be formulated.

H.J. McCloskey, *John Stuart Mill: a critical study*².

Was Mill a socialist?

That, of course, largely depends on how "socialism" is defined. Mill's own definition, that "what is characteristic of socialism" is

the joint ownership by all the members of the community of the instruments and means of production... with... the consequence that the division of the produce among the body of owners must be a public act, performed according to rules laid down by the community³

probably serves just as well as any for present purposes. There is no doubt that Mill regarded the issue as important. In much the same way as in *On Liberty* he proposed the very simple principle as a solution to "the practical question" of where to place the limit between individual independence and social control⁴, so likewise he wrote in a letter that

I regard the purely abstract investigations of political economy... as of very minor importance compared with the *great practical questions* which the progress of democracy and the spread of socialist opinions are pressing on⁵*

Were they, however, the *same* "practical question" for Mill? Did he consider the concerns addressed by the very simple principle about liberty and the limits of social control of a piece with the issue of socialism? Alan Ryan thinks not, and contends that it is a "misunderstanding" to believe that the purpose of *On Liberty* was "to consider 'what is the function of the state'"⁶. But textual analysis of Mill's writings suggests a different view: that Mill regarded the arguments deployed in *On Liberty* as *highly relevant* to the extent of the state's functions, and hence to the question of socialism. In book II of *Principles of Political Economy*, written in 1848 at a time when he was flirting with socialist ideas, Mill nonetheless wondered how far socialism was compatible with what he considered to be "the perfection both of social arrangements and of practical morality", namely:

to secure to all persons complete independence and freedom of action, subject to no restriction but that of not doing injury to others⁷.

This is language which almost exactly mirrors the terms of the very simple principle itself, with its requirement 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... to prevent harm to others"⁸: it shows Mill applying the standard of the very simple principle to socialism.

At the time he wrote *Principles*, Mill considered that "it remains to be discovered"⁷ how compatible socialism was with this standard. Later in his life, he was to come

* Emphasis added.

out more strongly against socialism - precisely because he felt it difficult to reconcile with the sort of concerns for freedom expressed in *On Liberty*. Thus, in his chapters on socialism, published posthumously in 1879, Mill deployed arguments against socialism which strongly echo the words of *On Liberty*. His concern in *On Liberty* about "the tyranny of the majority"⁹ is paralleled by his statement in the chapters on socialism that, in the sort of property-less society advocated by many socialists, there would be "a delusive unanimity produced by the prostration of all individual opinions and wishes before the decree of the majority"¹⁰. Attacking such a society, Mill wrote in the chapters that, whereas human nature ought to have "freedom to expand spontaneously in various directions"¹⁰, in a property-less society there would be less scope for "the development of individual character and individual preferences"¹⁰: therefore, he concluded, the tendency towards this state of affairs should be avoided, particularly now when "already in all societies the compression of individuality by the majority is a great and growing evil"¹⁰. These words closely resemble the arguments advanced in *On Liberty* for the very simple principle - the anxiety that "the tendency of all the changes taking place in the world is to strengthen society and diminish the power of the individual"¹¹ with the resulting "pinched and hidebound type of human character"¹², "wearing down into uniformity"¹³ and "compression"¹⁴ of human nature; and the insistence that "it is only the cultivation of individuality which produces, or can produce, well-developed human beings"¹⁴. In short: the concerns which animated Mill's advocacy of freedom in *On Liberty* likewise made him critical of socialism as potentially inimical to freedom.

This attitude carried through, to some extent at least, into Mill's views on specific policy questions. Although he expressed himself in favour of public health legislation, he made clear that this was purely because it

could be justified on grounds of state intervention in "other-regarding" conduct. He utterly rejected intervention which was motivated by social paternalism, as being inimical to the requirements of liberty. Thus, writing in 1859, Mill declared:

The proper object of sanitary laws is not to compel people to take care of their own health, but to prevent them from endangering the health of others. To prescribe by law, what they should do for their own health alone, would by most people be regarded as something very like *tyranny*^{15*}.

The natural implication of this statement is a far more limited scope for *state welfarism* than socialists normally allow: unless social legislation can be justified on the fairly narrow grounds of being necessary to restrain the effects of *other-regarding* conduct, it is illegitimate and impermissible. At a stroke, much of the *raison d'être* for the welfare state thereby evaporates. And it does indeed seem to be the case from textual evidence that Mill envisaged a fairly limited role for state welfare assistance: acceptable (he wrote in *The claims of labour* in 1859) only if it is "of such a kind, and given in such a manner, as to render [the recipient] ultimately independent of similar assistance"¹⁶.

Similarly, Mill came out against *nationalisation*, again largely out of considerations of liberty. In *On Liberty* he wrote that, were the roads, railways, banks, insurance companies, major industries, universities and public charities to be nationalised**,

not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name¹⁷.

* Emphasis added.

** something very much like what was to happen in England under the 1945 Labour Government.

In the same vein, in an essay called *Centralism* which was published in 1859, Mill described the idea that governments can do better than individuals anything which individuals are able and willing to do, as "both a mathematical and a moral absurdity"¹⁶.

Inequality - the great *bete noire* of socialism - was considered by Mill in his posthumously-published chapters on socialism. he wrote there that equality of reward would be unjust, because different types of labour are unequal and therefore deserve different rewards¹⁸; while any attempt by socialists to distribute remuneration according to deserts would be both very difficult to achieve¹⁹ and liable to promote precisely that resentment and disharmony which socialism is supposed to relieve society of¹⁹.

In book IV of *Principles* Mill identified socialists' opposition to *competition* as "the most vehement and conspicuous part of their teaching", from which, he said, "I utterly dissent"²⁰. In the chapters on socialism, he rejected the argument that free-market competition is detrimental to the working classes in setting workers ferociously against each other to the detriment of all (pushing down prices, and hence wages): he pointed out that, on the contrary, competition works two ways, such that "the buyers of labour and of commodities compete with one another as well as the sellers"; and, moreover, that when competition pushes down prices, any detriment to the interests of workers as producers is offset by the advantage to them as consumers²¹. Perhaps most interesting is Mill's argument in *Principles* that

to be protected against competition is to be protected in idleness, in mental dulness; to be saved the necessity of being as active and as intelligent as other people²²

- a clear echo of Mill's arguments, in chapter 2 of *On Liberty*, for free competition in ideas and opinions, necessary to ensure that all received opinions, even true ones are constantly challenged and thus do not lapse into dead dogmas, "a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any real and heartfelt conviction from reason or personal experience... deprived of its vital effect on the character and conduct"²³. Here, then, the case for freedom of thought and expression is at one with that for freedom of economic activity.

Lastly there is the question of *industrial organisation*. It is true that Mill expressed unease at the employer/employee relationship forming the basis of industrial capitalism and frequently suggested alternative forms of industrial organisation in which the status and rights of workers would be enhanced. In book IV of *Principles* he envisaged that "the relation of masters and workpeople" would be gradually superseded either by "association of the labourers with the capitalist" or "in other [cases], and perhaps finally in all, association of labourers among themselves"²⁴. But how much this represents a repudiation of "capitalist individualism" in favour of "the co-operative principle" may be open to doubt. Mill did, indeed, refer approvingly to "the progressive advance of the co-operative movement"²⁵, but his main point seems to have been that, with existing employer/employee relations, workers had little personal incentive to produce and that therefore some form of new "industrial partnership" was needed²⁶. The fact is that employee share-ownership no less than socialist co-operatives could fulfil that need - and, indeed, Sidney Webb was to tell fellow Fabians in 1899 that this aspect of Mill's thinking was not so much socialism as "joint-stock individualism"²⁷; in a later day, it might well be called "popular capitalism". And in all Mill's consideration of this question there was an anxiety that

new forms of industrial organisation should not displace individual enterprise and initiative. In book IV of *Principles* he cautioned that:

A private capitalist... is considerably more likely than almost any association to run judicious risks, and originate costly improvements. Co-operative societies may be depended on for adopting improvements after they have been tested by success, but individuals are more likely to commence things previously untried³⁰.

Once again, there is an echo of the arguments for freedom put forward in *On Liberty*: Mill's point that individuality should be given free rein because "the initiation of all wise or noble things comes and must come from individuals; generally at first from some one individual"³¹.

The picture which emerges from the quotations set out above is of a Mill committed to the very simple principle, hence to freedom - including economic freedom - and hence opposed to socialism. But, as is ever the case with Mill, things are far from being so clear. The characterisation of Mill's writings in general, and *On Liberty* in particular, as "anti-socialist" is by no means universally accepted by commentators. On the one hand, A.L. Harris depicts Mill as committed to economic liberty as "an essential... ingredient of freedom"²⁰ and affirms that "state socialism was always abhorrent to Mill, for he believed it inimical to liberty"³². Likewise, John Skorupski contends that Mill was "far from thinking that the state could play the role of bringing people to their best selves"³³, and H.J. McCloskey insists that Mill "was never a socialist"³⁴. On the other hand, however, Sidney Webb wrote in 1948 that Mill had been "a convinced socialist"³⁵; Bertrand Russell, who in fact was actually Mill's godson³⁶, identified Mill's ideas with those of "pre-Marxian socialism", in which there continues to be

free competition, but "between rival societies of workers, not between rival capitalists"³⁷; while Alan Ryan has placed Mill among the "critics of capitalism and defenders of a socialist alternative"³⁸, and indeed has suggested that "it is hard to believe that Marx and Mill would have been far apart on most practical issues"³⁹. More subtle colours have been painted by Noel Annan - who writes that over the years *On Liberty* has "troubled the conscience of converted Marxists and... mellowed the convictions of British socialists"⁴⁰ - and by Hayek, portraying Mill as sympathetic to the "ultimate aims" of socialism but at odds with its "concrete suggestions" for abolishing competition and private property⁴¹.

The cause of all this confusion on the part of the commentators is, as might be expected, traceable to ambiguities on the part of Mill himself. Mill was not as unequivocally opposed to state socialism as some of the commentators claim; but neither was he as unequivocally in favour as others make out. Indeed, his position on this "great practical question"⁵ is characterised, above all, by equivocation. In book IV of *Principles*, he wrote of "communism" (a word which he used interchangeably with "socialism") that, if weighed against "the present state of society", "the difficulties, great or small, of communism would be as dust in the balance"⁴². Yet this view is directly contradicted by Mill's own statement in the posthumously-published chapters on socialism that

The present system is not, as many socialists believe, hurrying us into a state of general indigence and slavery from which only socialism can save us. The evils and injustices suffered under the present system are great, but they are not increasing; on the contrary, the general tendency is towards their slow diminution⁴³.

It is fair to point out that the passage in *Principles* was written relatively early in Mill's career, in the 1840s, whereas the chapters on socialism were written towards the

end of his career almost a quarter of a century later. It would not be surprising or illegitimate if Mill had changed his mind about socialism in that time, or if circumstances had changed and facts had become clear so as to cause him to alter his view. However the lapse of time cannot explain away contradictions *within the same works* by Mill. At the same time as Mill was writing, in *Principles*, that communism's difficulties were "as dust" compared to those of capitalism - and classing himself, according to the *Autobiography*, "under the general designation of socialists"⁴⁴ - he was also, elsewhere in *Principles*, advocating laissez-faire as a maxim of public policy:

letting alone... should be the general practice: every departure from it, unless required by some great good, is a certain evil⁴⁵.

(Interestingly, Mill was apparently⁴⁵ the first English classical economist to use the expression "laissez-faire" in the context of government interventionism.)

More plausible than attempting to trace a shift over time from a pro- to an anti-socialist position, or than placing Mill firmly in one camp or the other, is the proposition that he did not stand firmly in either camp on the issue. It seems likely that just as Mill appears to have done everything he could in his life to reconcile the conflicting doctrines of liberty and utilitarianism (see chapter one of this thesis, and especially section 2.2.), so too he engaged on the equally doomed eclectic exercise of trying to marry socialism with his commitment to freedom and individuality. Donald Winch quotes Mill as saying that the "social problem of the future" would be "how to unite the greatest individual liberty of action with a common ownership of the raw materials of the globe, and an equal participation of all in the benefits of combined labour"⁴⁶. In 1859 Mill wrote in his *Vindication of the French revolution of February 1848* that governments must "make the scale turn in favour of equality, whenever

this can be done without impairing the security of the property which is the product and reward of personal exertion"⁴⁷. Similarly, there is a revealing passage in chapter 2 of *On Liberty* where Mill argued that

unless opinions favourable to democracy and to aristocracy, to property and to equality, to cooperation and to competition... are... enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due... Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites...^{48*}.

The result of this attempt by Mill to "reconcile and combine" socialism and liberty - as of his attempt to reconcile utilitarianism and liberty - is a mess. Possibly the best way to describe Mill's position on the question of socialism or free-market liberalism is to say that he was a pragmatic social-democrat. He wrote in the chapters on socialism that "the intellectual and moral grounds of socialism" offered "in many cases" the guiding principles for "improvements necessary to give the *present* economic system of society its best chance"^{49**}. He added that the socialist case should be considered fully for ways of enabling the institution of private property "to work in a manner more beneficial to that large portion of society which at present enjoys the least share of its direct benefits"⁵⁰. And, in the *Autobiography*, with an unnerving lack of precision he declared that his views could best be described as having "a greater approximation" to a "qualified socialism"⁵¹.

* Emphasis added.

** Emphasis added.

Many will find this undoctinaire stance attractive and, indeed, laudable. Gray writes approvingly that Mill "softened the tension between the moral individualism of the liberal outlook and the collectivist implications of the classical utilitarian goal of general welfare"⁵². Halliday observes that

for Mill, neither laissez-faire nor socialism was a complete policy or theory in itself; such theories were not possible without an unacceptable dogmatism¹⁶.

The point is, however, that no matter how "unacceptable" dogmatism may be in the eyes of Halliday or others, it makes little sense to describe it as unacceptable to Mill - when the very simple principle is, after all, a statement of dogma: "one very simple principle... entitled to govern absolutely..."⁸. No matter how appealing an undoctinaire stance on the question of socialism may be, it is inconsistent with the objectives of the very simple principle. To recapitulate: in the introductory chapter of *On Liberty* Mill presented the very simple principle as something necessary to fill a major lacuna - "the absence of rule or principle... as to what things are fit to be done by a government"⁸. The difference between socialism and free-market liberalism is *about* what things are fit to be done by a government: whether governments should run industrial enterprises, subsidise prices, "redistribute" wealth, and so on. Also in the introductory chapter of *On Liberty* Mill lamented the fact that, faced with such issues, "men range themselves on one or the other side in any particular case, according to this general direction of their sentiments, or according to the degree of interest they feel in the particular thing which it is proposed that the government should do... but very rarely on account of any opinion to which they consistently adhere"⁸. The very simple principle was supposed to reverse this situation, and replace pragmatism with consistent adherence to a principle in deciding what things are fit to be done by governments. It was supposed

to give clear and unambiguous answers to those questions which are the very stuff of the tension between socialism and laissez-faire. To end up, as Mill did, with ambiguities and equivocations which "soften" that tension is a failure for the very simple principle, not a success.

* * *

That there should be so much uncertainty about Mill's attitude to socialism - both on the part of the commentators and of Mill himself - is hardly to be wondered at, given the three fundamental ambiguities at the heart of his very simple principle which have been the subject of each of the three chapters of this thesis. The ambiguity identified in chapter one was whether the liberty of the very simple principle is justified intrinsically, or on grounds of rule-consequentialism: liberty's instrumentality in procuring utilitarian ends. This was shown to be significant because, if liberty is justified by virtue of its ability to achieve the general welfare, then it can easily be sacrificed if ever the requirements of general welfare conflict with those of liberty. Saddled with this ambiguity, the very simple principle could therefore be interpreted as permitting socialist and paternalist policies to override considerations of liberty. In chapter two, consideration was given to the ambiguity of Mill's qualification to the very simple principle, that intervention in individual freedom may be permissible to prevent "harm to others". It was argued that "harm" is such a nebulous concept that, in an interdependent society, there is virtually no limit on the range of human activities which could be said to harm others, and hence almost infinite scope for interpreting the principle as permitting any kind of *dirigiste* or socialistic interventionism. Finally, chapter three examined ambiguities in the use of the word

"liberty", and Mill's failure to define it precisely for the purposes of the principle. Without such definition, a "liberty" principle might be interpreted as sanctioning the promotion of classical ("negative") liberty, and hence economic liberalism - or alternatively the promotion of ability ("positive liberty") and hence the advancement of state socialism and the diminution of classical liberty. Mill fails to give sufficient indication as to which he means. The result is, as Gray puts it, that Mill's very simple principle

is compatible with some variants of socialism and social democracy, and no less compatible with some doctrines of the minimum functions of the state⁵³.

On the question of socialism or liberalism, of "what things are fit to be done by a government", Mill's very simple principle is compatible with everything and anything. Contrary to its pretensions it offers people no clear guidance. It tells them nothing.

Is it inevitable that this should be so? Are the "difficulties and criticisms" to which Feinberg refers in the epigraph to this conclusion¹ inherent in, and hence ultimately fatal to, any attempt to formulate a principle of liberty? Or is it possible that, on the contrary, a satisfactory principle can be formulated - the hope expressed by McCloskey in the epigraph²?

In the early 1980s Feinberg embarked on an attempt to draw up a satisfactory principle which, in his own words, would delineate "the zone in which the citizen has a moral claim to be at liberty, that is, free of legal action"⁵⁴. He averred that, although similar in intention to Mill's very simple principle, this was actually a less ambitious, more modest, project:

This book is an attempt to find a general answer, albeit a complicated one, to the question: What sorts of conduct may the state rightly make criminal? Its subject, though broad, is still

narrower than John Stuart Mill's famous concern in *On Liberty* with 'the nature and limits of the power which can be legitimately exercised by society over the individual', since our concern is only with power exercised by the state by means of the criminal law⁵⁵.

A "narrower" concern than that of the very simple principle, and yet one which required four volumes for Feinberg to expound. And at the end of all that, it seemed that the subtleties and modifications and refinements which Feinberg had felt compelled to introduce had quite overwhelmed the principle itself, so that it was impossible to see the wood for the trees. The "answer" to Feinberg's question was indeed "complicated", but it was scarcely "general"; and it elicited the following gloomy comment from a reviewer, referring to the writings of both Feinberg and Raz, "thinkers, whose work together constitutes the high-water mark of recent liberal theorising":

...the project of giving liberalism a universally compelling foundation has been abandoned, and the attempt to formulate definitive and uniquely determinate liberty-limiting principles given up or severely qualified. Foundationless and virtually contentless, liberalism has then the aspect of the Cheshire Cat, becoming the vanishing spectre of a once-living doctrine⁵⁶.

It is tempting to conclude from this that formulating a liberty principle is a futile business - and hence to agree with Isaiah Berlin's pragmatic view that limitations on liberty should be drawn on the basis of "practical compromise" and "not always for reasons which can be clearly stated, let alone generalised into rules or universal maxims"⁵⁷. Berlin writes:

...to be rational is to follow the course of conduct which least obstructs the general pattern of life in which we believe. The right policy

cannot be arrived at in a mechanical or deductive fashion; there are no hard-and-fast rules to guide us⁵⁸.

But, however compelling such an approach may seem, however tempting it may be to abandon the idea of a liberty principle, it is a temptation that ought to be resisted. This thesis has been highly critical of Mill for the way in which he formulated the "very simple principle", and in particular for its many ambiguities. However, the criticisms should not be allowed to detract from acknowledgement of Mill's central achievement in *On Liberty*, which was to understand, more clearly than most other theorists, the necessity of having *some* sort of principle: "a recognized principle by which the propriety or impropriety of government interference is customarily tested"⁵⁹, as he puts it in the opening paragraphs of the essay. In the absence of such a guiding principle, which can serve as a point of reference for the governing and the governed alike, there are no outer limits to the range of functions which the state may accumulate, no acknowledged constraints on the state's right to make incursions into the liberties of its citizens and no grounds for resisting such incursions. A policy of "practical compromise" without "hard-and-fast rules to guide us" means that it is difficult for a government to know whether or not it is entitled to interfere in any given situation, and impossible to act with consistency. It is a recipe for *ad hoc*, arbitrary, and potentially tyrannical rule.

Mill rightly laments the absence of a proper principle of liberty. His own attempt to formulate one proves to be less than wholly satisfactory. But that still does not remove the imperative to devise a better one.

The basic contours of a more satisfactory principle than Mill's are implicit in the criticisms which have been made in this thesis.

First of all, it must be clear from the outset that the principle is upholding liberty for its own sake, and absolutely, rather than conditionally on its propensity to produce some other objective such as the "happiness" or "general welfare" sought by utilitarians*.

Next, the limitation on an individual's entitlement to liberty must be set clearly and unambiguously: interference in someone's liberty is not warranted on such a nebulous and expandable ground as preventing harm to others, but only on the narrow, specific ground of *preventing infringements to the liberty of others*. It is only ever justifiable to constrain freedom where doing so is necessary to protect freedom. This is what was referred to in chapter two of this thesis as the "Berlin principle", in contradistinction to the "Mill principle"**. It can best be regarded as a principle to *maximise* liberty. Anarchists argue that, since the state interferes in the liberties of individuals, the way to give people the most liberty they can possibly have ("absolute liberty") is to be rid of the state altogether. That argument ignores the fact that individuals' liberties can be infringed by persons other than the state - by fellow citizens, or by foreign invaders - and that such infringements are *more* likely to occur in the absence of the state whose police force, judiciary and penal service protect against criminal attack, and whose military forces protect against external, foreign attack. Removing these infringements of liberty *requires* the existence of a state which interferes. By interfering to limit X's freedom to plant bombs in the road, the state upholds Y's freedom to

* See chapter one, *passim*.

** See chapter two, sections 1.1. and 1.5.1.

walk down that road. By conscripting A into the army at a time of imminent invasion (as in Britain in 1940), the state limits A's freedom to choose how he spends his time, where he works, and so on - but also upholds the freedom of B, C and D, which is threatened by the foreign invader. Taxation, as was seen in section 1.3.3. of chapter three, infringes people's liberties, but in financing the police, judiciary, penal service and army, it also helps prevent other people's liberties being infringed. In short, contrary to the claims of anarchists, the state's interference in liberty is sometimes required to protect and enhance liberty (which would be threatened in the absence of the state). But a principle of liberty-maximisation means that the state's interference must be limited to what is necessary to prevent interference in others' liberty: it must not interfere any more than this: it must not over-police, or over-imprison, or over-militarise, or over-tax. Maximising liberty justifies the state in policing, imprisoning, arming and taxing just sufficiently to protect its citizens' liberty; neither more nor less. This is the proper "fitting adjustment between individual independence and social control"⁴: a principle whereby *people are entitled to freedom up to the point where exercising their freedom infringes the freedom of others, and (which is the other side of the same coin) the state may only interfere in a person's freedom to protect the freedom of others.* It is a principle which differs from Mill's - and ensures a greater degree of liberty than Mill's: indeed, a maximal degree of liberty. But it is not a novel idea. In the late nineteenth century, Herbert Spencer (who was actually a friend of Mill's⁶⁰) argued that an individual's liberty should be restrained only to the extent

needful for preventing him from directly or indirectly aggressing on his fellows - needful, that is, for maintaining the liberties of his fellows against his invasions of them⁶¹.

More recently, and from a conservative perspective, Michael Oakeshott similarly advocated

an understanding of government as the prevention of coercion⁶².

The time is long overdue for displacing Mill as the point of departure for formulating a principle of liberty: the Spencer/Oakeshott doctrine is a surer basis from which to proceed.

But, that having been done, there remains a third ingredient which must go into any new principle of liberty. It must be made quite clear precisely what is meant by "liberty" in the context of the principle. What is the "liberty" which is to be maximised? The state must not violate a person's "liberty", except to protect the "liberty" of others: but what kind of "liberty"? It must be unambiguously understood that this is liberty in its classical meaning: a person's entitlement to take his own decisions without external influence from other people, be they the state, fellow citizens or foreign invaders*. The state must respect, uphold and protect that liberty. It is a necessary implication of this that the state must also ensure that each individual has the necessary prerequisites of such classical liberty - sustenance, by way of health, food, clothing and shelter, and the basic education required for the meaningful exercise of free choices** - and the state is entitled to interfere, including by way of taxation, to do so. But it must be clear that the state's responsibilities for promoting liberty and its prerequisites do not extend to promoting *ability*. There must be no ambiguity about the meaning of liberty under the principle: it is not to be conflated with ability, which, while masquerading as a "positive"

* See chapter three, section 1.2.1.

** See chapter two, section 1.5.1.A and chapter three, section 1.2.1.

form of liberty, can in fact only be advanced by the state through the diminution of liberty in its classical sense***.

These, then, are the basic elements which should go into a new principle of liberty. But they still leave a number of difficulties to be resolved.

One such difficulty will be immediately apparent. A principle of restricting liberty only to protect liberty (coercing to prevent coercion) - even if it is clear that the liberty meant is classical liberty, and that it is not contingent on externalities such as utilitarianism - contains a fundamental paradox. A's liberty to act in a certain way might infringe B's liberty: the principle requires that A's liberty must therefore be restrained. But this only means that B's liberty is infringing A's liberty, so should B's liberty be restrained? In other words, when two liberties conflict, how does one decide which to protect and which to restrain?

There are some cases where the answer is obvious - as between the liberty of A to plant bombs in the street and the liberty of B to walk down that street; or between a person's liberty not to be conscripted into the army and the liberty of his fellow citizens at a time of imminent invasion, for instance in England of 1940. Mill makes the same point in *On Liberty* when he notes that there is "no parity"

between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it, no more than between the desire of a thief to take a purse and the desire of the right owner to keep it⁶³.

*** See chapter three, section 1.3.3.

But in other cases it is more difficult to decide which of two conflicting freedoms should prevail. Shadia Drury points to the "inevitable clash of different but equally 'inviolable' rights" where, for example, "someone's right to life may conflict with another's right to property, in the case of a famine"⁶⁴. Somewhat more prosaically, Feinberg wonders how one can adjudicate between a motorcyclist's interest in speed, excitement and economical transport, and the interest of a professional scholar residing in the suburbs in the peace and quiet of his neighbourhood⁶⁵. The dilemma often arises in practical politics, as in the *Spycatcher* controversy in England in the mid-1980s where the freedom of the press to publish a former intelligence officer's memoirs had to be balanced against the freedom of the country's citizens from foreign invasion ("national security") which might be more at risk unless publication were restrained. If the state intervened to prohibit publication, one kind of freedom would be infringed; but if it did not, another kind of freedom would be threatened. Which freedom should prevail?

A principle of liberty, according to which "the propriety or impropriety of government interference is customarily tested"¹⁹, ought to be able to furnish an answer. It is at this point that the thesis may appear to turn full-circle for, having in chapter one insisted on the importance of a liberty principle being independent of utilitarianism, it will now be argued that something can be salvaged from utilitarianism which can greatly assist the formulation of a liberty principle. The point is this. There are essentially two propositions at the heart of utilitarianism: first, that choices between actions should be made on the basis of their consequences, and, secondly, that consequences should be assessed in terms of "happiness" or "welfare"⁶⁶. The utility principle is an act-consequentialist formula for promoting happiness/welfare. In chapter one of this thesis, it will

be recalled, the second limb - promoting happiness/welfare - was rejected as an inappropriate basis for a liberty principle, because maximising happiness is not always consistent with promoting liberty*. However, the first limb - act-consequentialism - was not rejected; on the contrary, it was seen to be the only moral basis for saving one of the children in the extract from the novel *Sophie's Choice*, or for Duncan Sandys's policy in 1943 of feeding the Germans false information as to the landing of their V1 and V2 missiles and thereby sparing London massive destruction and loss of life**. A principle of liberty, formulated to maximise liberty, can make good use of act-consequentialism: freedom will be maximised if, in any choice as to whether the state should intervene or not, the decision is taken by assessing the consequences of either course of action *in terms of liberty*. In any given case, is the loss of liberty consequent on restraining A's freedom greater or less than the loss of liberty consequent on permitting A to infringe B's freedom? A number of factors need to be taken into account in calculating either set of consequences, including the number of people whose liberty is infringed and the extent or depth of the infringement sustained by each person. The result in either case must be multiplied by the risk - whether it is a virtual certainty (almost 100 per cent) or a remote possibility (a much lower percentage). Thus, in the *Spycatcher* case, an act-consequentialist principle of liberty would involve balancing the loss of press freedom consequent on prohibiting publication against the potential loss of

* See chapter one, sections 3.3.1. and 3.3.3.A - in particular the example of the child with a virus liable to infect every other person on earth such that they each had a headache for a day (but were never troubled again), and the difference between the responses which utilitarians (on the one hand) and those primarily concerned with liberty (on the other) would give to the question of whether to sacrifice the child.

** See chapter one, section 3.2., for details of these examples and their ethical applications. See also section 3.3.3.A of chapter one in this connection.

freedom in terms of breakdown of national security and foreign conquest consequent on not prohibiting publication (a greater number of people affected, a more serious deprivation of liberty, but a much less certain, more remote, possibility). Quantifying such factors in assessing the consequences of actions is obviously extremely difficult and, even with the best will in the world (and the greatest foresight), it can only ever be approximate. But it is the approach which needs to be adopted if liberty is to be maximised.

Hitching act-consequentialism to the principle of liberty which has been outlined here also helps to resolve another difficulty. This is highlighted by the old debate about whether a principle of liberty should permit slavery. As noted in section 1.4.1. of chapter two, it is characteristic of a free society that people should be free to enter binding contracts with each other. Ought they therefore be free to contract into slavery? Nozick, for one, believes that consistent application of a commitment to liberty requires that such slavery contracts *should* be allowed - and, like any other contract, legally enforceable⁶⁷. But this argument is only tenable if one is prepared to carry the consistency to its logical conclusion, and legally enforce contracts under which (say) a man desperate to obtain a pop record "buys" one from someone in return for agreeing to have one of his arms and one of his legs chopped off. (Nozick offers no clues as to what his position would be on this.) Such a situation, in which the law enforces contracts to mutilate people, seems entirely incompatible with anything that could sensibly be called a free society. On the other side of the debate, Mill in *On Liberty* expresses the view that an individual should *not* be allowed to contract into slavery:

...by selling himself for a slave, he abdicates his liberty... The principle of freedom cannot require

that he should be free not to be free. It is not freedom to be allowed to alienate his freedom⁶⁸.

But this argument is also unsatisfactory, because every contract - indeed, every choice - involves people to some extent alienating their freedom. If I enter a five-year employment contract, working from nine till five-thirty, forty-eight weeks a year, I am not free to spend those hours over the next five years as I choose; I must spend them working for my employer. If I sell you my car, I am no longer free to sell it to someone else. If I have a choice between living in New York and living in Massachusetts, and I freely choose Massachusetts, then I have alienated my freedom to make the choices available only to those who live in New York (at least for the time that I stay in Massachusetts; but time of course is irreversible, and the choice of how to spend time is therefore an irrevocable choice, freedom alienated)⁶⁹. As Kenneth Minogue puts it

freedom is like money: we delight in spending it. We contract marriages, enter into contracts, pledge our service, get jobs and make arrangements. Our favourite use of freedom, it would seem, is to get rid of it⁷⁰.

So if all choices and contracts involve individuals "getting rid of" their freedom, it cannot be a valid objection to a slavery contract (or a mutilation contract) that one should not be free to alienate one's freedom. It is here that act-consequentialism comes to the rescue. There is a choice of actions. Either an individual is prohibited from entering into binding contract *x*, in which case his freedom to make contracts is restrained; or alternatively he is permitted to enter into binding contract *x*, in which case his freedom to act is restrained by the terms of the contract (he must be a slave for life, or work for the same employer for the next five years, or sell his car to one person rather than another). The question to be asked is which course of action -

prohibiting or permitting - has as its consequence the greater loss of freedom. That of course will depend on the terms of the contract *x*. A principle of maximising liberty requires permitting people to enter enforceable contracts where the alienation of liberty involved in enforcing the terms of the contract *x* is *less* than the restraint of liberty which would be involved in forbidding the person to enter the contract (as for example in a contract to sell my house to someone); but intervening to forbid people entering enforceable contracts where the liberty lost by enforcing the contract is greater than the liberty lost by forbidding it (as in a mutilation contract and, almost certainly, a slavery contract).

What we are left with, then, is something rather different from Mill's very simple principle. It is a *liberty-maximising principle - using "liberty" in the classical sense - which is not conditional on any external objectives, and under which people are fully entitled to exercise liberty, with the state being permitted to restrict liberty only where, and to the extent that, such restriction is necessary to prevent a greater loss of liberty (either infringement of others' liberty or alienation of their own).*

This is of course a framework only, and there are many gaps to fill in, many questions which remain unanswered. Should the state impose on its citizens only "passive duties" of non-interference in another's liberty, or in addition "active duties" to protect the liberties of others? Ought a man, in other words, be held legally answerable for doing nothing while he watches a stranger drowning in a river before his very eyes? When someone violates the liberty of someone else, should the state intervene by punishing the offender, or merely by awarding compensation from the offender to the victim, as and when the victim requests it? That is to say: should offences be criminal or civil? - trespass over property, for

example? insider dealing? And when the state does restrain liberties, should it do so preventatively (before the event) or only by way of punishment after the event?⁷¹

Answering these questions, filling in the gaps, is obviously beyond the scope of this thesis. It is enough to note their existence, which serves as a reminder that in considering the proper relationship between the state and its citizens, "between individual independence and social control", much work remains to be done. The principle sketched out in the preceding paragraphs offers no final answers. What it does offer, however, is the prospect that, by avoiding some of the ambiguities which bedevil Mill's very simple principle, it may serve as a firmer foundation for the task Mill set himself: to delineate clearly "what things are fit to be done by a government", and thereby to limit the incursions which may be made on the liberty of individuals.

London, 1991

SOURCES: CONCLUSION

All page numbers are, unless otherwise indicated, references to:

John Stuart Mill; *On Liberty*; Penguin (Harmondsworth 1974/1859).

- 1 Joel Feinberg; *The moral limits of the criminal law*; Oxford University Press; volume I (Oxford 1984); page 15.
- 2 H.J. McCloskey; *John Stuart Mill: a critical study*; Macmillan (London 1971); page 110.
- 3 John Stuart Mill; *On socialism*; Prometheus Books (Buffalo, New York 1987/1879); page 140.
- 4 Page 63.
- 5 S.R. Elliot (editor); *Letters of J.S. Mill*; Longmans Green (London 1910); volume I; page 170.
- 6 Alan Ryan; *The philosophy of John Stuart Mill* (second edition); Macmillan (London 1987); page 234.
- 7 John Stuart Mill; *Principles of Political Economy* books IV and V; Penguin (London 1970/1848); page 360.
- 8 Page 68.
- 9 Page 62.
- 10 Mill; *On socialism*; page 130.
- 11 Page 73.
- 12 Page 126.
- 13 Page 127.
- 14 Page 128.
- 15 John Stuart Mill; *Dr Whewell on moral philosophy - in: John Stuart Mill; Dissertations and discussions*; John W. Parker & Son (London 1859); volume II; page 504.
- 16 R.J. Halliday; *John Stuart Mill*; George Allen & Unwin (London 1976); page 107.
- 17 Page 182.

- 18 *Mill; On socialism; page 127.*
- 19 *Mill; On socialism; page 128.*
- 20 *Abram L. Harris; Economics and social reform; Harper (New York 1958); page 40.*
- 21 *Mill; On socialism; page 101.*
- 22 *Mill; Principles; page 142.*
- 23 *Page 116.*
- 24 *Mill; Principles; page 129.*
- 25 *Mill; Principles; page 137.*
- 26 *Mill; On socialism; page 126.*
- 27 *Sidney Webb; Socialism: true and false; Fabian tract number 51; The Fabian Society (London 1899).*
- 30 *Mill; Principles; page 139.*
- 31 *Page 131.*
- 32 *Harris; page 26.*
- 33 *John Skorupski; John Stuart Mill; Routledge (London 1989); page 353.*
- 34 *McCloskey; page 137.*
- 35 *Sidney Webb - in Bernard Shaw (editor); Fabian essays; Allen & Unwin (London 1948); pages 54 to 55.*
- 36 *See, for example: William Thomas; Mill; Oxford University Press (Oxford 1985); page 56.*
- 37 *Bertrand Russell; "John Stuart Mill" - in: J.B. Schneewind (editor); Mill: a collection of critical essays; Macmillan (London 1968/1951); page 7.*
- 38 *Alan Ryan; Property and political theory; Basil Blackwell (Oxford 1984); page 142.*
- 39 *Ryan; Property and political theory; page 159.*
- 40 *Noel Annan; "John Stuart Mill" - in: J.B. Schneewind (editor); Mill: a collection of critical essays; Macmillan (London 1968/1964); page 41.*
- 41 *F.A. Hayek; "John Stuart Mill at the age of twenty-five" - introduction to: John Stuart Mill; The spirit of the age; University of Chicago Press (Chicago 1942); page xxx.*

- 42 *Mill; Principles; page 358.*
- 43 *Mill; On socialism; page 112.*
- 44 *John Stuart Mill; "Autobiography" in the Collected Works of John Stuart Mill; University of Toronto Press (Toronto 1981/1873); page 239.*
- 45 *Harris; page 32.*
- 46 *Donald Winch; "Introduction" - in: John Stuart Mill; Principles of Political Economy books IV and V; Penguin (Harmondsworth 1970); page 48.*
- 47 *Halliday; page 101.*
- 48 *Page 110.*
- 49 *Mill; On socialism; page 113.*
- 50 *Mill; On socialism; page 146.*
- 51 *Harris; page 29.*
- 52 *John Gray; Liberalism; Open University Press (Milton Keynes 1986); page 53.*
- 53 *John Gray; Mill on liberty: a defence; Routledge & Kegan Paul (London 1983); page 18.*
- 54 *Feinberg; The moral limits of the criminal law, volume I (Oxford 1984); page 7.*
- 55 *Feinberg; The moral limits of the criminal law, volume I (Oxford 1984); page 3.*
- 56 *John Gray; An epitaph for liberalism (review of Joel Feinberg's "The moral limits of the criminal law") - in Times Literary Supplement (London), 12th to 18th January 1990, pages 31 to 32.*
- 57 *Isaiah Berlin; "Two concepts of liberty" - in: Isaiah Berlin; Four essays on liberty; Oxford University Press (Oxford 1969/1958); page 126.*
- 58 *Isaiah Berlin; "Introduction" - in: Isaiah Berlin; four essays on liberty; Oxford University Press (Oxford 1969); page lv.*
- 59 *Page 67.*
- 60 *Donald MacRae; "Introduction" - in: Herbert Spencer; The man versus the state; Penguin (Harmondsworth 1969); page 18.*
- 61 *Herbert Spencer; The man versus the state; Penguin (Harmondsworth 1969/1884); page 79.*

- 62 Michael *Oakeshott*; *Rationalism in politics and other essays*; Methuen (London 1962); page 58.
- 63 Page 151.
- 64 Shadia B. *Drury*; "Robert Nozick and the right to property" - in: Anthony Parel and Thomas Flanagan (editors); *Theories of property: Aristotle to the present*; Wilfrid Laurier University Press (Ontario 1979); page 365.
- 65 Joel *Feinberg*; *Rights, justice and the bounds of liberty: essays in social philosophy*; Princeton University Press (Princeton 1980); page 31.
- 66 Amartya *Sen* and Bernard *Williams* (editors); *Utilitarianism and beyond*; Cambridge University Press (Cambridge 1982); page 4.
- 67 Robert *Nozick*; *Anarchy, state and utopia*; Basil Blackwell (Oxford 1974); page 331.
- 68 Page 173.
- 69 *Nozick*; page 166.
- 70 K.R. *Minogue*; "Freedom as a skill" - in: A. Phillips Griffiths (editor); *Of liberty*; Cambridge University Press (Cambridge 1983); page 198.
- 71 Page 71.

B I B L I O G R A P H Y

WORKS BY MILL

John Stuart Mill;

An examination of Sir William Hamilton's philosophy;
Longmans, Green & Co (London 1865).

Autobiography - in the Collected Works of John Stuart Mill;
University of Toronto Press (Toronto 1981/1873).

Bentham - in: J.S. Mill and Jeremy Bentham;
Utilitarianism and other essays; Penguin
(Harmondsworth 1987/1838).

Dr Whewell on moral philosophy - in: John Stuart Mill;
Dissertations and discussions; John W. Parker & Son (London 1859); volume II.

Employment of children in manufactories - in: *The Examiner* (29th January 1832).

Letter to Harriet Taylor, 15th January 1855 - in: Francis E. Mineka and Dwight N. Lindley; "Later Letters 1849-1873" - in the Collected Works of John Stuart Mill; University of Toronto Press (Toronto 1972); volume I.

ON LIBERTY; Penguin (Harmondsworth 1974/1859).

On socialism; Prometheus Books (Buffalo, New York 1987/1879).

Principles of Political Economy; Penguin
(Harmondsworth 1970/1848).

System of Logic, book VI, chapter 12, section vi - in: J.S. Mill; *The logic of the moral sciences*; Gerald Duckworth (London 1987/1843).

Utilitarianism - in: J.S. Mill and Jeremy Bentham;
Utilitarianism and other essays; Penguin
(Harmondsworth 1987/1861).

Vindication of the French revolution of February 1848, in reply to Lord Brougham and others - in: John Stuart Mill; *Dissertations and discussions*; John W. Parker & Son (London 1859); volume II.

SECONDARY CRITICISM OF MILL'S WORKS

Noel Annan;

"John Stuart Mill" - in: J.B. Schneewind (editor);
Mill: a collection of critical essays; Macmillan
(London 1968/1964).

Eugene August;

John Stuart Mill: a mind at large; Vision Press
(London 1976).

Fred R. Berger;

Mill's substantive principles of justice - a
comparison with Nozick; *American Philosophical
Quarterly* (Pittsburgh); volume XIX, number 4
(October 1982).

Maurice Cowling;

Mill and liberalism; Cambridge University Press
(Cambridge 1963).

S.R. Elliot (editor);

Letters of J.S. Mill; Longmans Green (London 1910);
volume I.

John Gray;

"John Stuart Mill on the theory of property" - in:
Anthony Parel and Thomas Flanagan (editors);
Theories of property: Aristotle to the present;
Wilfrid Laurier University Press (Ontario 1979).

"John Stuart Mill: the crisis of liberalism" - in:
Brian Redhead (editor); Political thought from Plato
to NATO; BBC (London 1984).

Mill on liberty: a defence; Routledge and Kegan Paul
(London 1983).

R.J. Halliday;

John Stuart Mill; George Allen & Unwin (London
1976).

F.A. Hayek;

"John Stuart Mill at the age of twenty-five" -
introduction to: John Stuart Mill; The spirit of
the age; University of Chicago Press (Chicago 1942).

Gertrude *Himmelfarb*;

"Editor's introduction" - in: J.S. Mill; *On Liberty*; Penguin (Harmondsworth 1974).

O. *Kurer*;

John Stuart Mill on government intervention; *History of political thought* (London 1989); volume X.

H.J. *McCloskey*;

John Stuart Mill: a critical study; Macmillan (London 1971);.

John C. *Rees*;

John Stuart Mill's "On Liberty" (constructed posthumously from published and unpublished sources, by G.L. Williams); Clarendon Press (Oxford 1985).

Bertrand *Russell*;

"John Stuart Mill" - in: J.B. Schneewind (editor); *Mill: a collection of critical essays*; Macmillan (London 1968/1951).

Alan *Ryan*;

The philosophy of John Stuart Mill, second edition; Macmillan (London 1987).

John *Skorupski*;

John Stuart Mill; Routledge (London 1989).

G.W. *Smith*;

"J.S. Mill on freedom" - in: Zbigniew Pelczynski and John Gray (editors); *Conceptions of liberty in political philosophy*; Athlone Press (London 1984).

C.L. *Ten*;

Mill on liberty; Clarendon Press (Oxford 1980).

William *Thomas*;

Mill; Oxford University Press (Oxford 1985).

Neil *Thornton*;

The problem of liberalism in the thought of John Stuart Mill; Garland (New York 1987).

J.W.N. Watkins;

"John Stuart Mill and the liberty of the individual"
- in: David Thomson; *Political ideas*; Penguin
(Harmondsworth 1969).

Geraint L. Williams;

"Introduction" - in: Geraint L. Williams (editor);
John Stuart Mill on politics and society;
Collins/Fontana (Glasgow 1976).

"Preface" - in: John C. Rees; *John Stuart Mill's
"On Liberty"* (constructed posthumously from published
and unpublished sources, by G.L. Williams);
Clarendon Press (Oxford 1985).

Donald Winch;

"Introduction" - in: John Stuart Mill; *Principles
of Political Economy books IV and V*; Penguin
(Harmondsworth 1970).

GENERAL POLITICAL THEORY

Shlomo Avineri;

Hegel's theory of the modern state; Cambridge
University Press.

Brian Barry;

"The continuing relevance of socialism" - in: Robert
Skidelsky (editor); *Thatcherism*; Chatto & Windus
(London 1988).

Norman P. Barry;

On classical liberalism and libertarianism;
Macmillan (London 1986).

Isaiah Berlin;

Four essays on liberty; Oxford University Press
(Oxford 1969).

Edmund Burke;

Reflections on the revolution in France; Penguin
(Harmondsworth 1968/1790).

Patrick Devlin;

The enforcement of morals; Oxford University Press
(London 1959).

Shadia B. Drury;

"Robert Nozick and the right to property" - in:
Anthony Parel and Thomas Flanagan (editors);
Theories of property: Aristotle to the present;
Wilfrid Laurier University Press (Ontario 1979).

Joel Feinberg;

*Rights, justice and the bounds of liberty: essays in
social philosophy;* Princeton University Press
(Princeton 1980).

The moral limits of the criminal law; Oxford
University Press; volume I (Oxford 1984) and volume
III (Oxford 1986).

James Fitzjames Stephen;

Liberty, equality, fraternity; Smith Elder & Co
(London 1874).

John Gray;

An epitaph for liberalism (review of Joel Feinberg's
"The moral limits of the criminal law") - in *Times
Literary Supplement* (London), 12th to 18th January
1990.

Liberalism; Open University Press (Milton Keynes
1986).

"On negative and positive liberty" - in: Zbigniew
Pelczynski and John Gray (editors); *Conceptions of
liberty in political philosophy;* Athlone Press
(London 1984).

T.H. Green;

Liberal legislation and freedom of contract - in:
R.L. Nettleship (editor); *Works of Thomas Hill
Green;* Longmans, Green & Co (London 1888/1881).

Abram L. Harris;

Economics and social reform; Harper (New York 1958).

H.L.A. Hart;

Between utility and rights; 79 *Columbia Law Review;*
page 835.

Law, liberty and morality; Oxford University Press
(London 1963).

F.A. Hayek;

Rules and order; - in: F.A. Hayek; *Law, legislation and liberty*; Routledge and Kegan Paul (London 1982/1973).

The constitution of liberty; Routledge (London 1960).

Thomas Hobbes;

Leviathan; Everyman (1914/1651).

David Hume;

A treatise of human nature; Clarendon Press (Oxford 1888/1739).

Simon Lee;

Law and morals; Oxford University Press (Oxford 1986).

John Locke;

Two treatises on government; Cambridge University Press (Cambridge 1967/1690).

Alasdair MacIntyre;

A short history of ethics; Routledge and Kegan Paul (London 1967).

Donald MacRae;

"Introduction" - in: Herbert Spencer; *The man versus the state*; Penguin (Harmondsworth 1969).

David Miller;

"Autonomous" v "autarchic" persons (review of S.I. Benn's "A theory of freedom") - in *Government and Opposition* (1988).

K.R. Minogue;

"Freedom as a skill" - in: A. Phillips Griffiths (editor); *Of liberty*; Cambridge University Press (Cambridge 1983).

Robert Nozick;

Anarchy, state and utopia; Basil Blackwell (Oxford 1974).

Michael Oakeshott;

Rationalism in politics and other essays; Methuen
(London 1962).

R.S. Peters;

"Hegel and the nation-state" - in: David Thomson;
Political ideas; Penguin (Harmondsworth 1969).

Madsen Pirie;

"Why F.A. Hayek is a conservative" - in: Eamonn
Butler and Madsen Pirie (editors); Hayek on the
fabric of human society; Adam Smith Institute
(London 1987).

Larry M. Preston;

Freedom, markets and voluntary exchange; *The
American Political Science Review*; volume 78.

Joseph Raz;

The morality of freedom; Clarendon Press (Oxford
1986).

Jean-Jacques Rousseau;

The Social Contract - in: Jean-Jacques Rousseau;
Oeuvres Completes, edited by Gagnebin and Raymond;
Bibliotheque de la Pleiade (Paris 1959/1762); volume
III.

Alan Ryan;

Property; Open University Press (Milton Keynes
1987).

Property and political theory; Basil Blackwell
(Oxford 1984).

Roger Scruton;

A dictionary of political thought; Pan
Books/Macmillan (London 1983).

A short history of modern philosophy - from Descartes
to Wittgenstein; ARK Paperbacks (London 1984).

Amartya Sen and Bernard Williams (editors);

Utilitarianism and beyond; Cambridge University
Press (Cambridge 1982).

Tom Settle;

The grounds of morals and the propriety of property -
in: Anthony Parel and Thomas Flanagan (editors);
Theories of property: Aristotle to the present;
Wilfrid Laurier University Press (Ontario 1979).

Herbert Spencer;

The man versus the state; Penguin (Harmondsworth
1969/1884).

Sidney Webb;

Socialism: true and false; Fabian tract number 51;
The Fabian Society (London 1899).

Robert Paul Wolff;

The poverty of liberalism; (Boston 1969).

Robert Young;

Autonomy and egalitarianism; *Political Studies*
(Guildford 1988); volume XXXVI.

MISCELLANEOUS

Lisa Appignanesi and Sara Maitland (editors);

The Rushdie file; ICA/Fourth Estate (London 1989).

Declaration of Independence of the United States of
America (Philadelphia), 4th July 1776.

John Donne;

Devotions.

H.V. Emy;

Liberals, radicals and social politics - 1892 to
1914; Cambridge University Press (Cambridge).

Halsbury's laws of England (4th edition); volume VI.

Roy Hattersley;

"The real meaning of liberty" - in *The Observer*
(London), 24th January 1988.

Ferdinand Mount;

The subversive family: an alternative history of love
and marriage; Cape (London 1982).

New Statesman & Society (London):

23rd March 1989.

Now! magazine (London):

6th June 1980 and 4th July 1980.

George Orwell;

Nineteen eighty-four; Penguin (Harmondsworth 1983/1949).

Bhikhu Parekh;

The Rushdie affair: research agenda for political philosophy; *Political Studies* (Guildford 1990); volume XXXVIII.

Raymond Plant;

"Sense and sensibility" - in *The Times* (London), 13th March 1989.

Piers Paul Read; *A Season in the West*; Pan Books (London 1989/1988).

Report of the committee on homosexual offences and prostitution (the "Wolfenden report") (CMD 247) 1957, section 13.

William Styron;

Sophie's Choice; Corgi (London 1980).

Margaret Thatcher;

Lecture to Conservative Political Centre, Blackpool, 10th October 1968 - in: Nicholas Wapshott and George Brock; *Thatcher*; Futura (London 1983).

The Times (London):

9th May 1985, 27th November 1987, 7th September 1988, 14th October 1988, 29th October 1988, and 4th October 1989.

Time magazine, Atlantic edition (Amsterdam/New York):

14th May 1979, 23rd January 1989, and 30th January 1989.

Hugo Young and Anne Sloman;

The Thatcher phenomenon; BBC (London 1986).