

# THE FATHER OF MODERN CONSTITUTIONAL LIBERALISM

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## INTRODUCTION

The cemetery Saint-Véran in Avignon, France is a thirty minute walk outside the walls of the old city, a short distance from the palace of the fourteenth century popes and the river Rhône. Toward the back of the cemetery, inauspiciously nestled among the markers and mausoleums, is a simple, unadorned stone sepulcher—the only one in sight without a trace of religious symbolism. It was here that John Stuart Mill buried his wife of seven years, Harriet Taylor Mill, after she succumbed to what Mill called “the family disease”—consumption—in November 1858.<sup>1</sup> Legend has it that Mill purchased a small cottage overlooking the cemetery from which he could see her final resting place, then purchased the furniture from the room in the Hôtel d’Europe where they had spent their last night together, installing the latter in the cottage.<sup>2</sup> He then split his time for the last fifteen years of his life between London and Avignon, visiting Harriet’s grave several times a day from that little cottage, before joining her again in 1873.<sup>3</sup>

John Stuart Mill is the great unsung hero of American constitutional liberalism as it took shape in the latter half of the twentieth century. Although he was English, not

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<sup>1</sup> 1 JOHN STUART MILL, *Autobiography*, in COLLECTED WORKS OF JOHN STUART MILL 24 (John M. Robson & Jack Stillinger eds., 1981) [hereinafter MILL, *Autobiography*].

<sup>2</sup> NICHOLAS CAPALDI, JOHN STUART MILL: A BIOGRAPHY 245–48 (2004) (describing the circumstances surrounding, and after, Harriet’s death).

<sup>3</sup> *Id.* at 247 (describing Mill’s daily routine at Avignon). Much of this legend is true. The Hôtel d’Europe stands today, and has become something of a place of pilgrimage for those interested in Mill’s life and legacy. It was from here that Mill penned a frenzied letter to a doctor in Nice, begging him to make the trip and offering £1,000 to attend to his wife, who had suffered a severe attack while *en route* to Avignon. But the doctor arrived too late. *Id.* at 246. Mill did install the furniture from the hotel room in his cottage, and it can still be seen in a little warehouse in Avignon. *Id.* at 247. As for the cottage, Mill says in his *Autobiography* that he purchased a place as close to her grave as he could find. MILL, *Autobiography*, *supra* note 1, at 251. But the site of the cottage was actually about a ten minute walk from the cemetery. Mill could not have looked out from his window to see Harriet’s grave, as some have imagined. The cottage was demolished in the 1960s—ironically enough, to build public housing. As the cemetery archivist told me, “It was the *romantic* century and this legend [that Mill could look from his window to see her grave] was finely formed, if not fully true.”

American, and died just five years after the adoption of the Fourteenth Amendment—the same year the *Slaughterhouse Cases* were decided<sup>4</sup>—he is the intellectual “father” of modern liberalism. Mill published the most influential defense of liberalism, *On Liberty*, three months after Harriet’s death, in February, 1859.<sup>5</sup> It took more than a century, but many of the central ideas of *On Liberty* and some of his other works slowly percolated into our political ideals and, ultimately, into our constitutional tradition. His ideas presaged, influenced, or directly shaped almost every facet of American constitutional liberalism as it developed from the 1960s onward: the right to privacy, a robust understanding of freedom of expression, complete equality between the sexes and, underlying these other ideas, a novel understanding of what freedom is.

Hundreds of books and articles have been written about Mill’s political thought, but little attention has been paid to his influence on modern American constitutional law.<sup>6</sup> Indeed, Mill is to modern constitutional liberalism what John Locke was to the classical liberal tradition which shaped the first century of American constitutionalism.<sup>7</sup> No

<sup>4</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>5</sup> Mill always insisted that it was as much the product of her mind as his: “The *Liberty* was more directly and literally our joint production than anything else which bears my name, for there was not a sentence of it that was not several times gone through by us together . . . .” MILL, *Autobiography*, *supra* note 1, at 257. It is certainly his best-remembered and most influential work, surpassing his *Utilitarianism*, *The Subjection of Women*, and more philosophical works such as his *System of Logic* (which he mistakenly thought would be as well-remembered as *On Liberty*). *Id.* at 259.

<sup>6</sup> For example, one of the most influential law review articles of all time, Warren and Brandeis’s *The Right to Privacy*, which spurred the development of the tort right of privacy in the early twentieth century, never even mentions Mill. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing for civil protection for the violation of private places and the disclosure of personal information). Similarly, Justice Douglas’s concurring opinion in *Doe v. Bolton*, 410 U.S. 179 (1973), a companion case to *Roe v. Wade*, 410 U.S. 113 (1973), virtually plagiarizes Mill’s three categories of activities which should be absolutely protected from governmental interference. *See infra* notes 279–85 and accompanying text. Similarly, Justice Kennedy’s pronouncement in *Planned Parenthood v. Casey*, that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe and the mystery of human life,” 505 U.S. 833, 851 (1992), is pure John Stuart Mill, as we will see later. *See infra* notes 199–200 and accompanying text. It may be that lawyers and judges tend to cite legal precedent, rather than the philosophical underpinnings of precedent, but the omissions in this case are genuinely perplexing. So much is owed to Mill, but there has been so little acknowledgment of the debt owed to him in our legal tradition.

<sup>7</sup> Locke is usually regarded as the father of the classical liberal tradition which dominated European and American thought in the eighteenth and nineteenth centuries. Locke’s *Second Treatise of Government* was sometimes thought to be merely a justification for the Glorious Revolution of 1688–89, but recent scholarship has demonstrated that Locke began the book as early as 1679, and as a general attempt to create an entirely new approach to political thought. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 45–66 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, TWO TREATISES]. In the *Second Treatise*, Locke defends Parliamentary supremacy, limited government, individual rights, religious toleration, and economic freedom—positions that all reflect the classical liberal position.

other thinker has so profoundly influenced our modern constitutional conceptions of liberty and rights as has John Stuart Mill.<sup>8</sup>

Part I of this Article surveys Mill's life and work, including his relationship with Harriet Taylor, the woman whom he credited with inspiring and refining his ideas, especially *On Liberty*.

Part II, "Liberty, Old and New," compares Mill's conception of freedom with the older, classical liberal idea. It then traces the influence of each of these ideas within our constitutional tradition. The classical conception of liberty, which the Supreme Court developed in the *Lochner* era,<sup>9</sup> views freedom primarily in "negative" terms, as non-interference by government, and emphasizes property and contractual rights.<sup>10</sup> In contrast, Mill linked freedom to the value of *self-individuation*, the process by which each individual discovers, develops, and expresses their true understanding of themselves.<sup>11</sup> This conception of freedom as self-individuation is the inspirational principle underlying several modern constitutional doctrines, to be surveyed in the following sections.

One of the most important applications of Mill's idea of freedom is in the sphere of modern due process jurisprudence. Part III, "The Intellectual Origins of the Right to Privacy," argues that the original inspiration for the privacy right is found in Mill's then-novel defense of a zone of "self-regarding" activity into which government

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<sup>8</sup> As one of Mill's most recent biographers puts it, "he was the most significant British philosopher of the nineteenth century. His restatement of liberalism, including his identification of its most salient features and problems, continues to be the starting point for all subsequent discussion within the liberal tradition." CAPALDI, *supra* note 2, at x. Yet little has been written connecting Mill's thought to American constitutional law.

<sup>9</sup> See *infra* note 13 and accompanying text (discussing the *Lochner* era, in which contract and property rights were central values protected by the Due Process Clause of the Fourteenth Amendment).

<sup>10</sup> Isaiah Berlin provided the classic treatment of the differences between "negative" and "positive" freedom. ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118–33 (1969) [hereinafter BERLIN, *Two Concepts of Liberty*]. Writing at the height of the Cold War, Berlin compared the "negative" freedom of the Anglo-American tradition with the "positive" freedom of Soviet Russia. See *id.* at 123–28, 131–34. Negative freedom is "freedom from"—freedom from interference with personal decisions and actions. *Id.* at 122. Positive freedom is "freedom to"—freedom to various social rights and commodities—housing, health care, etc. *Id.* at 132–33. He argued that positive freedom conflates freedom with other values—equality, well-being, etc. *Id.* at 125–26.

<sup>11</sup> See generally WENDY DONNER, *THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY* (1991) (discussing Mill's philosophical and psychological assumptions about human psychology, liberty, and self-development); JOHN GRAY, *MILL ON LIBERTY: A DEFENSE* (1983) (examining the difficulties with Mill's conception of the self). See also John L. Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty*, 26 SETON HALL L. REV. 92 (1995) [hereinafter Hill, *Mill, Freud, and Skinner*] (comparing Mill's liberal humanism with two competing views of human nature—Freud's psychoanalytic theory and Skinner's behaviorism).

should not intrude.<sup>12</sup> Whereas classical liberal constitutionalism was associated largely with economic liberty and protections for traditional family relationships,<sup>13</sup> more recent constitutional developments have followed Mill's lead in conceiving the zone of non-interference as a protection for *individual* autonomy and the value of privacy.<sup>14</sup> His influence is seen today in such cases as *Griswold v. Connecticut*,<sup>15</sup> *Roe v. Wade*,<sup>16</sup> and *Lawrence v. Texas*.<sup>17</sup>

Part IV of this Article looks at Mill's influence on modern equal protection jurisprudence, particularly in the realm of gender equality. Mill was one of the earliest defenders of total political and social equality between the sexes.<sup>18</sup> Mill and Harriet's views on sex, marriage, and divorce, moreover, were radical for their time (and, in some ways, for ours). They argued for the unfettered right to marry and divorce, with some limitations where children would be affected, and their views on sex were ultralibertarian.<sup>19</sup> Though many others have certainly contributed to these intellectual trends, Mill's influence was among the first and most systematically articulated.

As important as these developments have been, however, Mill's influence far transcends privacy and equal protection issues. Part V of this Article examines

<sup>12</sup> See *infra* notes 201–09 and accompanying text.

<sup>13</sup> Privacy can be viewed more narrowly as a value protecting certain intimate places, personal information, or as a protection for family autonomy, or more broadly as a generalized right of personal autonomy in the “self-regarding” zone, i.e., the area representing those activities that do not directly harm third parties. The narrower (and more traditional) idea is reflected in the protections afforded by the Third and Fourth Amendments to the U.S. Constitution, amendments which protect the home from quartering of soldiers and from unwarranted searches and seizures. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 91–94, 100 (1996) (comparing the “old” and “new” conceptions of privacy). More generally, classical thought provided for a right of family autonomy represented by the *Lochner* era cases, *Myers v. Nebraska*, 262 U.S. 390 (1923) (using the Due Process Clause to strike down a law which criminalized the teaching of foreign languages in elementary school) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a state law which made it a crime for a parent to send their children to a private school). These cases are understood today as providing constitutional protection to family autonomy, a right of parents to decide how to raise and educate their children. See SANDEL, *supra*, at 94; *infra* notes 265–68 (discussing this idea and its influence on the *Lochner* era).

<sup>14</sup> The broader idea of privacy is linked to the value of personal autonomy, the right to live one's life as one wishes. This broader right is not place dependent nor is it linked to property rights; it is a right of the person to live as he wishes. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1410–33 (1974) (discussing the similarities and differences between these two values and their constitutional reception). For a discussion of Mill's harm principle and the value of personal autonomy, see *infra* notes 141–80 and accompanying text.

<sup>15</sup> 381 U.S. 479 (1965).

<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> 539 U.S. 558 (2003).

<sup>18</sup> His classic work on this topic was one of the last things he wrote. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (1986) [hereinafter MILL, *THE SUBJECTION OF WOMEN*] (first published 1869).

<sup>19</sup> See *infra* note 241 and accompanying text.

Mill's unrivaled influence on our modern ideas of freedom of expression. In Chapter Two of *On Liberty*, he gave free speech and press its broadest and deepest justification yet.<sup>20</sup> He insisted there that even false ideas and opinions deserve protection because they permit us to refine our understanding of the truth.<sup>21</sup> Mill's ideas directly influenced Justice Oliver Wendell Holmes's "marketplace of ideas" conception of free speech developed in several famous dissents shortly after World War I. These ideas eventually gained broader assent in the free speech jurisprudence of the last fifty years.<sup>22</sup> In fact, Mill's influence on Holmes was not purely academic. As we will see, an aging Mill actually hosted Holmes and exchanged ideas with him when the latter visited London as a young man shortly after the Civil War.<sup>23</sup>

Additionally, Mill contributed to a broader understanding of freedom of expression in a second way. Mill thought that the right of freedom of expression encompasses not simply the propositional or truth-functional aspects of expression, but the *emotive* content of our expression as well.<sup>24</sup> That the First Amendment is now understood to protect not simply *what* is said, but *how* it is said, and that it now protects expressive *acts* as well as speech, is another of Mill's legacies to our constitutional tradition.

In sum, no other thinker has had such a broad influence on our modern constitutional rights tradition; in our conceptions of personal freedom, equality, and freedom of expression; and on our evolving understanding of the very meaning of freedom itself.

Finally, in Part VI, I raise some questions about the coherence of Mill's political thought with his general philosophical outlook. As a philosopher, Mill was a naturalist and a determinist.<sup>25</sup> He did not subscribe to the idea of what was traditionally called "freedom of the will" but believed that human choices are shaped by personal, biological, and social factors.<sup>26</sup> He was also profoundly cautious about whether it was appropriate to talk as if there is a "self" whose choices can be said to be "free."<sup>27</sup>

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<sup>20</sup> See *infra* note 366 and accompanying text.

<sup>21</sup> See *infra* notes 366–71 and accompanying text.

<sup>22</sup> See *infra* notes 384–90 and accompanying text.

<sup>23</sup> See *infra* note 386 and accompanying text.

<sup>24</sup> In other words, free speech principles should not permit the state to regulate *what we say* by limiting *how we say it*. See *infra* notes 372–73 and accompanying text.

<sup>25</sup> The term "naturalism" has several meanings, but in philosophical discourse, naturalism is the view that the world (and human beings in that world) must be understood in a purely natural, materialistic, or nonspiritual way. See JOHN LAWRENCE HILL, *AFTER THE NATURAL LAW: HOW THE CLASSICAL WORLDVIEW SUPPORTS OUR MODERN MORAL AND POLITICAL VALUES* 143–44 (2016) [hereinafter HILL, *AFTER THE NATURAL LAW*]. Philosophers sometimes use the term "materialism" to describe these views in nonvarnished terms. *Id.* at 139–41. "Determinism" is the related idea that all human choices are determined by a constellation of genetic and environmental factors in a person's life. *Id.* at 180–84. Determinism is usually understood to negate or conflict with the traditional idea of "freedom of the will," which holds that people genuinely make choices. *Id.* at 184–85.

<sup>26</sup> See *infra* note 429 and accompanying text.

<sup>27</sup> See John Lawrence Hill, *Theism, Naturalism, and Liberalism: John Stuart Mill and the*

The tenor of much of his worldview, expressed in several of his more academic and philosophical writings, runs against the assumptions of *On Liberty*, which conceives of human beings as choice-making and which links freedom to the process of unfolding the individual self.<sup>28</sup>

This raises a fundamental question not simply for Mill, but for any modern liberal who, like Mill, is skeptical about the ideas of free will and selfhood: *Liberalism values freedom*. But can we truly be “free,” politically or socially, if we are not *inwardly* free to make choices which are—in the deepest sense—genuinely “our own”? We will consider Mill’s novel response to this problem, a problem that implicitly confronts liberal political thought today.

### I. THE LIFE AND WORK OF JOHN STUART MILL

John Stuart Mill was born in London on May 20, 1806.<sup>29</sup> His father, James Mill, had decided to make his son an archetype of enlightened intellectuality—a utilitarian, a reformer, and, as the elder Mill wrote to Jeremy Bentham, “a successor worthy of us.”<sup>30</sup> Today, we would say that he home-schooled his son ruthlessly. The elder Mill was a close associate of Jeremy Bentham, the popularizer of utilitarianism, David Ricardo, one of the founders of modern economics, and of John Austin, the father of modern legal positivism.<sup>31</sup> Their circle of associates dominated English political and social thought during the first half of the nineteenth century and dedicated themselves to transforming social and political structures to a basis of more secular, humanistic, and utilitarian principles.<sup>32</sup>

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“*Final Inexplicability*” of the Self, 39 PEPP. L. REV. 1401 (2013) (discussing Mill’s ambivalent attachment to the idea of the self).

<sup>28</sup> See *supra* note 11 and accompanying text (discussing the conflict between Mill’s commitment to the self and to the value of self-actualization in his political thought, and his skepticism toward this same idea in his philosophical thought).

<sup>29</sup> MILL, *Autobiography*, *supra* note 1, at 5.

<sup>30</sup> This letter, written in 1812 when Mill was only six, is quoted in a commemorative article written by several authors in a volume of *Popular Science* shortly after Mill died. John Stuart Mill, POPULAR SCIENCE MONTHLY, vol. 3 (July, 1873), [https://en.wikisource.org/wiki/Popular\\_Science\\_Monthly/Volume\\_3/July\\_1873/John\\_Stuart\\_Mill](https://en.wikisource.org/wiki/Popular_Science_Monthly/Volume_3/July_1873/John_Stuart_Mill) [<https://perma.cc/HM3H-NHQA>].

<sup>31</sup> James Mill respected Bentham immensely and ultimately became his friend. Their relationship is described in CAPALDI, *supra* note 2, at 17–21. James Mill and Bentham then surrounded themselves with a circle of thinkers who embraced utilitarianism and its corollary doctrines, including legal positivism. John Austin, who was sixteen years older than John Stuart Mill and had been a neighbor of the Mills, had an important influence on J.S. Mill. *Id.* at 35–36. Austin is most remembered as the father of legal positivism and analytic jurisprudence; the attempt to describe law in purely analytic, non-moral terms. See JOHN AUSTIN, THE PROVENCE OF JURISPRUDENCE DETERMINED (1861).

<sup>32</sup> MICHAEL ST. JOHN PACKE, THE LIFE OF JOHN STUART MILL, 3–24 (1st ed., 1954). Mill’s early life and education are described by one biographer as “the great experiment.” See CAPALDI, *supra* note 2, at 1–34 (describing Mill’s childhood and the cultural milieu in which he grew up).

The elder Mill was of Scottish Presbyterian stock and, though he rejected early in life the substance of that religion, he retained to the end the highly disciplined emotional austerity of his Calvinist forbears.<sup>33</sup> Mill described his father as utterly dispassionate, rational, and a Stoic.<sup>34</sup> He tells us that James Mill regarded the expression of every passionate emotion “as a form of madness[,]”<sup>35</sup> regarded human life as “a poor thing at best,”<sup>36</sup> and often said that he “had never known a happy old man.”<sup>37</sup>

In the first draft of Mill’s *Autobiography*, he wrote candidly of his father’s “bane-ful” influence on the emotional lives of his children: “my father’s children neither loved him . . . with any warmth of affection,” Mill remembered, “nor [did] . . . any one else.”<sup>38</sup> But he toned this down in a later draft, saying simply that while he did not love his father, he was “always . . . devoted to him.”<sup>39</sup>

Mill tells us that his father shielded him from the association of other children so that he could get on with the serious business of his education.<sup>40</sup> And so he did. Mill began to read ancient Greek at the age of three, studied history and the classics at six, and was learning algebra, geometry, and Latin by eight.<sup>41</sup> At this point, Mill’s father appointed him schoolmaster to his younger siblings.<sup>42</sup> By ten, Mill was reading Plato’s *Dialogues* fluently in the original Greek and at twelve he began the study of logic and political economy.<sup>43</sup> A year later he was busy preparing paragraph

<sup>33</sup> CAPALDI, *supra* note 2, at 2; PACKE, *supra* note 32, at 6–7.

<sup>34</sup> MILL, *Autobiography*, *supra* note 1, at 49.

<sup>35</sup> *Id.* at 50.

<sup>36</sup> *Id.* at 49.

<sup>37</sup> *Id.* at 50.

<sup>38</sup> These statements, recorded in an earlier draft, did not make it into the final version of Mill’s *Collected Works*, but they are available in a popular version of the *Autobiography*. JOHN STUART MILL, *Autobiography* 32–33, 33 n.3 (Jack Stillinger ed., 1969). As for his mother, Mill regarded her as a shallow drudge who was guilty by omission of curing his father’s, or her children’s, emotional distance:

That rarity in England, a really warm-hearted mother, would . . . have made my father a totally different being and . . . would have made the children grow up loving and being loved. But my mother, with the very best intentions, only knew how to pass her life in drudging for them. Whatever she could do for them she did, and they liked her, because she was kind to them, but to make herself loved, looked up to, or even obeyed, required qualities which she unfortunately did not possess.

*Id.* at 33.

<sup>39</sup> *Id.* at 32.

<sup>40</sup> *Id.* at 37. Mill’s father was “bent upon my escaping not only the ordinary corrupting influences which boys exercise over boys, but the contagion of vulgar modes of thought and feeling . . .” *Id.* at 37–39.

<sup>41</sup> *Id.* at 9–13.

<sup>42</sup> This duty lasted into Mill’s early thirties. CAPALDI, *supra* note 2, at 10.

<sup>43</sup> MILL, *Autobiography*, *supra* note 1, at 9, 13–17, 21.

summaries of his father's *Elements of Political Economy*, which was used as a text in universities for several decades during the nineteenth century.<sup>44</sup>

Mill was fifteen when he first read Bentham and decided that the goal of his life was "to be a reformer of the world."<sup>45</sup> Even his youthful anti-authoritarianism was appropriately directed toward good, progressive causes: he spent one night in jail in 1822, at the age of sixteen, for distributing birth control literature in the East End.<sup>46</sup> The pace of Mill's youthful career only picked up from this point. Between the ages of sixteen and nineteen he founded a debating club which he named "the Utilitarian Society."<sup>47</sup> Mill later claimed to be the first to use the term 'utilitarian' in its philosophical sense.<sup>48</sup> He also became a regular contributor to the *Westminster Review*, a Benthamite journal of political and social criticism, and for about eighteen months became Bentham's amanuensis.<sup>49</sup> Among other tasks, it was the young Mill's job to gather, collate, and massage into coherent essays a multitude of scraps of paper with thoughts and references which Bentham customarily pinned to the curtain behind his desk.<sup>50</sup> His education, Mill later said, gave him a quarter-century head start on his peers,<sup>51</sup> but he was soon to count its costs as well.

At twenty he suffered a nervous breakdown. The event was precipitated by a simple question he posed to himself one day:

Suppose that all your objects in life were realized; that all the changes in institutions and opinions which you are looking forward to, could be [realized] at this very instant: would this be a great joy and happiness to you?" And an irrepressible self-consciousness distinctly answered "No!" At this my heart sank within me: the whole foundation on which my life was constructed fell down . . . I seemed to have nothing left to live for.<sup>52</sup>

Mill spent the next six months in a semi-dissociated haze, robotically going through his day-to-day routine with little sense of commitment, let alone enjoyment.<sup>53</sup>

<sup>44</sup> CAPALDI, *supra* note 2, at 15.

<sup>45</sup> MILL, *Autobiography*, *supra* note 1, at 137.

<sup>46</sup> CAPALDI, *supra* note 2, at 41.

<sup>47</sup> *See id.* at 42–43.

<sup>48</sup> 10 JOHN STUART MILL, *Utilitarianism*, in COLLECTED WORKS OF JOHN STUART MILL 209–10 n.1 (John M. Robson & Jack Stillinger eds., 1981) [hereinafter MILL, *Utilitarianism*]; CAPALDI, *supra* note 2, at 257.

<sup>49</sup> *See generally* MILL, *Autobiography*, *supra* note 1, at 89–137 (describing the Utilitarian Society, the *Westminster Review*, and his "youthful propagandism").

<sup>50</sup> *See* 21 JOHN BOWRING, *Memoirs of Bentham*, in THE WORKS OF JEREMY BENTHAM 30 (1842).

<sup>51</sup> MILL, *Autobiography*, *supra* note 1, at 33.

<sup>52</sup> *Id.* at 139.

<sup>53</sup> *Id.*



He claimed that he was eventually cured of his first breakdown only by reading the romantic poets—Goethe, Wordsworth, and Coleridge, among others—an avocation later nurtured in him by Harriet Taylor.<sup>54</sup>

Mill's acquaintance with Taylor at the age of twenty-four was the second defining event of his life.<sup>55</sup> Mill was shy, sensitive, analytical, and physically awkward (he had trouble even tying his shoes as a youth); Taylor was vivacious, poetic, and intuitive.<sup>56</sup> Unfortunately for both, she was also married.<sup>57</sup> Her husband, John Taylor, was a prosperous wholesale druggist eleven years her senior.<sup>58</sup> She was twenty-three when she met Mill, already the mother of two with a third child soon on the way.<sup>59</sup> For the next twenty years, they carried on a public relationship that scandalized Victorian society.<sup>60</sup> They married after Harriet's husband died when Mill and Harriet were approaching their mid-forties.<sup>61</sup>

Sadly, Mill and Harriet's marriage lasted only seven and a half years.<sup>62</sup> Both suffered throughout their marriage from the tuberculosis which ultimately took their lives.<sup>63</sup> Mill called it his "family disease" as it had already taken his father and several siblings.<sup>64</sup> In fact, it is likely that Mill infected Harriet, as he suffered from

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<sup>54</sup> See generally CAPALDI, *supra* note 2, at 86–132 (discussing Mill's introduction to romanticism and its influence on his later thought).

<sup>55</sup> MILL, *Autobiography*, *supra* note 1, at 193. Mill was clearly love-struck, as evidenced by his descriptions of Harriet as an almost superhuman personage: "she was a beauty and a wit, with an air of natural distinction." *Id.* She was "a genius . . . her mind was the same perfect instrument, piercing to the very heart . . . of the matter . . ." *Id.* at 195. The poet, Shelley, who was loosely attached to their circle, was "but a child compared with what she ultimately became." *Id.* Her character was:

At once the noblest and the best balanced which I have ever met in life . . . the most genuine modesty combined with the loftiest pride; a simplicity and sincerity which were absolute, towards all who were fit to receive them . . . . To be admitted into any degree of personal intercourse with a being of these qualities, could not but have a most beneficial influence on my development.

*Id.* at 195–96.

<sup>56</sup> See generally PACKE, *supra* note 32, at 115–54 (describing their characters and early relationship).

<sup>57</sup> *Id.* at 116.

<sup>58</sup> *Id.* at 116–18.

<sup>59</sup> *Id.* at 126.

<sup>60</sup> CAPALDI, *supra* note 2, at 106–10, 222–48 (describing at length Mill's and Harriet's relationship which became "one of the most talked-about affairs of the Nineteenth century," and the effects of their relative social ostracism).

<sup>61</sup> MILL, *Autobiography*, *supra* note 1, at 247. See *infra* note 325 and accompanying text (discussing their marriage and views on matrimony and divorce).

<sup>62</sup> MILL, *Autobiography*, *supra* note 1, at 247.

<sup>63</sup> CAPALDI, *supra* note 2, at 233–34.

<sup>64</sup> MILL, *Autobiography*, *supra* note 1, at 247.

the condition long before she did.<sup>65</sup> But in her case it developed much more rapidly and took its ultimate toll on her while the two were traveling in Avignon, France, in November 1858.<sup>66</sup>

Mill's personality might be described as a dizzying emulsion of arrogance, nobility, chilly condescension, and heroic generosity. As a result of strained relations caused by his and Harriet's decades-long friendship, he did not invite either his mother or his remaining siblings to their wedding ceremony; most were informed of the event by others after it took place.<sup>67</sup> When one of his sisters, Clara, tried to visit him at their new home, Mill refused to see her.<sup>68</sup> A volley of letters followed from Mill's sisters—written more from hurt than reproach. Mill brushed them off in turn as “impertinen[t],” “vulgar,” and “insolent.”<sup>69</sup> His mother attempted to visit him at the India House, where he worked essentially as an administrator of the Indian government (then a colony of Britain), but he had her turned away.<sup>70</sup> More than two years later, as she was dying of liver cancer, she wrote again in the kindest of terms: “[Y]our Marriage gave us all pleasure as you had chosen a Wife who was capable of entering into all your pursuits and appreciate your good qualities.”<sup>71</sup> Mill visited his mother only once during her final illness and went abroad for an extended vacation just before she died. In his last letter to her, he asked to be relieved as executor of her will.<sup>72</sup>

Mill was often openly contemptuous of those who disagreed with him.<sup>73</sup> Any politician who did not see the value of his theory of voting, he wrote, “may be pronounced an incompetent statesman, unequal to the politics of the future.”<sup>74</sup> He frequently distinguished himself and Harriet from others in almost ontological terms. His romanticism reached almost Nietzschean heights when he defended an absolute right of “highest natures” not to be restrained in any way “from seeking out and uniting themselves with some one whom they can perfectly love.”<sup>75</sup> He asks:

<sup>65</sup> PACKE, *supra* note 32, at 360.

<sup>66</sup> *Id.* at 392–94. Mill wrote a frenzied letter from the Hôtel d'Europe in Avignon to a doctor in Nice, offering him £1,000, the equivalent of \$50,000 today, to come and attend to Harriet, but the doctor arrived too late. CAPALDI, *supra* note 2, at 246.

<sup>67</sup> These events are described in detail in PACKE, *supra* note 32, at 344–50.

<sup>68</sup> CAPALDI, *supra* note 2, at 229.

<sup>69</sup> *Id.* at 232.

<sup>70</sup> *Id.* at 229.

<sup>71</sup> PACKE, *supra* note 32, at 355–56.

<sup>72</sup> *Id.* at 356.

<sup>73</sup> In his *Considerations on Representative Government*, Mill asserted that conservatives were “the stupidest party.” JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 138 (1861). He later defended this in an odd way: “I never meant to say that the Conservatives are generally stupid. I meant to say that stupid people are generally Conservative.” PACKE, *supra* note 32, at 454.

<sup>74</sup> MILL, *Autobiography*, *supra* note 1, at 262.

<sup>75</sup> F.A. HAYEK, *JOHN STUART MILL AND HARRIET TAYLOR: THEIR CORRESPONDENCE AND SUBSEQUENT MARRIAGE* 60 (1951).

But will the morality which suits the highest natures, in this matter, be also best for all inferior natures? My conviction is that it will: but this can be only a happy accident. All of the difficulties of morality in any of its brands, grow out of the conflict which continually arises between the highest morality & even the best popular morality which the degree of development yet achieved by average human nature, will allow to exist.<sup>76</sup>

Nor were strangers exempt from Mill's icy condescension.<sup>77</sup>

Yet Mill was also a man of great virtue in the right circumstances. He was sober and serious, generous, courageous, and possessed of great intellectual integrity. While running for Parliament, he was confronted with a comment he had made in one of his writings that most people in the working class were liars.<sup>78</sup> When asked if he had written this by a gathering of working class voters, he responded, "I did."<sup>79</sup> The crowd erupted in applause, apparently in appreciation for his candor.<sup>80</sup> While in office, Mill received almost weekly death threats which he seems to have largely shrugged off.<sup>81</sup> He was scrupulously honest financially. He supported himself and Harriet on his own income after they married, refusing to take a penny from the substantial estate left by her late husband.<sup>82</sup> He generously supported many friends and intellectuals who had fallen on hard times.<sup>83</sup> And he brought a combination of integrity and passion

<sup>76</sup> *Id.*

<sup>77</sup> In a letter to Harriet he smugly sized up a fellow Englishman, a man named Pope, whom Mill met while traveling in France in 1855:

He turned out a pleasant person to meet, as, though he does not seem to me to have any talent, he is better informed than common Englishmen—knows a good deal of French history for example, especially that of the Revolution—and seems either to have already got to or to be quite ready to receive, all our opinions. I tried him on religion, where I found him quite what we thin[k] right—on politics, on which he was somewhat more than a radical—on the equality of women which he seemed not to have quite dared to think of himself but seemed to adopt it at once—and to be ready for all reasonable socialism—he boggled a little at limiting the power of bequest which I was glad of as it showed that the other agreements were not merely following a lead taken. He was therefore worth talking to and I think he will have taken away a good many ideas from me.

PACKE, *supra* note 32, at 373.

<sup>78</sup> MILL, *Autobiography*, *supra* note 1, at 274.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 282.

<sup>82</sup> CAPALDI, *supra* note 2, at 228–29 (Mill wrote a letter disavowing any right to her property).

<sup>83</sup> PACKE, *supra* note 32, at 484. For example, Mill long supported Herbert Spencer. *Id.* at 433.

to bear in political and moral matters where it was often most needed. When his old friend Carlyle, whose conservatism had soured with age into a reactionary anti-humanitarianism, published his *Discourse on the Nigger Question*, suggesting that the newly freed slaves in Jamaica were much better off under the yoke, Mill penned an impassioned rejoinder calling Carlyle's piece "a true work of the devil."<sup>84</sup>

The range of Mill's intellectual interests and expertise spanned virtually the entire spectrum of the humanities. He wrote on politics, economics, metaphysics, epistemology, logic, moral theory, and social science, among others.<sup>85</sup> His first and most substantial publication was *A System of Logic*, published in 1843.<sup>86</sup> The multi-volume work covered a wide spectrum of philosophical topics including logic (he defended a highly inductive approach to logic congenial to his empiricism), moral theory, and metaphysics, including his treatment of the nature of mind and the free will question.<sup>87</sup> The *Principles of Political Economy* followed in 1848 and was used as the standard textbook on economics in English universities until 1919.<sup>88</sup>

No other major works appeared for a decade, during the period of his marriage to Harriet. But after her death came the outpouring of his most remembered works—*On Liberty* in 1859, *Considerations on Representative Government* in 1861 and *Utilitarianism* in 1863 (it appeared in supplements in *Fraser's Review* in 1861).<sup>89</sup> He returned to metaphysics with the publication of the ponderous *An Examination of Sir William Hamilton's Philosophy* in 1865,<sup>90</sup> in which he refined his materialist theory of mind and freedom commenced in the *System of Logic*.<sup>91</sup> *Auguste Comte and Positivism* appeared the same year.<sup>92</sup> Here he warned of the growing threat to freedom posed by radical thinkers such as Comte, who had once been Mill's friend, and whose many "reforms" included a proposal for a hierarchy of secular priests to guide society.<sup>93</sup> Mill's last important work was *The Subjection of Women*, published

<sup>84</sup> *Id.* at 464–65.

<sup>85</sup> 7–8 JOHN STUART MILL, *A System of Logic Ratiocinative and Inductive*, in COLLECTED WORKS OF JOHN STUART MILL (J. M. Robson ed., 1973) [hereinafter MILL, *A System of Logic*].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 2 JOHN STUART MILL, *The Principles of Political Economy with some of Their Applications to Social Philosophy*, in COLLECTED WORKS OF JOHN STUART MILL (J. M. Robson ed., 1965). See MILL, *Autobiography*, *supra* note 1, at 271–72 (discussing the writing of this, along with Harriet's influence on the world).

<sup>89</sup> See CAPALDI, *supra* note 2, at 303–31 (discussing the outpouring of these works after Harriet's death).

<sup>90</sup> 9 JOHN STUART MILL, *An Examination of Sir William Hamilton's Philosophy*, in COLLECTED WORKS OF JOHN STUART MILL (J. M. Robson ed., 1974) [hereinafter MILL, *An Examination of Hamilton's Philosophy*].

<sup>91</sup> See *id.*

<sup>92</sup> 10 JOHN STUART MILL, *Auguste Comte and Positivism*, in COLLECTED WORKS OF JOHN STUART MILL (John M. Robson & Jack Stillinger eds., 1981) [hereinafter MILL, *Auguste Comte and Positivism*].

<sup>93</sup> Mill grew increasingly dubious of the authoritarian and totalitarian tendencies in Comte's

in 1869.<sup>94</sup> He also left a large, unfinished manuscript in which he advanced his most radical proposal yet for a decentralized form of socialism.<sup>95</sup>

In 1865 Mill reluctantly accepted calls for him to stand for election to Parliament for Westminster. He refused to canvas, would not spend a penny on the campaign, and answered all questions with complete candor, refusing to hide his more unpopular opinions.<sup>96</sup> He won the election anyway.<sup>97</sup> He held office for only one term during which he helped to pass the Reform Bill of 1867, which doubled the number of eligible voters among the working class.<sup>98</sup> Yet Mill's utilitarianism occasionally led him to take stands that were out of step with his fellow liberals. He opposed a bill to abolish capital punishment and he supported another to permit the interdiction of neutral vessels carrying goods to countries which were enemies of Britain.<sup>99</sup> He was turned out of office after three years when Parliament was dissolved after the passage of the Reform Bill which he helped to pass.<sup>100</sup> If anything, Mill was relieved that he could return to private life without the substantial distractions of public office.<sup>101</sup>

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thought and published the book originally as two installments in the *Westminster Review*. MILL, *Autobiography*, *supra* note 1, at 271–72. Mill's remarks make clear his hatred for Comte's central planning: "[O]ne is appalled at the picture of entire subjugation and slavery, which is recommended to us as the last and highest result of the evolution of Humanity." *Id.* at 351.

<sup>94</sup> MILL, *THE SUBJECTION OF WOMEN*, *supra* note 18. See *infra* notes 338–52 and accompanying text (discussing Mill's conception of feminism).

<sup>95</sup> See generally 5 JOHN STUART MILL, *Chapters on Socialism* (1879) (J. M. Robson ed., 1967) (an incomplete work on the subject published by Helen Taylor, Harriet's daughter, under this title six years after his death). Mill's attitude toward socialism was complex and has been the subject of much controversy since his socialist and libertarian impulses potentially conflicted at the core with each other. In the *Chapters on Socialism*, he distinguished between two kinds of socialism—the first is the decentralized socialism of Owen, Fourier, and others who sought to create “a new order of society, in which private property and individual competition are to be superseded and other motives to action substituted . . . .” *Id.* at 737. A second, revolutionary form of socialism of thinkers like Comte and Marx calls for:

the management of the whole productive resources of the country by one central authority, the general government. And with this view some of them avow as their purpose that the working classes, or somebody in their behalf, should take possession of all the property of the country, and administer it for the general benefit.

*Id.* Mill defended the first and warned against the second form of socialism, insisting that its animating principle was “hate.” *Id.* at 749.

<sup>96</sup> MILL, *Autobiography*, *supra* note 1, at 272–75.

<sup>97</sup> *Id.* at 275.

<sup>98</sup> *Id.* at 275–79 (describing his efforts, successes, and failures in Parliament).

<sup>99</sup> See MILL, *Autobiography*, *supra* note 1, at 275–76 (describing his differences with the liberal party); CAPALDI, *supra* note 2, at 321–31 (describing Mill's period in Parliament and the impact of utilitarianism on his politics).

<sup>100</sup> MILL, *Autobiography*, *supra* note 1, at 288.

<sup>101</sup> Immediately upon defeat, Mill received invitations to stand for election in other precincts which he happily rejected. *Id.* at 289–90.

The picture of Mill's last five years is poignant. A good deal of his time was spent at Avignon, in the villa he had purchased and furnished with the furniture from the hotel room in which Harriet died.<sup>102</sup> His only and almost constant companion during these last years was Harriet's daughter, Helen.<sup>103</sup> There, surrounded as it were by Harriet, Mill died two weeks before his sixty-seventh birthday on May 7, 1873, and took his place beside her.<sup>104</sup>

## II. LIBERTY, OLD AND NEW

### A. *The Meaning of Freedom: The Classical Liberal Ideal*

The classical liberal tradition is usually traced to John Locke (1632–1704), whose *Second Treatise of Government* and other works are characteristically thought to be the first genuine expression of liberal thought.<sup>105</sup> Yet Locke was also the last important natural rights thinker and the only important liberal thinker to link freedom to the existence of God.<sup>106</sup>

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<sup>102</sup> CAPALDI, *supra* note 2, at 247.

<sup>103</sup> PACKE, *supra* note 32, at 505–08; CAPALDI, *supra* note 2, at 246–47.

<sup>104</sup> PACKE, *supra* note 32, at 507–08.

<sup>105</sup> Locke was the first political thinker to give what would later be called “liberalism” a systematic defense. GOTTFRIED DIETZE, LIBERALISM PROPER AND PROPER LIBERALISM 2 (1985). The central value of the liberal tradition is freedom and the first political thinker to emphasize freedom in all of its facets was John Locke. As another leading commentator on Locke's thought puts it, Locke's philosophy can be summed up as:

*All government is limited in its powers and exists only by the consent of the governed. And the ground Locke buil[t] on is this: All men are born free.* The theme of human freedom characterizes those of Locke's works which are most important for an understanding of his political thought: in *A Letter Concerning Toleration* (1689), he wrote of religious freedom; in *Two Treatises of Government* (1690), of political freedom; and in *Some Considerations of the Consequences of the Lowering of Interest and Raising the Value of Money* (1691), of economic freedom. Each of these works is an instructive examination of the principle of human freedom . . . .

3 ROBERT A. GOLDWIN, *John Locke*, in HISTORY OF POLITICAL PHILOSOPHY 476 (Leo Strauss & Joseph Cropsey eds., 1987).

<sup>106</sup> Much of Locke's philosophy can be viewed as an attempt to chart a middle way between the scholasticism of the Catholic natural lawyers, on one hand, and atheistic materialists such as Thomas Hobbes, on the other. He was a Christian but also an empiricist, a natural lawyer but also the first of the classical liberals. Locke wrote early on in the *Essay Concerning Human Understanding*, a work that is generally thought to represent the “secular” side of his thought: “Tis as certain there is a God, as that the oppo[s]ite Angles, made by the inter[s]section of two straight Lines, are equal.” JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (London 1689), at I, iv, 33 [hereinafter LOCKE, HUMAN UNDERSTANDING]. But he was skeptical of many of the claims of Christian orthodoxy. In his *Reasonableness of Christianity*, published in the last decade of his life, Locke attacked original sin and the existence of Hell as incompatible with an all-loving God. See JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY 5–10

Locke was the first true classical liberal because he was the first to draw consistently individualistic conclusions from explicitly individualistic premises.<sup>107</sup> He directly challenged the most basic tenet of the entire classical political tradition—the idea, as Aristotle put it, that “the state is a creation of nature and prior to the individual.”<sup>108</sup> Locke reversed this, insisting that the individual is by nature prior to the state both *historically*, in the sense that individuals lived in a state of nature before entering into society and, more importantly, *morally*, in the sense that our political institutions must be grounded on the consent of the individual.<sup>109</sup> Whereas classical

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(John C. Higgins-Biddle ed., 1999). When critics charged him with having studiously avoided having said a single word in defense of the Trinity he responded weakly that he had not written a word *against* it. JOHN C. HIGGINS-BIDDLE, *Introduction to JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY* lxviii (Clarendon Press 1999) (1695).

<sup>107</sup> Hobbes and Locke both started from this essentially individualistic premise, arguing from a hypothetical state of nature which precedes the State. Yet where Hobbes’s thought may well be the source of modern absolutism and even totalitarianism, Locke argued for limited government and individual rights. See LOCKE, *TWO TREATISES*, *supra* note 7, at 67–92 (comparing Locke and Hobbes’s philosophical and political thought); ISAIAH BERLIN, *FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* 30–31 (2002) (comparing the same).

<sup>108</sup> Aristotle, *Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1127, 1130 (Richard McKeon ed., 1941). Aristotle was no collectivist in the modern sense, of course. He thought the state exists for the benefit of creating the conditions of the good life for the individual, but he also taught that the state was prior to the individual in a *formal* sense—in the sense that the individual apart from the state is not fully human. *Id.* Aristotle taught the eminently sensible thesis that it is our social life which is literally *constitutive* of our humanity; the man in the state of nature is less than fully human. See *id.* To put it in modern terms, we only become individuals *by being socialized*. Locke found in the state of nature the kind of individual that Aristotle thought could only be found in civilized society—a rational individual who can be morally bound by his commitments and promises. As a leading commentator on Locke puts it, Locke was not ignorant of the conditions of man in the state of nature, but Locke:

emphasize[d] . . . the positive moral features of the natural state of man . . . because his notion of the state of nature is structured in terms of certain fundamental religious beliefs he held regarding the relationship between God and man. In other words, whereas men are wholly responsible for whatever they make of themselves in political society, what individuals are in their natural state primarily depends upon what one assumes God has made them to be.

Richard Ashcraft, *Locke’s Political Philosophy*, *THE CAMBRIDGE COMPANION TO LOCKE* 226, 238 (1994).

<sup>109</sup> Though Locke assumed that the state of nature does precede society historically, he makes clear that his argument does not depend on this:

To those that say, There were never any Men in the State of Nature; I will not only oppose the Authority of the Judicious *Hooker* . . . But I moreover affirm, That all Men are naturally in that State, and remain so, till by their own Consents they make themselves Members of some Politick Society.

LOCKE, *TWO TREATISES*, *supra* note 7, at 277–78. The state of nature is the natural state of all men before they consent to government. See *id.* at 276–77. Whether or not there ever was such a state is irrelevant. The state of nature is a moral construct in the sense that no man is

political thinkers predicated the legitimacy of political institutions either on essentialized notions of human nature (Aristotle) or divine will (pre-Enlightenment Christian thinkers),<sup>110</sup> Locke insisted that legitimacy is grounded on nothing more than the consent of the governed, limited only by the fundamental strictures of the natural law.<sup>111</sup>

Locke's theory was individualistic in a second, deeper sense as well. Locke was perhaps the very first political thinker to argue that each of us is possessed of a right of

bound by the law of any state until he consents to its government. *Id.* at 276–78. The isolated individual today is still “in the state of nature” in this sense.

<sup>110</sup> Classical political thinkers from Plato and Aristotle onward, based the legitimacy of social and political institutions on the naturalness of the State and on their capacity to create order and realize the human good. See F. Miller, *Aristotle's Political Theory*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 7, 2017), <https://plato.stanford.edu/entries/aristotle-politics/> [https://perma.cc/4S5V-HGXQ]. Christian thinkers often predicated these on the will of God. Some, like Thomas Aquinas (1225–74), combined these ideas, arguing that there is a natural law reflecting God's order. Joseph Magee, *St. Thomas Aquinas on the Natural Law*, THOMISTIC PHILOSOPHY PAGE (May 2, 2015), <http://www.aquinasonline.com/Topics/natlaw.html> [https://perma.cc/9N8G-HW85]. Locke's *First Treatise of Government* was devoted to refuting Robert Filmer's divine will justification for the right of kings to rule. See LOCKE, TWO TREATISES, *supra* note 7, at 143–44, 146, 151, 202, 218.

<sup>111</sup> Locke is clear that the state of nature is, nevertheless, bound by morality for “though this be a *State of Liberty*, yet it is *not a State of License* . . . . The *State of Nature* has a Law of Nature to govern it, which obliges every one.” LOCKE, TWO TREATISES, *supra* note 7, at 270–71.

The natural law was for Locke a dictate of God. See LOCKE, HUMAN UNDERSTANDING, *supra* note 106, at II:28:8. Locke was explicit that all morality depends on a law which obligates the will, and that this law depends, in turn, on God. *Id.* In fact, Locke regarded a Godless moral order as an absurdity. See *id.* Locke was a moral voluntarist in that he thought that all moral obligation rests on God's will. See *id.* The natural law or, for that matter, any form of what later philosophers would call “objective moral truth” depends entirely on the existence of God. See *id.* God's law, he wrote in the Essay, “is the only true touchstone of moral Rectitude . . . .” *Id.* The idea of a Godless natural law would have been an absurdity to him. See *id.* In fact, all moral obligation, Locke insisted, depends upon a *command*, an act of will that obliges the individual, through offer of reward and threat of punishment, to carry out his duty: “But what duty is, cannot be understood without a law;” Locke wrote, “nor can a law be known or supposed, without a law-maker, or without reward and punishment . . . .” *Id.* at I.3.12.

God's natural law imposes normative limits on human acts, *e.g.*, prohibiting us from taking our own life or treating others unjustly, even in the state of nature. And yet the law's function is not merely that of a constraint or limit. Here Locke comes closer to the earlier idea of the natural law. “[L]aw, in its true Notion, is not so much the Limitation as *the direction of a free and intelligent Agent* to his proper Interest, and prescribes no farther than is for the general Good of those under that Law.” LOCKE, TWO TREATISES, *supra* note 7, at 305. Where law limits freedom in Hobbes's view, it has the opposite import for Locke. “[T]he end of Law is not to abolish or restrain, but to *preserve and enlarge Freedom*.” *Id.* at 306. Locke insists that “*where there is no Law there is no Freedom* . . . Freedom is not, as we are told [by Hobbes], *A Liberty for every Man to do what he lists*.” *Id.* It is “a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the allowance of those laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.” *Id.*



self-ownership.<sup>112</sup> We are responsible for our lives and, insofar as each individual is inherently rational, we are morally sovereign over ourselves.<sup>113</sup> Each possesses a general liberty of acting from his own will that prohibits any other from compelling or coercing him in violation of his natural rights.<sup>114</sup> The individual is free to the extent that he understands and acts without coercion.<sup>115</sup> The only limit on his natural freedom is the natural law.<sup>116</sup>

From this, Locke derived his skein of natural rights—the rights to “life, liberty and estates” which was transposed into our own Due Process Clause to protect life, liberty, and property.<sup>117</sup> In the span of just a few pages of the *Second Treatise*, Locke

<sup>112</sup> “Though the Earth and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.” LOCKE, TWO TREATISES, *supra* note 7, at 287–88. All of our property rights in the things that we create stem from the right we have in ourselves, and in the fruits of our labor. *Id.*

<sup>113</sup> “We are born free, as we are born rational.” *Id.* at 308.

<sup>114</sup> *Id.* at 309.

<sup>115</sup> *Id.* at 306.

<sup>116</sup> “For God having given Man an Understanding to direct his Actions, has allowed him a freedom of Will, and liberty of Acting, as properly belonging thereunto, within the bounds of that Law he is under.” *Id.* See also *id.* at 309. For Hobbes, the materialist, freedom and law are opposed to one another. See generally THOMAS HOBBS, LEVIATHAN (George Rutledge & Sons 2d ed. 1886). Every individual is “free” to do whatever he can do without limitation. *Id.* at 65–66. We have a right to all the world—if we can take it. And “law,” which is ultimately a creature of the state, is what limits that freedom. See *id.* at 100–01. But for Locke, the natural lawyer, law and freedom are still intertwined—though not quite in the same way that they were for scholastic thinkers. Freedom is bounded by the normative force of the natural law even in the state of nature. In fact, freedom is not the mere absence of constraint—a “freedom to do as one lists”—as it was for Hobbes. Men are free, both in the state of nature and in society, to act “within the bounds of the Law of Nature, without asking leave, or depending on the Will of any other Man.” LOCKE, TWO TREATISES, *supra* note 7, at 269.

<sup>117</sup> “Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power . . . to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men . . . .” LOCKE, TWO TREATISES, *supra* note 7, at 323. The protection of “life, liberty and estates” was the basis for the protection of the Due Process Clause and its protection of “life, liberty and property.” U.S. CONST., amends. V, XIV. Whereas we tend to think that we have a right to property, Locke would have said that we have property in our rights. Life, liberty, and estates were the three categories in which we have a morally protectable interest—“property.” Each individual has “property” in being, in doing, and in having, respectively, life, liberty, and estates. See JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988) (discussing the relationship between rights, property, and liberty and Locke’s influence on the American revolutionary idea of liberty). Locke did not invent these categories—they go back to the Magna Carta, chapter 39 which protects, in terms, the legal protection of life, liberty, and property: “No freeman shall be taken or imprisoned, or disseized, or outlawed, or banished, or in any way destroyed, nor will we pass upon him, unless by the lawful judgment of his peers, or the law of the land.” MILTON VIORST, THE GREAT DOCUMENTS OF WESTERN CIVILIZATION

developed his ideas of property rights as the mixture of a person's labor with the bounty of nature,<sup>118</sup> of the right to equality before the law,<sup>119</sup> and the central animating idea of liberalism that the chief end of government is not to promulgate God's will, or to form the character of the good citizen, or even to create the just society—but simply to protect individual rights.<sup>120</sup> This conception of liberty, which has been broadly described as “negative” liberty, or freedom as absence of government intervention, was the dominant idea of the classical liberal tradition.<sup>121</sup>

It is this classical liberal conception of freedom that underlies the *Lochner* era of American constitutional law. The core values protected by this tradition were grounded in property and contract rights. Justices Field and Bradley had each invoked this tradition in their dissents in the *Slaughterhouse Cases* in 1872.<sup>122</sup> Justice Field went so far as to quote Adam Smith to the effect that “the most sacred and inviolable” right is the “property which each man has in his own labor.”<sup>123</sup> Regulations which interfere with economic relationships between the workman and his employer “hinder[ ] the one from working at what he thinks proper, and hinder[ ] the others from employing whom they think proper.”<sup>124</sup> Thirty years later, in 1905, these ideas had gained majority support among the Justices of the Court. In *Lochner v. New York*,<sup>125</sup> the Court used the

115 (1994). In this respect, Locke was giving a philosophical veneer to the English common law tradition of rights.

<sup>118</sup> LOCKE, TWO TREATISES, *supra* note 7, at 287–88.

<sup>119</sup> Locke's idea of equality was, of course, formal equality: equality before the law. “Though I have said . . . [t]hat *all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality* . . . [but only] that *equal Right*, that every Man hath, to his *Natural Freedom*, without being subjected to the Will or Authority of any other Man.” *Id.* at 304.

<sup>120</sup> “The great and *chief end*, therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property*.” *Id.* at 350–51. As we have noted, “property” here designates all of our rights, not simply the rights we have in our physical possessions.

<sup>121</sup> As one of classical liberalism's leading modern defenders puts it, freedom: meant always the possibility of a person's acting according to his own decisions and plans, in contrast to the . . . one who was irrevocably subject to the will of another . . . . In this sense “freedom” refers solely to a relation of men to other men, and the only infringement on it is coercion by men.

FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 12 (1960). And as Berlin describes “negative” freedom in his classic essay on the subject, negative freedom is linked to the question, “[w]hat is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference by other persons?” BERLIN, *Two Concepts of Liberty*, *supra* note 10, at 121–22. Being free to do something is not the same thing as having the power or ability to do it—Berlin quotes Helvétius in asserting that “‘it is not lack of freedom not to fly like an eagle or swim like a whale.’” *Id.* at 122 n.2.

<sup>122</sup> 83 U.S. 36, 109–16, 119, 122 (1872) (Field, J., and Bradley, J., dissenting).

<sup>123</sup> *Id.* at 110 n.1 (Field, J., dissenting) (quoting ADAM SMITH, THE WEALTH OF NATIONS 138 (R. H. Campbell et al. eds., 1979)).

<sup>124</sup> *Id.*

<sup>125</sup> 198 U.S. 45 (1905).

doctrine of substantive due process to strike down a state law forbidding bakers from working more than ten hours a day and sixty hours a week.<sup>126</sup> The Court stated that the “statute necessarily interferes with the right to contract between the employer and employees, concerning the number of hours in which the latter may labor.”<sup>127</sup>

The *Lochner* era spanned roughly the next three decades, from 1905 until the New Deal.<sup>128</sup> During this period, the Court used the Due Process Clause to constitutionalize the classical liberal idea of freedom in a series of other cases.<sup>129</sup> In *Coppage v. Kansas*,<sup>130</sup> the Court invalidated a Kansas law that outlawed “yellow dog contracts”—contracts that required employees to relinquish their right to collective bargaining as a condition of employment.<sup>131</sup> The Court acknowledged the disparity in bargaining power between employers and employees, but observed, as classical liberals long had insisted, that:

[W]herever the right of private property exists, there must and will be inequalities of fortune . . . [such that] it is . . . impossible to uphold freedom of contract and the right of private property without at the same time recognizing . . . those inequalities of fortune that are the necessary result of the exercise of those rights.<sup>132</sup>

In *Adkins v. Children’s Hospital*,<sup>133</sup> the Court struck down a state minimum wage law, and in a series of other cases, struck down regulations on the price of gasoline<sup>134</sup> and other commodities.<sup>135</sup> It also invalidated licensing laws limiting entry into various professions.<sup>136</sup> *Lochner* and its progeny were finally overruled in the 1930s.<sup>137</sup> It

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<sup>126</sup> *Id.* at 61–62.

<sup>127</sup> *Id.* at 53.

<sup>128</sup> *Lochner Era*, LEGAL INFORMATION INSTITUTE (Sept. 9, 2018), [http://www.law.cornell.edu/wex/lochner\\_era](http://www.law.cornell.edu/wex/lochner_era) [<https://perma.cc/B2TC-Y4G4>].

<sup>129</sup> *See id.*

<sup>130</sup> 236 U.S. 1, 3 (1915).

<sup>131</sup> *Id.* at 9.

<sup>132</sup> *Id.* at 17.

<sup>133</sup> 261 U.S. 525 (1923).

<sup>134</sup> *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

<sup>135</sup> *Ribnik v. McBride*, 277 U.S. 350, 357–59 (1928) (striking down a regulation of employment agency fees); *Tyson v. Brother & Banton*, 273 U.S. 418, 445 (1927) (striking down regulations of theater tickets).

<sup>136</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 273 (1932) (invalidating requirement that ice dealers obtain certificate of convenience); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113–14 (1928) (invalidating a law that limited the business ownership of pharmacies to licensed pharmacists).

<sup>137</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923)); *Nebbia v. New York*, 291 U.S. 502, 538–39 (1934) (overruling *Lochner*).

would take another three decades before the Due Process Clause would again be used by the Court, but this time in the name of a more Millian concept of freedom.

### *B. The Utilitarian Influence*

Philosophical trends always seem to develop a century or two ahead of their reception in the law. Locke died in 1704 but his ideas helped inspire the American Revolution of 1776.<sup>138</sup> His three basic rights—life, liberty, and property—are reflected in the Due Process Clauses of the Fifth and Fourteenth Amendments<sup>139</sup> and achieved their fullest constitutional expression during the *Lochner* era, as previously discussed.<sup>140</sup> Yet well before these ideas had achieved their greatest influence during the *Lochner* era, the idea of freedom began to morph in the more rarified atmosphere of political philosophy.

By the early nineteenth century, a newer brand of thinkers, the utilitarians, began to ground classical liberal ideals on a more secular understanding of the world.<sup>141</sup>

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<sup>138</sup> CHARLES BEARD ET AL., *THE RISE OF AMERICAN CIVILIZATION* 32 (1937) (“[I]t was in the doctrines of John Locke . . . that [the colonies] found the secular authority for their Declaration of Independence in 1776.”).

<sup>139</sup> “No person . . . shall be . . . deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V.

<sup>140</sup> See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 558 (2015).

<sup>141</sup> Utilitarianism is a form of moral consequentialism; what makes an act “good” or “bad” is the beneficial consequences of that act (rather than whether the act is of a kind that has been specifically enjoined by some moral principle). See W. Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 22, 2015), <https://plato.stanford.edu/entries/consequentialism/> [<https://perma.cc/7PKK-DLHH>]. The classic statement is that the good is equivalent to “the greatest happiness of the greatest number,” a principle Bentham picked up from Joseph Priestly’s *First Principles of Government* (1768) but which had antecedents in the work of Francis Hutcheson and David Hume. See J. E. Crimmins, *Jeremy Bentham*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 22, 2014), <https://plato.stanford.edu/entries/bentham/> [<https://perma.cc/N6AH-TGSD>]. In fact, the basic idea goes back to thinkers like Epicurus and Aristippus in antiquity. See Dan Weijers, *Hedonism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/hedonism/> [<https://perma.cc/9TGP-KRYC>]. The appeal of utilitarianism is that it attempts to salvage the idea that moral questions have determinate or objective answers (morality is not purely subjective or relative) while grounding morality on a more secular, this-worldly foundation. The classic statement is that the best action is that which maximizes the most happiness for the most people. See Stephen Nathanson, *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/util-a-r/> [<https://perma.cc/CWJ9-A78H>]. Happiness, in turn, is a function of human pleasure, or the absence of pain. See *id.* A bit rudely put, the “best” action to take in any particular circumstance is the one that creates the most pleasure overall. See *id.* “Good” and “bad” do not depend on God’s will, or natural law, or Kantian duties and rights. JEREMY BENTHAM, *A FRAGMENT OF GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 246 (Wilfred Harrison ed., 1948) (1789) [hereinafter BENTHAM,

Jeremy Bentham, James Mill, and their followers rested the case for liberty on the “greatest happiness” principle.<sup>142</sup> Bentham, an agnostic, wrote anti-religious tracts under a pseudonym and famously referred to Locke’s God-given natural rights as “nonsense on stilts.”<sup>143</sup> Like Locke, he defended limited government and free markets for most of his life. Yet the more secular character of his thought led him to far more antimoralistic conclusions than Locke.<sup>144</sup>

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PRINCIPLES OF MORALS AND LEGISLATION] (developing the classic utilitarian themes and arguments). See HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 216–25 (discussing the origins and appeal of utilitarianism, along with a discussion of three main problems with utilitarianism); L.T. HOBHOUSE, *LIBERALISM AND OTHER WRITINGS* 50–77 (James Meadowcroft ed., 2006) (1911) (discussing the utilitarian influence on liberal thought, particularly as it opposed the natural rights philosophy of Locke); J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (a smart dialogue between a utilitarian and a critic of utilitarianism).

<sup>142</sup> Rather than natural rights, the case for liberty was based on the idea that increasing freedom tends to increase happiness of the population, since each individual presumably knows best what will make him happy and will pursue it if given the liberty to do so. See William Sweet, *Jeremy Bentham (1748–1832)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/bentham/#SH5b> [<https://perma.cc/DKM7-KSV9>]. One of the chief difficulties with this, however, is that freedom and rights are no longer “absolutes”—they depend on their happiness-generating quality. See *id.* As Bentham himself observed, people should only have “rights” to do those things that tend to maximize everyone’s happiness. See *id.* A “right” which reduces net utility cannot be defended on utilitarian grounds. Nevertheless, Bentham reached many of the same practical results as Locke had—as L.T. Hobhouse concluded in his classic treatment of liberalism, “though their starting-point was different, the Benthamites arrived at practical results not notably divergent from . . . the doctrine of natural liberty; and, on the whole, the two influences worked together in the formation of [nineteenth century liberalism] . . .” HOBHOUSE, *supra* note 141, at 77.

<sup>143</sup> 2 JEREMY BENTHAM, *ANARCHICAL FALLACIES: BEING AN EXAMINATION OF THE DECLARATIONS OF RIGHTS ISSUED DURING THE FRENCH REVOLUTION*, in *THE WORKS OF JEREMY BENTHAM* 489, 501 (John Bowring ed., 1843).

<sup>144</sup> Locke’s natural rights philosophy was still influenced by specifically Christian modes of thought. For example, Locke argued that no one has the right to commit suicide since our life is a gift of God which we may not “give back.” LOCKE, *TWO TREATISES*, *supra* note 7, at 270–71. Locke also would not have doubted the propriety of laws based on moralistic justifications—laws prohibiting prostitution or homosexuality. But Bentham, guided by his “hedonic calculus,” was not influenced by religious considerations. See Crimmins, *supra* note 141. Indeed, much of his thought is a reaction against religion. See *id.* Utilitarianism is itself an attempt to supplant religious morality with a secular replacement. See *id.* As one commentator on Bentham’s thought puts it:

We cannot base [our moral judgments] on natural law, because we cannot verify what it implies, and we cannot found them on the revealed will of God, because of the doubt as to what this is . . . He felt that the superiority of his own doctrine lay in the fact that a man’s knowledge of the goodness and badness of actual pleasure and pain is confirmed every time he experiences them; consequently, every man can assess the value of his actions from calculating the quantity of pleasure and pain they promote.

D. J. MANNING, *THE MIND OF JEREMY BENTHAM* 39–40 (1968).

For example, Bentham was among the first to argue for a series of positions that we regard today as quintessentially “liberal.” He argued for the decriminalization of private, consensual activity, laying the groundwork for Mill’s injunction against “morals offenses.”<sup>145</sup> He observed, in opposition to the “eye for an eye” retributive view of punishment, that all punishment is intrinsically evil, even when necessary.<sup>146</sup> He insisted that education is often more efficient than punishment in preventing various forms of mischief.<sup>147</sup> He opposed legislation in matters affecting religion and generally argued for broader religious toleration.<sup>148</sup> He thought that paternalistic laws were frequently harmful and often pointless.<sup>149</sup> He opposed censorship of almost every kind.<sup>150</sup> And he insisted on reforms of the criminal law suitable to a more enlightened age.<sup>151</sup> Utilitarianism’s “this-worldly” influence pointed liberalism in a secular direction, emphasizing happiness, pleasure, and self-fulfillment over the more sectarian values of the earlier common law. Bentham, nevertheless, advanced these values under the rubric of a “negative” conception of freedom.<sup>152</sup> In this

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<sup>145</sup> BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 141, at 282 (describing acts which “might, on some occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his *consent* . . .”). See BENTHAM, OF SEXUAL IRREGULARITIES, AND OTHER WRITINGS ON SEXUAL MORALITY (P. Schofield, C. Pease-Watkin & M. Quinn eds., 2014). For a discussion of Mill’s harm principle and the abnegation of laws based solely on the majority’s perception that the act is immoral, see BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 141 and accompanying text.

<sup>146</sup> BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 141, at 281; *id.* at 286. Cf. KARL MENNINGER, THE CRIME OF PUNISHMENT 10–15 (1969).

<sup>147</sup> BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 141, at 287.

<sup>148</sup> *Id.* at 421. Bentham left a substantial bequest to the University of London, now University College London, which was among the first universities to admit Catholics, Jews, and Atheists.

<sup>149</sup> *Id.* at 421–23. Mill would sharpen this into a general principle later as well. See *infra* note 221 and accompanying text.

<sup>150</sup> “As to the evil which results from censorship,” he wrote, “it is impossible to measure it, because it is impossible to tell where it ends.” JEREMY BENTHAM, THE THEORY OF LEGISLATION 370–71 (C. K. Odgen ed., 1931).

<sup>151</sup> In particular, there are four classes of acts which should never be punished: where punishment is groundless (because no harm had been done), inefficacious (because the act could not be deterred by threat of punishment), unprofitable (because punishment creates more pain than pleasure), or needless (where it can be achieved by other means, such as education). *Id.* at 282–88.

<sup>152</sup> Liberty and law were antithetical values for Bentham because all laws, by nature, limit the freedom of the individual. Even when a law protects one person’s rights, it does so by limiting the freedom of another who might infringe on the first person’s rights. All of this comported with Bentham’s utilitarianism. As one commentator puts it,

The purpose of the criminal and constitutional codes was . . . to allow each individual . . . to pursue his own happiness as is compatible with the pursuit of happiness by his fellows. Now since: “Liberty is the absence of restraint,” and laws are . . . a restraint on liberty, we must keep their number down to a minimum.

MANNING, *supra* note 144, at 87.

respect, Bentham and the utilitarians were still classical liberal thinkers, although their utilitarianism always gave their conclusions a provisional character. For example, if it turned out that free markets or the protection of property were not the best way to achieve the “greatest happiness for the greatest number,” these ideas could be left behind. And this, indeed, is exactly what happened: as Bentham grew older, he reconsidered many of his conclusions, favoring more government intervention in areas he had once thought beyond the reach of government.<sup>153</sup> Many of the progressives of the late nineteenth and early twentieth centuries were essentially utilitarians who, for a variety of reasons, increasingly adopted more pro-government policies.<sup>154</sup>

### *C. The Modern Ideal: Freedom as Self-Individuation*

It was this milieu into which Mill was born. His father, James Mill, was Bentham’s closest associate.<sup>155</sup> The younger Mill, however, ultimately reacted against utilitarianism—for reasons both philosophical and personal.<sup>156</sup> His reverence for Bentham was limited. Mill wrote of Bentham: “He was a boy to the last,” a “one-eyed man” who saw but half the truth, though he saw it more clearly than others had before him.<sup>157</sup> He rejected Bentham and his father’s purely quantitative approach to utilitarianism in favor of a more qualitative idea of happiness.<sup>158</sup> But he also associated

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<sup>153</sup> We must remember that rights were, for Bentham, provisional: if an assumed right turns out not to maximize utility, then utility trumps that right. If utility is best promoted by more government, then more government we should have. And as Bentham grew older, he saw more causes for intervention, particularly in the economic sphere, thus, as one Bentham commentator has concluded, “there is nothing in Bentham’s character, in the principle of utility or in the logic of the [collective] will, to suggest he could not have been a supporter of Fabian socialism had he lived a hundred years later.” *Id.* at 97.

<sup>154</sup> One reason for this was that progressives began to grow skeptical of the antipaternalistic assumptions of earlier liberals. See generally CASS SUNSTEIN, *NUDGE* (2004) (arguing for a soft paternalistic conception of progressivism). They concluded, in sum, that most persons were not quite as good about making decisions about their own well-being as earlier thinkers had hoped. See generally *id.* Government intervention might be necessary to—as one recent theorist put it—“nudge” people in the right decision. See generally *id.*

<sup>155</sup> CAPALDI, *supra* note 2, at 17–19 (describing the relationship between the Mills and Bentham). When Bentham achieved financial independence, for several years the Mills spent six months each year with him at a large estate in Somerset. *Id.* at 18.

<sup>156</sup> *Id.* at 55–61.

<sup>157</sup> 10 JOHN STUART MILL, *Bentham*, in COLLECTED WORKS OF JOHN STUART MILL (John M. Robson & Jack Stillinger eds., 1981) [hereinafter MILL, *Bentham*].

<sup>158</sup> Bentham’s idea of pleasure was purely quantitative: while there were different dimensions of a pleasure—its intensity, duration, how likely it is, etc.—he insisted that these could be quantified, measured, counted up, and compared with other pleasures. BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 141, at 151. Mill rejected this out of hand. “It would be absurd that while, in estimating all other things, quality is considered as well as quantity, the estimation of pleasures should be supposed to depend on quantity alone.” MILL, *Utilitarianism*, *supra* note 48, at 211. How can we judge the higher of two pleasures? “Of two pleasures, if there be one to which all or almost all who have experience of both . . . irrespective of any

Bentham's utilitarianism with the trauma of his youthful education and with his nervous breakdown. It was at this point that Harriet came into his life, kindling Mill's interest in romanticism which breathed a vivifying spirit into Mill's philosophy, as it had in his own life.<sup>159</sup>

Nineteenth century romanticism was a reaction against the rationalism of eighteenth century thought, of which utilitarianism was one of the clearest expressions.<sup>160</sup> Romanticism valorized the individual over the collective, imagination over reason, the aesthetic over the moral dimensions of human existence, spontaneity over the collar of habit and tradition, and authenticity over the regimentation of assigned roles.<sup>161</sup> Above all the romantics exalted the genius—the boundary-transcending individual whose example explodes the narrow confines of bourgeois society.<sup>162</sup> Mill read Wordsworth and Shelley, Coleridge and Carlyle, Byron and Keats, among others, and was influenced as well by such romantic and idealist philosophers as Fichte, Hegel, and Schelling.<sup>163</sup> He believed that his mission in life was the reconciling of opposites—of poetry and science, the spiritual and the logical, romanticism and utilitarianism—and wrote to Carlyle that “if I have any *vocation* . . . it is . . . to translate the mysticism of others into the language of Argument.”<sup>164</sup>

feeling of moral obligation to prefer it, that is the more desirable pleasure.” *Id.* “It is better to be a human being dissatisfied than a pig satisfied.” *Id.* at 212. This, of course, makes utilitarian principles more difficult to apply since not only will there be disagreements about the respective quality of two or more pleasures but, worse, it is not clear how to balance less of a higher pleasure with a greater share of a lower pleasure. The purely quantitative idea was, in principle at least, one that could be applied in more or less mathematical terms.

<sup>159</sup> Utilitarianism was rational, quantitative, and reductionistic. In its classical Benthamite form, it seeks to reduce all values—love, courage, faith, patriotism, loyalty—to one lowest common denominator. See BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 141, at 151. Romanticism embraced strong emotion, stood against the empirical and measurable, and possessed a strongly spiritual (though not religious) view of life in which authenticity, individuality, and genius were pursued as spiritual ends in themselves. See CAPALDI, *supra* note 2, at 88–93. Mill's most recent philosophical biographer, Capaldi, devotes an entire chapter to the influence of romanticism (and romance) on Mill's development. *Id.* at 86–132. He read Wordsworth and Coleridge, meeting the latter as a young man in his twenties. MILL, *Autobiography*, *supra* note 1, at 88–89, 97. These influences countered the stultifying influence of classical utilitarianism.

<sup>160</sup> Keren Gorodeisky, *19th Century Romantic Aesthetics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zatta ed., June 14, 2016), <https://plato.stanford.edu/archives/fall2016/entries/aesthetics-19th-romantic/> [<https://perma.cc/8P29-8SGV>].

<sup>161</sup> See ISAAH BERLIN, *THE ROOTS OF ROMANTICISM* 14–17 (Henry Hardy ed., 1999).

<sup>162</sup> See HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 160–64 (describing romanticism and its influence on Mill); MICHAEL FERBER, *ROMANTICISM: A VERY SHORT INTRODUCTION* (2010); CHARLES TAYLOR, *SOURCES OF THE SELF* (1989) (for a discussion of romanticism and its influence on contemporary culture and morality); BERLIN, *supra* note 161 (for an excellent intellectual history of romanticism).

<sup>163</sup> See CAPALDI, *supra* note 2, at 88–101 (discussing these influences on Mill's thought).

<sup>164</sup> 12 JOHN STUART MILL, *To Thomas Carlyle* (Mar. 2, 1834), in *COLLECTED WORKS OF JOHN STUART MILL* at 219 (Francis E. Mineka ed., 1963) [hereinafter MILL, *Mill to Carlyle*].



*On Liberty* was born of the unsteady marriage of these two radically contrasting philosophies. Mill insisted at the beginning of the book that he rested the case for liberty on utilitarian principles, but it was not his father and Bentham's narrow utilitarianism rooted in the idea of happiness as a fungible, one-dimensional commodity.<sup>165</sup> Rather, it was utilitarianism "grounded on the permanent interests of man as a progressive being."<sup>166</sup> What emerged in *On Liberty* is a romanticized libertarianism that valorizes individuality and conceives of freedom as a means to happiness, self-development, and social progress.<sup>167</sup>

The spiritual heart of *On Liberty* is Chapter III, titled, "Individuality as an Element of Well-Being."<sup>168</sup> Here, Mill suggests that we must think of each individual as a unique but inchoate potentiality whose essence must be called forth, developed, and refined.<sup>169</sup> This self is distinct from, and frequently in tension with, social influences, along with the residue of tradition, custom, and habit that threaten its emergence:

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 said to have a character. One whose desires and impulses are not his own, has no character, any more than a steam-engine has a character.<sup>170</sup>

There is an organic and natural character to the true self: "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop [sic] itself on all sides, according to the tendency of *the inward forces which make it a living thing*."<sup>171</sup>

We find, even in these brief passages, that Mill was drawing together divergent, often conflicting, philosophical traditions concerning the self: traditions of Kant, the idealists, Fichte, and Hegel; of the romantics and the Renaissance humanists; and, beneath all of these, something distinctively Aristotelian—all while advancing, in his more philosophical writings, a radically empiricist view of human nature.<sup>172</sup> In

<sup>165</sup> MILL, *Utilitarianism*, *supra* note 48, at 209–14 (Mill's criticism of Bentham's idea of happiness).

<sup>166</sup> 18 JOHN STUART MILL, *On Liberty*, in COLLECTED WORKS OF JOHN STUART MILL at 224 (John M. Robson ed., 1977) [hereinafter MILL, *On Liberty*].

<sup>167</sup> Mill's libertarian streak was also nurtured by thinkers like the late eighteenth-century German thinker, Wilhelm von Humboldt, whom Mill cites in the epigraph of *On Liberty*. MILL, *On Liberty*, *supra* note 166, at 215. Humboldt wrote perhaps the first systematically libertarian treatise on government in 1791–92 as a young man, though the book was not published until 1854. See WILHELM VON HUMBOLDT, *THE LIMITS OF STATE ACTION* (J.W. Burrow ed., 1993).

<sup>168</sup> MILL, *On Liberty*, *supra* note 166, at 260.

<sup>169</sup> *Id.* at 266.

<sup>170</sup> *Id.* at 264.

<sup>171</sup> *Id.* at 263 (emphasis added).

<sup>172</sup> See WENDY DONNER, *THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY* (1991); HENRY M. MAGID, *John Stuart Mill*, in *HISTORY OF POLITICAL*

the spirit of the great humanists of the Renaissance he insisted that “[a]mong the works of man which human life is rightly employed in beautifying and perfecting, the first in importance surely is man himself.”<sup>173</sup> Self-development, individuality, and genius were largely one and the same thing.<sup>174</sup> “Individuality is the same thing with development and . . . it is only the cultivation of individuality which produces, or can produce, well-developed human beings.”<sup>175</sup>

Central to his idea of freedom is that choice-making is literally *constitutive* of our self-creation.<sup>176</sup> Freedom is not valuable simply in an instrumental way—as the means for satisfying particular desires—but as a means of self-creation.<sup>177</sup> Choices possess a profound moral significance.<sup>178</sup> Through them, we cultivate our capacity for judgment and decision-making:

The human faculties of perception, judgment, 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 choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used.<sup>179</sup>

It is through our choices that we *literally construct ourselves*.<sup>180</sup>

In sum, Mill *reconceptualized our very idea of freedom*. The classical liberal idea of negative liberty, freedom as non-interference by the government, was a *necessary* but not a *sufficient* condition for individual freedom. True freedom requires not only non-interference into the private choices of the individual, but that one’s will is *one’s own*—that it is the expression of one’s autonomous inner self and not merely the product of social influences.<sup>181</sup> Freedom’s fullest flowering means that

PHILOSOPHY 784–801 (Leo Strauss & Joseph Cropsey eds., 1987); ALAN RYAN, J.S. MILL (1974) (discussing the philosophical influences on Mill’s thought).

<sup>173</sup> MILL, *On Liberty*, *supra* note 166, at 264.

<sup>174</sup> *Id.* at 269.

<sup>175</sup> *Id.* at 267.

<sup>176</sup> *Id.* at 262–63.

<sup>177</sup> *See id.* at 266–67.

<sup>178</sup> *See id.* at 270–71.

<sup>179</sup> *Id.* at 262.

<sup>180</sup> *Id.* at 224–26.

<sup>181</sup> In contrast to the “negative” idea of freedom, Mill’s is a positive, mildly perfectionistic, and more individualistic idea of freedom. As commentators have observed, this is a “positive” idea of freedom to the extent that freedom requires more than non-interference and depends on the realization of other internal values—autonomy, integrity, prudence; indeed, as one commentator has put it, “some of [Mill’s] critics have suspected that the relations he argues for between liberty, self-development and happiness are no more than a series of analytical equivalences.” GRAY, *supra* note 11, at 14. Mill’s concept of freedom is mildly perfectionistic to the extent that freedom is connected to the realization of virtue. Sounding more like Aristotle

each individual has the opportunity to discover, develop, and express his essential character—his core authentic individual self.<sup>182</sup>

Central to Mill's reconceptualization of freedom was a more skeptical attitude toward society—its customs, traditions, and institutions.<sup>183</sup> He observed that:

[W]hen society is itself the tyrant . . . its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and [when it does] it practises a social tyranny more formidable than many kinds of political oppression, since . . . it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.<sup>184</sup>

This was not the view of classical liberals who were closer, in this respect, to Aristotle and the conservatism of the premodern tradition.<sup>185</sup> This older philosophy

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than Bentham, in his *System of Logic*, he concluded his argument for the possibility of human freedom with the words: "And hence it is said with truth, that none but a person of confirmed virtue is completely free." MILL, *A System of Logic*, *supra* note 85, at 841. Finally, it is a more individualistic idea of freedom in the sense that freedom is now connected to a specifically individual virtue—self-realization. Hill, *Mill, Freud, and Skinner*, *supra* note 11, at 129. Freedom, in sum, is not merely a condition in which the unformed and unfinished individual is at liberty to act as he desires. *See id.* at 128–29. It is a deeply value-laden idea: to be free is to be able to act in accordance with one's own essential nature as it has been developed and refined through choice-making. *See id.*

<sup>182</sup> This is the upshot of Mill's idea of freedom. Note that political liberty provides the condition for this discovery and development of the self by preventing unwarranted social intrusion into the process of self-creation, and by permitting the full range of expressive abilities of the developed self. *See Hill, Mill, Freud, and Skinner*, *supra* note 11, at 116–30 (discussing Mill's conception of freedom, the self, and their relation to political liberty).

<sup>183</sup> *See MILL, On Liberty*, *supra* note 166, at 272.

<sup>184</sup> *Id.* at 219–20. Mill's passion swells in passages such as this, where he is warning of the "tyranny of the majority." Indeed, Mill had imbibed his Tocqueville, who coined that phrase. Jack Crittenden & Peter Levine, *Civic Education*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 31, 2018), <https://plato.stanford.edu/entries/civic-education/> [<https://perma.cc/WYD6-9BU5>]. Classical liberals shared the preliberal notion that society is an unqualified benefit to the individual: for instance, a classical liberal such as Thomas Paine could declare that:

Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher. Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one.

THOMAS PAINE, *Common Sense*, in COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 23–24 (1969).

<sup>185</sup> Aristotle wrote in the *Politics* that "he who is unable to live in society, or who has no

taught that tradition and social custom were essential not only to social cohesion, but to the healthy formation of individual character.<sup>186</sup>

The classical liberal's sanguine view of society, however, began to change with early romantic thinkers such as Jean-Jacques Rousseau. It was Rousseau who insisted that modern society was a corrupting force on the natural goodness of the individual.<sup>187</sup> As he put it with characteristic *panache* at the end of his *A Discourse on Inequality*, it is modern society which gives us a life of "honour without virtue, reason without wisdom, and pleasure without happiness."<sup>188</sup> Mill imbibed the notion that tradition and custom are not the sources of our self-constitution but are in fact the nemesis of the authentic self, threatening at every turn to overwhelm and subdue it into conformity.<sup>189</sup> Mill observed that "society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences."<sup>190</sup> These reflections were likely influenced by Mill's and Harriet's personal experiences at the hands of Victorian society.

These sentiments played powerfully into Mill's insistence that individual liberty is threatened not simply by government or the state, *but more generally by society*, leading him to apply the "harm principle" to society as well as to government.<sup>191</sup>

need because he is sufficient for himself, must be either a beast or a god." ARISTOTLE, *Politics*, in THE BASIC WORKS OF ARISTOTLE 1114, 1130 (Richard McKeon ed., 1941). The state—by which Aristotle meant, all of our social and political institutions outside the family—is natural, a good thing for human development. *Id.* at 1129. "[T]he state is a creation of nature, and . . . man is by nature a political animal." *Id.* Classical liberals began to draw a distinction between society, which is still beneficial, and government, which is at best a necessary evil. Thus, a classical liberal like Thomas Paine could declare:

Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher. Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one.

PAINE, *supra* note 184, at 24. Mill carried on this critique of the state and extended it to society.

<sup>186</sup> For premodern thinkers, the individual outside of society is not naturally free or autonomous. As Hannah Arendt points out, our word "idiot" comes from the Greek "idion," which meant not a mentally deficient person, but someone without any real sense of himself as a human being. HANNAH ARENDT, *THE HUMAN CONDITION* 38 (1958).

<sup>187</sup> JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON THE ORIGIN OF INEQUALITY* 132 (Maurice Cranston trans., 1984).

<sup>188</sup> *Id.* at 136.

<sup>189</sup> "Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress." MILL, *On Liberty*, *supra* note 166, at 261.

<sup>190</sup> *Id.* at 264.

<sup>191</sup> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual

This led to a decisive shift in the modern liberal conception of government: Government must be checked, *but so must society*—and who can check society but government itself? Though Mill remained skeptical to the end of expansive government, later progressive thinkers began to argue that more government was necessary precisely in order to achieve the Millian quest for freedom.<sup>192</sup>

A similar shift in Mill's thinking involves the relationship between freedom and equality. Classical liberals recognized that freedom in the form of non-interference, and equality in the form of *substantive* equality, or equality of condition are inversely related: the greater the level of negative freedom, the more substantive inequality, and vice versa.<sup>193</sup> Mill attempted to massage the tension, reconceiving both values: freedom requires a certain kind of equality—what he called “equal freedom of development.”<sup>194</sup> Equal freedom of development is an “opportunity” concept: freedom requires that every individual has a reasonable opportunity to achieve personal autonomy in their own life.<sup>195</sup> He reconciled his libertarian and egalitarian sentiments by observing that there is “no authority whatever in Society over the

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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 . . . .

*Id.* at 223.

<sup>192</sup> Mill remained an opponent of political centralization to the end of his life: indeed, his chief criticism of the later views of Auguste Comte were that Comte's socialism was deeply authoritarian and that centralized government is always a threat to individual liberty. See MILL, *Auguste Comte and Positivism*, *supra* note 92, at 263–68. One salient example of Mill's skepticism can be seen in his view of public education: while the state should ensure that every child is educated, it is better if the state itself is not involved in the education of children. “An education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence.” MILL, *On Liberty*, *supra* note 166, at 302.

<sup>193</sup> To the extent that government creates equality of condition, it will inevitably have to regulate and control the behavior of individuals—not only in redistributing their money, but in subtler, more indirect ways, i.e., by having to control and balance economic resources at every turn. The reason for this, as F.A. Hayek summed it up, is that:

Every . . . attempt at deliberate control of some remunerations is bound to create further demands for new controls. The principle of distributive justice, once introduced, would not be fulfilled until the whole of society was organized in accordance with it. This would produce a kind of society which in all essential respects would be the opposite of a free society—a society in which authority decided what the individual was to do and how he was to do it.

17 F.A. HAYEK, *THE CONSTITUTION OF LIBERTY*, in *THE COLLECTED WORKS OF F. A. HAYEK* (Ronald Hamowy ed., 2011) 164.

<sup>194</sup> MILL, *Autobiography*, *supra* note 1, at 260.

<sup>195</sup> For a discussion of the concept of freedom as an “opportunity” concept, see 2 CHARLES TAYLOR, *What's Wrong with Negative Liberty*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 211, 211–19 (1985).

individual, *except to enforce equal freedom of development for all individualities.*"<sup>196</sup> When modern liberals insist on more government to equalize social and economic opportunity for all, it is because they believe, following Mill, that this kind of equality is the true condition of freedom.<sup>197</sup>

This was a decisive move, leading ultimately to the fracture between classical and modern liberalism. If government has the power to enforce equality—even in the name of promoting freedom—far more government will be necessary than anything Mill or his classical liberal forbears imagined. These two tensions—the tension between freedom and equality, and the tension between limiting government (in the name of liberty) and expanding government (in the name of liberty)—are really one and the same. This is the tension *par excellence* of modern liberalism.<sup>198</sup>

Mill's ideas simultaneously influenced both the progressive shift toward more government beginning with FDR's New Deal and the Supreme Court's privacy right jurisprudence which requires greater limits on government in the personal sphere. Yet nowhere in Supreme Court jurisprudence is Mill's idea of individual liberty more pristinely expressed than in Justice Kennedy's observation in *Casey* that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>199</sup> This is pure John Stuart Mill. Perhaps this should not surprise us. Justice Kennedy once remarked that of all the great political thinkers, the greatest influence on him was none other than Mill.<sup>200</sup>

### III. THE INTELLECTUAL ORIGINS OF THE RIGHT TO PRIVACY

#### A. *The Concept of the Harm Principle*

In Chapter I of *On Liberty*, Mill divided the world of human activity into two spheres—the “self-regarding” and the “other-regarding.”<sup>201</sup> Society has the right to interfere only in the latter sphere: “The only part of the conduct of any one, for

<sup>196</sup> MILL, *Autobiography*, *supra* note 1, at 260 (emphasis added). This was another potential bombshell since a power to enforce equal development of individuality can predictably lead to a sweeping expansion of government power. Mill made these comments in an off-handed way in speaking of his preferred form of socialism, but the context suggests that he believed society or government should have such a power.

<sup>197</sup> Some modern liberals have maintained that freedom simply *is* equality. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1980) (“[T]he government must treat all its citizens with equal concern and respect.”).

<sup>198</sup> See generally JOHN L. HILL, *THE POLITICAL CENTRIST* 11–28 (2009) (discussing the origins and consequences of “the liberal paradox”).

<sup>199</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>200</sup> Commentators on Justice Kennedy have long noted Mill's influence on his thought. HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 26–27 (2009).

<sup>201</sup> See MILL, *On Liberty*, *supra* note 166, at 223–24.

which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>202</sup>

Within the self-regarding sphere, Mill argued that three zones of human liberty should be absolutely free of all restrictions and sanctions, political, or social.<sup>203</sup> The first is “liberty of conscience, in the most comprehensive sense,” including “absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.”<sup>204</sup> Mill understood this first sphere of liberty to encompass not simply the inner domain of conscience and opinion, but an unlimited freedom of “expressing and publishing opinions” since this is “practically inseparable” from liberty of thought.<sup>205</sup>

The second zone to be protected is “liberty of tastes and pursuits; of framing the plan of our life to suit our own character.”<sup>206</sup> Here is the core of the negative liberal ideal of freedom, the impetus for Justice Brandeis’ “right to be let alone”<sup>207</sup> and ultimately the template for the constitutional “right to privacy.” The third zone is “freedom to unite for any purpose not involving harm to other persons.”<sup>208</sup> Mill was proposing a general right of association far more expansive than prevailing ideas such as the right to assemble and to petition the government protected in the American constitution. Almost exactly a century after he wrote *On Liberty*, the Supreme Court recognized just such a right.<sup>209</sup> Each of Mill’s three zones of liberty provided a template for, and undoubtedly spurred, the liberal jurisprudence of the Supreme Court in the last half of the twentieth century.

From the standpoint of liberty, Mill insisted that society has no right to intrude into these zones of activity for any reason.<sup>210</sup> But, from the standpoint of the state, Mill also provided a negative principle for limiting the power of government and society: society may not legitimately interfere with individual freedom except to protect an identifiable third party who can be harmed by the action to be regulated.<sup>211</sup> To “harm” another, in Mill’s specific sense, is to violate the individual’s moral or legal interests or rights.<sup>212</sup>

<sup>202</sup> *Id.* at 224.

<sup>203</sup> *Id.* at 225–26.

<sup>204</sup> *Id.* at 225.

<sup>205</sup> *Id.* at 225–26. See *infra* notes 366–417 and accompanying text (discussing Mill’s understanding of free expression).

<sup>206</sup> MILL, *On Liberty*, *supra* note 166, at 226.

<sup>207</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>208</sup> MILL, *On Liberty*, *supra* note 166, at 226.

<sup>209</sup> See *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>210</sup> “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 unqualified.” MILL, *On Liberty*, *supra* note 166, at 226.

<sup>211</sup> “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.” *Id.* at 223.

<sup>212</sup> Mill describes this as “certain interests, which, either by express legal provision or by

Merely offensive conduct, for example, does not qualify as harmful, though Mill made certain concessions to the moral traditions of our society. He allowed, for example, that the state could prohibit public indecency even though it might not constitute a harm, strictly speaking.<sup>213</sup>

The state, moreover, may only intervene to prevent *direct* harms.<sup>214</sup> Friends and family are not “harmed,” for example, when a loved one’s self-destructive behavior causes them severe emotional distress.<sup>215</sup> Nor does some generalized or merely probabilistic threat of harm justify interference.<sup>216</sup> The fact that a red-light district might attract a criminal element, or (to take a contemporary example) that the legalization of marijuana might be expected to lead to lowered social productivity or a rise in traffic accidents is too indirect, too generalized and/or too speculative to qualify as a *bona fide* harm under his principle.<sup>217</sup> Society may not, so to speak, uproot the seeds of social evils until the point at which they pose a direct and specific threat to identifiable persons.

These strictures on the meaning of “harm” meant that two traditional motives for legislation cannot be justified: paternalism and moralism.<sup>218</sup> Mill was a staunch

tacit understanding, ought to be considered as rights . . . .” *Id.* at 276. Harm was, thus, not some empirical concept equivalent to a demonstrable injury, but rather a normative concept. As such, it is open to the objection that there is a potential circularity or even vacuity here. It opens the possibility that the concept of harm could be broadened or narrowed by altering the legal protection of certain interests, or the “tacitly understood” sphere of moral interests. See J.C. REES, *A Re-Reading of Mill On Liberty*, 8 POLITICAL STUDIES 113, 113–29 (1960) (for an extended argument concerning the potentially circular nature of Mill’s idea of harm).

<sup>213</sup> Mill observed that:

There are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency; on which it is unnecessary to dwell . . . .

MILL, *On Liberty*, *supra* note 166, at 295–96.

<sup>214</sup> “When I say [that the harm must affect] only himself, I mean directly and in the first instance.” *Id.* at 225.

<sup>215</sup> *Id.* at 281–82.

<sup>216</sup> There must be “a definite damage, or a definite risk of damage, either to an individual or to the public.” *Id.* at 282. Similarly, a person cannot be interfered with for his own good “when there is not a certainty, but only a danger of mischief.” *Id.* at 294.

<sup>217</sup> See generally 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1986) (examining what can and cannot be regulated under the harm principle, including diffuse and probabilistic harms).

<sup>218</sup> Paternalism is best defined as any law or action that restricts a person’s freedom for their own well-being. Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 65 (1972). Dworkin further distinguished between “hard” and “soft” paternalism: hard paternalism is when a person is prohibited from doing a dangerous act to protect him; “soft” paternalism consists of measures that seek to ensure that a person is fully informed before he acts, such as a law that requires a woman seeking an abortion be provided with information about the medical risks and alternatives to abortion (the measure would be paternalistic to the extent that it



antipaternalist, insisting repeatedly that every adult is the captain of his own ship who may live his life as he sees fit, irrespective of whether it is (or others think it is) healthy, prudent, or conducive to his own well-being.<sup>219</sup> Although antipaternalism was a staple of classical liberal thought before and after him, Mill bolstered the case against paternalism in several ways. He argued that no one ought to tell another adult how to live, that the individual is likely to know his interests and plan of life far better than others, and that, when society intervenes, it usually does so ineptly.<sup>220</sup> It is here that modern liberalism departs most strikingly from Mill's ideas—for modern liberals frequently welcome the need for paternalism, claiming that most individuals are far less well acquainted with their own best interests than Mill assumed.<sup>221</sup>

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seeks to protect the woman, rather than the fetus). Gerald Dworkin, *Paternalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Feb. 12, 2017), <https://plato.stanford.edu/entries/paternalism/#HardVsSoftPate> [<https://perma.cc/9B2L-ACNU>].

Moralism consists of laws or other measures that discourage or prohibit an activity not because it harms anyone in the strict sense, but because the activity is thought to be wrong or immoral. David Brink, *Mill's Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Aug. 21, 2018), <https://plato.stanford.edu/entries/mill-moral-political/> [<https://perma.cc/N92J-V5J9>]. Laws prohibiting homosexual acts, gambling, recreational drug use, etc. are moralistic to the extent that they are motivated by disapproval of the activity rather than the threatened harm to the actor (in which case, again, the law would be paternalistic). *See generally* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALITY* (1965) (arguing for a conservative defense of morals legislation). *But see* H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1966) (for the classical liberal rejoinder to Devlin). *See generally* JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONG-DOING* (1988) (examining moralism and articulating a broad defense of the Millian position against morals legislation).

<sup>219</sup> After introducing the harm principle, Mill observed that:

His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him . . . .

MILL, *On Liberty*, *supra* note 166, at 223–24.

<sup>220</sup> *Id.* at 277.

<sup>221</sup> For example, one of Mill's most enthusiastic modern defenders, H. L. A. Hart, nevertheless cautions, "I do not propose to defend all that Mill said . . . ." HART, *supra* note 218, at 5. Hart cites Mill's criticism of paternalistic limits on the purchase of drugs and continues:

[n]o doubt if we no longer sympathise with this criticism this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent . . . . Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts. Mill, in fact, endows him with too much of the psychology of a middle-aged man whose desires are relatively fixed.

*Id.* at 32–33.

Mill's antipaternalism also flowed from his conception of harm: to "harm" a person is to violate a duty owed to another, *but we have duties only to others, not to ourselves*.<sup>222</sup> All rights and duties are essentially *interpersonal* in nature.<sup>223</sup> Consequently, no person can harm himself, properly speaking. Without a duty to oneself, moreover, there is no moral or legal ground for society to interfere. Both the profligate who squanders his inheritance leaving nothing for old age, and the drug addict who throws away his health have acted, Mill insisted, *imprudently*, but not *immorally*.<sup>224</sup> Mill assumed that a society that properly educated its members would not be in great need of paternalistic legislation.<sup>225</sup> He charged that, if society lets a considerable share of its members "grow up mere children," it only "has itself to blame for the consequences" of the failure to properly educate them.<sup>226</sup>

The harm principle also prohibits *moralistic* interferences with self-regarding acts.<sup>227</sup> Mill thus opposed the prohibition of certain activities because they are thought to be inherently wrong.<sup>228</sup> Before Mill, many classical liberal writers followed Locke in assuming that, though government's chief end is the protection of property, nothing prevents it from helping to enforce important social and moral norms through the strategic use of law.<sup>229</sup> Classical liberals rarely doubted that the state could prohibit adultery, prostitution, gambling, homosexuality, suicide, or other acts on the basis of what was regarded as their objectionable moral character.<sup>230</sup> Bentham, as we saw,

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<sup>222</sup> MILL, *On Liberty*, *supra* note 166, at 279.

<sup>223</sup> Particular acts:

[A]re only a subject of moral reprobation when they involve a breach of duty *to others* . . . . What are called duties to ourselves are not socially obligatory, unless circumstances render them at the same time duties to others. The term duty to oneself, when it means anything more than prudence, means self-respect or self-development; and for none of these is any one accountable to his fellow creatures . . . .

*Id.* (emphasis added).

<sup>224</sup> *Id.* at 278–79.

<sup>225</sup> *Id.* at 282.

<sup>226</sup> *Id.*

<sup>227</sup> Moralistic legislation are laws which prohibit or regulate not because the activity is harmful but because it is thought to be immoral. See John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L. J. 1, 7–10 (2009) (examining the viability of morals legislation in the wake of *Lawrence v. Texas* and other cases). See generally HART, *supra* note 218 (providing a modern liberal justification for antimoralism).

<sup>228</sup> See FEINBERG, *supra* note 217.

<sup>229</sup> LOCKE, TWO TREATISES, *supra* note 7, at 357–58.

<sup>230</sup> While Locke did not have much to say on the subject, he did say pointedly in the *Second Treatise* that human beings do not have a right to commit suicide since our lives are a gift of God. *Id.* at 270–71. Locke, a Puritan, would have also assumed that the state can prohibit other forms of immorality. Nor would the Framers, who were influenced by classical liberal ideas, have balked that the state has a role in upholding or safeguarding morality. In fact, classical liberal constitutional theorists in the middle and later nineteenth century accepted the traditional view that the Tenth Amendment protects the state's right to legislate in the sphere

questioned the efficacy of such laws and also argued that these laws were subject to the utilitarian objection that they might reduce the pleasure of the actors without necessarily creating any positive utility for society.<sup>231</sup> But Mill took a more categorical stand. He argued specifically against laws prohibiting alcohol and opium use, fornication, prostitution, and gambling.<sup>232</sup>

Mill did qualify or limit some of his conclusions. While prostitution should not be prohibited, public solicitation, pandering, and pimping could be regulated, he thought, to ensure that the customer's decisions are "as free as possible from the art of persons who stimulate their inclinations."<sup>233</sup> Alcohol should not be prohibited nor should the number of taverns be legally restricted by zoning laws since this treats the "laboring class," who use them most frequently, as children.<sup>234</sup>

Alcohol could be taxed, however, since government can legitimately prioritize among the commodities it chooses to burden by taxation.<sup>235</sup> Anyone, moreover, who commits a violent act while intoxicated can legitimately be prohibited from alcohol use with escalating penalties in the event of non-compliance.<sup>236</sup> These conclusions can almost certainly be extended to the debate about drug legalization today.<sup>237</sup>

On other issues, he advocated only the mildest of limits on individual activity. For example, he argued for moderate restrictions on the sale of guns.<sup>238</sup> More generally, while each person can contract with others freely for any act or service that does not harm a third party, a person may not sell himself into involuntary servitude because this one act of self-disposal negates all of the other free choices that the individual might potentially make.<sup>239</sup> Although he was an ardent feminist,

of health, safety, and morals. See DAVID BOAZ, *LIBERTARIANISM* 45 (1997). While these areas were off-limits, in their view, to federal power, they were not off-limits to state legislation. See *id.* This issue is precisely what divides classical liberals from modern libertarians: the latter follow Mill in holding that morals laws are illegitimate infringements of individual liberty whereas the former do not. As a leading libertarian commentator puts it:

The right of self-ownership certainly implies the right to decide for ourselves what food, drink, or drugs we will put into our own bodies; with whom we will make love (assuming our chosen partner agrees); and what kind of medical treatment we want (assuming a doctor agrees to provide it).

*Id.* at 79.

<sup>231</sup> BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 141, at 133–34.

<sup>232</sup> MILL, *On Liberty*, *supra* note 166, at 297–99.

<sup>233</sup> *Id.* at 297.

<sup>234</sup> *Id.* at 298–99.

<sup>235</sup> *Id.* at 298.

<sup>236</sup> *Id.* at 295.

<sup>237</sup> Mill went so far as to argue that laws prohibiting the importation of opium into China, which were passed in the wake of an epidemic of addiction, were an infringement on the liberty of the user. *Id.* at 293.

<sup>238</sup> The seller could be required to take down the name and address of the buyer, along with the reasons given for the purchase. *Id.* at 295.

<sup>239</sup> *Id.* at 299. Of course, many forms of paternalism can now be justified on this qualification.

he concluded that the state may not prohibit polygamy since such relationships are voluntary among adults.<sup>240</sup> It is also a safe conjecture that Mill would have fully supported gay marriage today.<sup>241</sup>

### *B. From the “Harm Principle” to the Right to Privacy*

A full century stands between the publication of *On Liberty* (1859) and the birth of the constitutional right to privacy, beginning with *Griswold v. Connecticut* in 1965.<sup>242</sup> During this time, scholars and judges groped their way toward articulating a workable conception of privacy for the modern age.<sup>243</sup> The first expression of this impulse was a law review article entitled “The Right to Privacy” published in the *Harvard Law Review* in 1890 by Charles Warren and the future Justice Brandeis.<sup>244</sup> While the article argued for the creation of a *tort* right of privacy that would provide remedies for the unwanted publication of private correspondence, information, and photographs, etc., it also inveighed against the trivializing influence of gossip—the same kind of gossip that had motivated Mill to write so passionately against the scandalous gossip of his own generation.<sup>245</sup> The verbiage of the article seems to

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The individual can be prohibited from smoking, using drugs, or a thousand other activities which Mill wanted to protect on the ground that these activities are liberty-negating in the long run. For this reason, other more thoroughgoing libertarians have not stopped short of permitting contracts to sell oneself into servitude.

<sup>240</sup> *Id.* at 290.

<sup>241</sup> Mill’s and Taylor’s views on marriage and divorce were ultralibertarian: every person should have the right to marry and divorce at will, though the state may limit marital rights in certain ways where children are concerned. See JO ELLEN JACOBS, *THE VOICE OF HARRIET TAYLOR MILL* 20–24, 112–19, 160–64 (2002).

<sup>242</sup> 381 U.S. 479 (1965). There had been other developments on the privacy front during the intervening century. Tort lawyers began to develop a “right to privacy” protecting private spaces and private information. VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ’S TORTS* 976 (12th ed. 2010). The catalyst for this was the most frequently cited law review article of all time. See Warren & Brandeis, *supra* note 6; see also SCHWARTZ ET AL., *supra*, at 976. By mid-twentieth century, legislatures and courts had begun to recognize these rights. New York State passed the first statute protecting a tort right of privacy in 1903. See *id.* Many courts came to accept the tort both as a protection for private places (*Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969)), and publication of private photos and information (*Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938)). “At the present time, the right to privacy is clearly recognized . . . in one form or another, in all but two or three states.” *Id.* at 977.

As a sitting Supreme Court Justice, Brandeis argued in dissent for a constitutional “right to be let alone” analogous to the privacy right. *Olmstead v. United States*, 277 U.S. 438, 478 (1928). And five years before *Griswold*, Justice Harlan wrote a famous dissent in *Poe v. Ullman*, arguing that the Due Process Clause protects private acts as against the same Connecticut statute at issue in *Griswold*. 367 U.S. 497, 522–55 (1961).

<sup>243</sup> See SCHWARTZ ET AL., *supra* note 242, at 976.

<sup>244</sup> See Warren & Brandeis, *supra* note 6, at 193; see also SCHWARTZ ET AL., *supra* note 242, at 976.

<sup>245</sup> See Warren & Brandeis, *supra* note 6, at 196.

channel Mill's high-toned contempt for all things small and idle, and his aristocratic embrace of all things that nurture the nobler human emotions: "[t]riviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence."<sup>246</sup> Mill's warnings against the baleful influence of purely *social* infringements of personal life, as well as the type of government interference that would be protected by a constitutional right, are also reflected in the creation of a tort right that would provide the individual with a remedy against non-political actors.<sup>247</sup>

Even more persuasively, however, Warren and Brandeis cast this new right not on the foundations of a quasi-property right analogous to common law protection against theft or copyright infringements, but on the basis of a *personal right of self-determination*—a right of “inviolable personality.”<sup>248</sup> The authors located the source of this right in a “more general right of the individual to be let alone.”<sup>249</sup> Warren and Brandeis borrowed this phrase from the most celebrated constitutional theorist of the late nineteenth century, Thomas Cooley.<sup>250</sup> Cooley was a Michigan jurist who had written perhaps the most influential constitutional treatise of the post-Civil War period.<sup>251</sup>

The Warren and Brandeis article, which has been called one of the most oft-cited law review articles of all time,<sup>252</sup> spurred the development of a new tort right of privacy

<sup>246</sup> *Id.*

<sup>247</sup> *See id.* at 214–15.

<sup>248</sup> “The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolable personality.” *Id.* at 205. “The common law secures to each person *the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.*” *Id.* at 198 (emphasis added).

<sup>249</sup> *Id.* at 205.

<sup>250</sup> *Id.* at 195.

<sup>251</sup> Cooley's *Constitutional Limitations* was published in 1868, almost a decade after *On Liberty* was published, and the same year that the Fourteenth Amendment was ratified. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868). Cooley was a defender of strict limits on federal power and the idea, that would later become popular during the *Lochner* era, that the Due Process Clause protects basic economic rights—to wit, freedom of contract and freedom of property. *See supra* notes 122–37 and accompanying text (outlining the *Lochner* era); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 821, 824–25 (8th ed. 1927). We do not know whether Cooley had read Mill. His ideas owed more to the “classical liberal” influence. For example, he defended the right of the state to legislate to protect health, safety, and morals. *Id.* at 1223–27. But his notion of a “right to be let alone” is one of those conceptual bridges from the older to the newer liberalism. *See* J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 532–33 (2004) (discussing Cooley's influence in the shift from the classical liberal to modern notions of freedom).

<sup>252</sup> *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2011–2012) (ranking *The Right to Privacy* as the second most cited law review article of all time).

which gained recognition over the course of the twentieth century.<sup>253</sup> The new tort rights of privacy, as they were developed and elaborated by courts in different situations, included four distinct tort privacy causes of action.<sup>254</sup> Even though these were tort rights and not constitutional rights, their acceptance by American courts in the twentieth century signaled a growing recognition of the need to protect privacy in all of its various facets.<sup>255</sup>

Warren and Brandeis's reference to the "right to be let alone" was significant, not only because it elucidated the deeper and more general nature of the source of the privacy right they were proposing, but also because, almost forty years later, Brandeis would—as a Justice on the U.S. Supreme Court—resurrect this phrase in one of his most famous constitutional dissents. In *Olmstead v. United States*,<sup>256</sup> a case involving the conviction of bootleggers using evidence obtained by warrantless telephone wiretapping, Brandeis argued that there is "a right to be let alone" which should inform our understanding of the Fourth Amendment right against searches and seizures.<sup>257</sup> Telephone conversations were private and should be off-limits to the government without a warrant.<sup>258</sup> This was the first genuine *constitutional* invocation of a right to privacy—one that later influenced Justice Douglas and others on the Court when they first recognized the right to privacy in *Griswold v. Connecticut* in 1965.<sup>259</sup>

With the solidification of a tort right providing a civil remedy for privacy violations by private actors, the stage was set for the creation of a constitutional right protecting the individual from government infringement. Yet in 1961, four years before

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<sup>253</sup> New York State passed the first statute protecting a tort right of privacy in 1903. See SCHWARTZ ET AL., *supra* note 242, at 976. Many courts came to accept the tort both as a protection for private places (*Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969)), and publication of private photos and information (*Flake v. Greensboro News Co.*, 195 S.E. 55 (N.C. 1938)). "At the present time, the right to privacy is clearly recognized . . . in one form or another, in all but two or three states." *Id.* at 977.

<sup>254</sup> Just five years before the elaboration of the constitutional right, Prosser wrote an important article delineating the four varieties of the tort right of privacy. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (describing (1) the invasion of private places, (2) the publication of private information, (3) the "false light" privacy tort, where true information is portrayed in a false light, thus damaging plaintiff's reputation, and (4) the misappropriation of one's name or likeness, where plaintiff's name or likeness is used for commercial purposes).

<sup>255</sup> That "privacy" now meant not simply protection for private enclaves such as the home, but also a right to control information about oneself, indicated that privacy was no longer simply a value connected with personal places but, more deeply, a value connected with the self, with that part of one's life which was not public and, by an extension of this, a right associated in some way with personal autonomy.

<sup>256</sup> 277 U.S. 438 (1928).

<sup>257</sup> *Id.* at 478 (Brandeis, J., dissenting). This case, decided on a 5–4 basis, was later overruled in *Katz v. United States*. 389 U.S. 347 (1967). Justice Brandeis's principle—and, more indirectly, Mill's—was thus later vindicated.

<sup>258</sup> *Olmstead*, 277 U.S. at 475–76 (Brandeis, J., dissenting) (arguing that there is "no difference between the sealed letter and the private telephone message").

<sup>259</sup> 381 U.S. 479 (1965).

*Griswold*, the Court declined to hear a challenge to the same Connecticut law banning the distribution of contraception for non-medical purposes, concluding that plaintiffs lacked standing because the law had never been enforced.<sup>260</sup> Justice Harlan wrote a famous dissent to the decision, arguing for the first time that the Due Process Clause protects a limited right of privacy encompassing the intimate reproductive choices of married couples.<sup>261</sup>

The Court changed its mind four years later in *Griswold*. Perhaps the most interesting of the various opinions, Justice Douglas found the source of the right to privacy in the “penumbras, formed by emanations” of various other constitutional rights: the First Amendment right of association, the Third Amendment right against quartering soldiers in houses, the Fourth Amendment right against searches and seizures (quoting, with approval, Brandeis’s dissent in *Olmstead*), the Fifth Amendment right against self-incrimination, and the implications of the Ninth and Fourteenth Amendments’ Due Process Clause.<sup>262</sup> These were all different notions of privacy, some having to do with private places, some with liberty of conscience, and some with the right to associate with others for social, political, or economic purposes.<sup>263</sup> Other opinions were more conservative, disagreeing about the textual source of the right of privacy<sup>264</sup> and postulating that this new privacy right was related to family autonomy or marriage.<sup>265</sup> These opinions interpreted the principle as analogous to the kind of right protected in the *Lochner* era cases of *Meyer v. Nebraska*<sup>266</sup> and *Pierce*

<sup>260</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>261</sup> *Id.* at 545–46 (Harlan, J., dissenting).

<sup>262</sup> *Griswold*, 381 U.S. at 484.

<sup>263</sup> Indeed, some criticized the idea of privacy as fundamentally vague. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–25 (arguing that autonomy was the real value protected by *Griswold* and *Roe v. Wade*); Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV., 1447, 1448 (1976) (arguing that privacy is actually a constellation of three distinct values: repose, sanctuary, and intimate decision).

<sup>264</sup> Whereas Justice Douglas argued that the right arose from the “penumbras, formed by emanations” of the First, Third, Fourth, Fifth and Fourteenth Amendments (*Griswold*, 381 U.S. at 484), Justice Goldberg thought that the Ninth and Fourteenth Amendments were the basis (*id.* at 491–94). Further, Justice Harlan insisted that the Due Process Clause of the Fourteenth Amendment “st[oo]d . . . on its own bottom.” *Id.* at 500.

<sup>265</sup> As Justice Douglas put it:

We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

*Id.* at 486. The right was still a *marital* right—a right that depended on the association of two spouses—rather than an individual right, but Douglas’s language served to clarify that, in his view, the associational right was not limited to political or social organizations. It was, in this respect, a personal, non-public right.

<sup>266</sup> 262 U.S. 390 (1923).

v. *Society of Sisters*<sup>267</sup>—both cases recognizing a right of families to raise and educate their children as they deem appropriate.<sup>268</sup> The various opinions in *Griswold* all stopped short of embracing a purely Millian interpretation of the privacy right. Dismissing the idea that the new right was an autonomy-based individual right, Justice Harlan went so far as to observe that “I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry. . . .”<sup>269</sup>

But this limited associational view of the privacy right soon disappeared. In *Eisenstadt v. Baird*,<sup>270</sup> a case decided seven years after *Griswold*, the Court held that the constitutional right to use contraception was not limited to married persons: it is an *individual* right based on a person’s autonomy rights.<sup>271</sup> As Justice Brennan insisted in the opinion of the Court:

It is true that in *Griswold* the right of privacy in question inhered in the *marital* relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right *of the individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>272</sup>

A clear majority of the Court explicitly embraced this broader view of privacy just a few years later.<sup>273</sup> *Eisenstadt* marks the true departure from the older idea, consistent

<sup>267</sup> 268 U.S. 510 (1925).

<sup>268</sup> *Meyer* invalidated a Nebraska act that made it illegal to teach a foreign language in primary schools, passed after World War I to prevent the teaching of German in the schools. 262 U.S. 390. *Pierce* held unconstitutional an Oregon statute that outlawed all private education, including religious education. 268 U.S. 510.

<sup>269</sup> *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

<sup>270</sup> 405 U.S. 438 (1972).

<sup>271</sup> [T]he rights [to contraceptives] must be same for the unmarried and the married alike . . . . It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453.

<sup>272</sup> *Id.* (emphasis added).

<sup>273</sup> As Justice Brennan wrote for the Court in *Carey v. Population Services*: “*Griswold* may no longer be read as holding only that a State may not prohibit a married couple’s use of



with the classical liberal tradition, that government power is limited by the independence of the *family unit*, to the newer idea of privacy as an *individual* right of autonomy analogous to the harm principle.<sup>274</sup>

*Roe v. Wade*,<sup>275</sup> decided a year later, held that the right to privacy encompasses a right to abortion up to the point of viability and, in cases where the woman's life or health is in jeopardy, up to the point of birth.<sup>276</sup> In *Doe v. Bolton*,<sup>277</sup> the companion case to *Roe*, Justice Douglas virtually "channels" John Stuart Mill in his concurring opinion.<sup>278</sup> In a passage that closely parallels—if not, frankly, plagiarizes—Mill's three zones of protected freedoms, Douglas observes that, in his view, there are three zones of liberty protected by the Fourteenth Amendment's protection of "liberty."<sup>279</sup> They are, first, "the autonomous control over the development and expression of one's intellect, interests, tastes and personality."<sup>280</sup> These, Douglas added, should be *absolutely protected* under the First and Fourteenth Amendments in that no state interest could overcome them.<sup>281</sup> Second, there is "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."<sup>282</sup> While these rights are not absolute, they are subject to the rigorous protection of strict scrutiny.<sup>283</sup> Third, there is "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."<sup>284</sup>

Mill's influence on Justice Douglas's thought can scarcely be doubted. In *Doe v. Bolton*, Douglas quotes the following from Justice Harlan's majority opinion in *Jacobson v. Massachusetts* (language closely mirroring the words of Mill): "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially

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contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." 431 U.S. 678, 687 (1977).

<sup>274</sup> The older idea is reflective of such *Lochner* era cases as *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Each of these cases, decided well before the *Griswold* era, were grounded on the idea that the state may not, without justification, intrude upon relations within the family, particularly concerning decisions about how to raise and educate one's children. See Sandel, *Moral Argument and Liberal Toleration; Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 529 (1989).

<sup>275</sup> 410 U.S. 113 (1973).

<sup>276</sup> *Id.*

<sup>277</sup> 410 U.S. 179 (1973).

<sup>278</sup> *Id.* at 209–21 (Douglas, J., concurring).

<sup>279</sup> *Id.* at 210–13.

<sup>280</sup> *Id.* at 211.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *See id.*

<sup>284</sup> *Id.* at 213.

of any free government existing under a written constitution, *to interfere with the exercise of that will.*"<sup>285</sup>

From the 1970s on, the Court sporadically filled out the contours of the privacy right in other contexts. It held that privacy encompasses the right of distant family members to live together.<sup>286</sup> It protects the right to be married even when someone applying for a marriage license is behind in child support payments.<sup>287</sup> It provides, moreover, the basis for a right to refuse life-sustaining medical treatment.<sup>288</sup> And in *Casey*, the plurality invoked the Millian idea of liberty as a right to make basic decisions and to act in accordance with one's view of the meaning of life.<sup>289</sup>

On the other hand, the courts have sometimes stopped short of embracing as expansive a right as Mill would have conceived it. Lower courts, for example, have consistently refused to accept privacy rights challenges to prostitution and drug laws.<sup>290</sup> Further, the Supreme Court rejected a generalized autonomy right to assisted suicide<sup>291</sup> and, at one point, rejected a challenge to an anti-sodomy law.<sup>292</sup>

Yet the logic of the privacy-autonomy right has endured these setbacks and even *Bowers* was overruled seventeen years later in *Lawrence v. Texas*.<sup>293</sup> *Lawrence* is significant for solidifying the right first adumbrated in *Eisenstadt*, i.e., a right of sexual autonomy among adults, whether married or unmarried, straight or gay.<sup>294</sup> Justice Kennedy wrote for the majority that "adults may choose to enter upon this [sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."<sup>295</sup> *Lawrence* is also the clearest elucidation of the antimoralistic implications of the privacy right. Justice Kennedy quoted with approval Justice Stevens's dissent in *Bowers* to the effect that, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>296</sup> Ultimately, as

<sup>285</sup> *Id.* at 213–14 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)) (emphasis added). Douglas's three zones do not parallel Mill's perfectly. Mill's third zone of liberty embraces associational rights, whereas Douglas reserves his third zone for health-related decisions relevant to the kinds of cases the Court was then deciding (i.e., cases involving abortion, in particular). See MILL, *On Liberty*, *supra* note 166, at 226. The first two categories of each, however, are strikingly similar, leading one to wonder if Douglas had been consciously or unconsciously influenced by Mill's discussion.

<sup>286</sup> *Moore v. East Cleveland*, 431 U.S. 494 (1977).

<sup>287</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>288</sup> See *Cruzan v. Dir., Missouri Dep't of Public Health*, 497 U.S. 261 (1990).

<sup>289</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 849–51 (1992).

<sup>290</sup> See, e.g., *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979); *Roe v. Butterworth*, 958 F. Supp. 1569 (S.D. Fla. 1997); *Morgan v. City of Detroit*, 389 F. Supp. 922 (E.D. Mich. 1975).

<sup>291</sup> *Washington v. Glucksberg*, 521 U.S. 707 (1997).

<sup>292</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>293</sup> 539 U.S. 558 (2003).

<sup>294</sup> *Id.* See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>295</sup> *Lawrence*, 539 U.S. at 567.

<sup>296</sup> *Id.* at 577.

Justice Kennedy concluded, the moral disapproval of an activity by the majority does not constitute a legitimate state interest: there must be some real harm to justify prohibitory legislation.<sup>297</sup>

Even Justice Scalia, in dissent, acknowledged this, declaring that the *Lawrence* opinion “effectively decrees the end of all morals legislation.”<sup>298</sup> He went on to assert that “[i]f, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws [prohibiting fornication, bigamy, adult incest, bestiality, and obscenity] can survive rational-basis review.”<sup>299</sup> Several lower courts have followed this lead, invalidating state bans on fornication and adultery.<sup>300</sup>

Characteristically, Mill is seldom mentioned directly in these opinions. There are striking parallels in the language and reasoning the courts have used, as with Justice Douglas’s opinion in *Doe v. Boulton*, but ironically most courts have been more likely to mention Mill when *rejecting* some application of his harm principle than in the broader tradition which has largely accepted his principle.<sup>301</sup>

#### IV. SEX, MARRIAGE, AND GENDER EQUALITY

The harm principle provides a general backdrop for understanding Mill’s essentially individualistic approach to issues concerning sex and marriage. Yet, for three reasons, his positions on sex, family, and equality are sometimes surprisingly nuanced. First, they implicate the interests of others, particularly spouses and children, in ways that take these activities beyond the realm of the “self-regarding.” Second, Mill was one of the most important feminist thinkers before the twentieth century.<sup>302</sup> He was particularly sensitive to the ways in which gender roles and other cultural norms mitigated women’s capacity to become truly autonomous. Finally,

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<sup>297</sup> *Id.* at 578.

<sup>298</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>299</sup> *Id.*

<sup>300</sup> *See, e.g.,* MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013); State v. Limon, 122 P.3d 22 (Kan. 2005); Martin v. Zihlerl, 607 S.E.2d 367 (Va. 2005).

<sup>301</sup> *See, e.g.,* Williams v. Att’y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004) (upholding Alabama law prohibiting the sale or use of vibrators, dildos, beads, and artificial vaginas); State v. Erickson, 574 P.2d 1 (Alaska 1978) (upholding indictments for possession of cocaine). In concurring, Judge Matthews cites Mill’s harm principle at great length in a manner that appears to endorse it while concluding that “there is responsible authority which indicates that cocaine does sometimes cause anti-social behavior affecting the safety of others . . . .” *Id.* at 23–24 (Matthews, J., concurring). The appellate court held that the position advocated by the district court was “a corollary to John Stuart Mill’s celebrated ‘harm principle,’ which would allow the state to proscribe only conduct that causes identifiable harm to another. . . . Regardless of its force as a policy argument, however, it does not translate *ipse dixit* into a constitutionally cognizable standard.” *Id.* at 1240 (citation omitted). Of course, Mill’s principle would have, indeed, embraced the possession of cocaine and sexual devices.

<sup>302</sup> *See infra* note 365 and accompanying text.

and most personally, his positions appear indissolubly linked to the emotional tenor of his relationship with Harriet.<sup>303</sup>

Harriet and Mill met through the radical Unitarian preacher, W.J. Fox, who was popular among London's fashionably liberal intelligentsia in the 1820s.<sup>304</sup> Fox had become the legal guardian of two teenage sisters, Eliza and Sally Flowers.<sup>305</sup> Though Fox was married, he soon commenced a scandalous relationship with Eliza, whom Mill had first fancied.<sup>306</sup> Perhaps in an effort to put Mill off the trail, Fox introduced him to Eliza's closest friend, Harriet, who was already married with two children and a third soon on the way.<sup>307</sup>

The details of Mill and Harriet's premarital arrangement are strange, even by contemporary standards. Mill was certain that Harriet would sue for divorce from

<sup>303</sup> There are two contrasting views of Harriet's emotional and intellectual influence on Mill. The first is that their relationship was a genuine collaboration of two great minds and that Harriet had a highly beneficial influence on Mill. Clearly, this was Mill's view. In *On Liberty*, he wrote:

[W]ere I but capable of interpreting to the world one-half the great thoughts and noble feelings which are buried in her grave, I should be the medium of a greater benefit to it than is ever likely to arise from anything that I can write, unprompted and unassisted by her all but unrivaled wisdom.

MILL, *On Liberty*, *supra* note 166, at 5. Some commentators have vigorously argued that Harriet was an intellectual force to be reckoned with. JACOBS, *supra* note 241 (pointing to Harriet's personal writings which presaged many of the ideas later expressed in *On Liberty* and other places). The second view is that Harriet's influence was more emotional than intellectual and that Mill was overcome, first by love and then by grief, that he was romantically inexperienced and head over heels in love with Harriet and prone to effusive statements about her after her death. See HAYEK, *supra* note 75, at 266, 268. Alan Ryan presents a more balanced view, arguing that Harriet's "combative and optimistic temperament" certainly colored works such as *On Liberty* but that "all imputations of influence [on Mill] are 'inferential and speculative.'" ALAN RYAN, J.S. MILL 126 (1974). For perhaps the most balanced view, see Gertrude Himelfarb, *Editor's Introduction*, in ON LIBERTY 24–27 (Pelican Books, 1974).

<sup>304</sup> CAPALDI, *supra* note 2, at 82.

<sup>305</sup> *Id.* at 105.

<sup>306</sup> *Id.* at 102, 105.

<sup>307</sup> PACKE, *supra* note 32, at 115–54. Thomas Carlyle described Fox's bohemian circle as:

[A] flight of really wretched looking 'friends of the species', who . . . struggle not in favor of Duty being *done*, but against Duty of any sort almost being *required* . . . Most of these people are very indignant at marriage and the like; and frequently indeed are obliged to divorce their own wives, or be divorced: for although the *world* is already blooming (or is one day to do it) in everlasting 'happiness of the greatest number,' these people's own *houses* (I always find) are little Hells of improvidence, discord, [and] unreason.

Thomas Carlyle to Dr. John Carlyle (July 28, 1834), excerpted in HAYEK, *supra* note 75, at 82. Still, Carlyle liked Mill personally, and exempted him from the criticism. *Id.*

her husband, John Taylor, who was eleven years her senior.<sup>308</sup> The two had even considered running off to Australia.<sup>309</sup> Taylor, a prosperous druggist, was convinced that Harriet would eventually repent the affair.<sup>310</sup> He sent her to Paris with the children for a six-month cooling-off but Mill visited her there anyway.<sup>311</sup> It was soon clear that Harriet had her own compromise in mind. She could only remain loyal to each man by renouncing sexual relations with both.<sup>312</sup> Apparently after some feeble protests, her husband reluctantly obliged.<sup>313</sup> The marriage continued on these chilly terms for almost the next twenty years.<sup>314</sup> Harriet managed their house and raised their children but accompanied Mill publicly to concerts and lectures, and vacationed with him in Europe.<sup>315</sup> Mill was even permitted to dine with her two nights a week at her residence while John Taylor supped at his club.<sup>316</sup>

There is general consensus among Mill's biographers that his and Harriet's twenty-year relationship before marriage was chaste.<sup>317</sup> Indeed, some have speculated that it may have remained so even after they were married.<sup>318</sup> Mill's *Autobiography* leaves only the vaguest suggestion otherwise.<sup>319</sup> What is clear is that both seem to have held a Platonic view of sex.

Their letters to each other reverberate with the idea that intellectual liberation requires physical renunciation.<sup>320</sup> “[G]ratification of this passion in its highest form,”

<sup>308</sup> CAPALDI, *supra* note 2, at 18.

<sup>309</sup> *Id.* at 107.

<sup>310</sup> *Id.* at 116.

<sup>311</sup> *Id.* at 107.

<sup>312</sup> *Id.*

<sup>313</sup> PACKE, *supra* note 32, at 147.

<sup>314</sup> *Id.* at 317.

<sup>315</sup> CAPALDI, *supra* note 2, at 108.

<sup>316</sup> PACKE, *supra* note 32, at 128–49. During this period, Mill terminated one friendship after another at even the gentlest suggestion that he and Harriet treat their public relationship with a modicum of discretion. When James Mill pressed Mill about the affair, the younger Mill responded that he “had no other feelings towards her, than he would have towards an equally able man.” HAYEK, *supra* note 75, at 101. After the elder Mill died in 1834, when Mill was twenty-eight, he would not permit his family, with whom he still lived, even to speak about Harriet in his presence. PACKE, *supra* note 32, at 351–55.

<sup>317</sup> See PACKE, *supra* note 32, at 317. One commentator refers to their relationship as involving a “passionate abstinence.” JACOBS, *supra* note 241, at 128.

<sup>318</sup> Mill's friend, Alexander Bain, who had helped edit his *System of Logic*, insinuated that Mill simply had a weak libido: “In the so-called sensual feelings, he was below average.” PACKE, *supra* note 32, at 318.

<sup>319</sup> He wrote that, after years of a “partnership of thought, feeling and writing” marriage brought them into “a partnership of our entire existence.” MILL, *Autobiography*, *supra* note 1, at 247.

<sup>320</sup> As one of Mill's biographers has noted, sex between the two was unthinkable. Not only was Harriet married to another man, but

Mill's psyche was Calvinist, almost puritanical. He experienced life as a contest between spiritual impulses and base material impulses. (Augustinian-Manichean.) He analogized the conflict between these

Mill wrote in one note, requires “restraining it in its lowest.”<sup>321</sup> Yet, while it was best to renounce sex for the sake of the life of the mind, it should, in any event, have no bearing on our public life.<sup>322</sup> Mill and Harriet condemned bourgeois marriage, along with any limits on the right to have sex, or to divorce, as an invention of the “sensualists.”<sup>323</sup> If only marriage “had as its goal the true happiness and development of both individuals, rather than their lower physical gratification,” Mill wrote, “there would never have been any reason why law or opinion should have set any limits to the most unbounded freedom of uniting and separating.”<sup>324</sup>

Notwithstanding their stated antipathy to the institution of marriage, the two were finally married on Easter Monday, 1851, two years after John Taylor died.<sup>325</sup> Yet even this event was attended with political significance. Mill penned a formal letter of protest denouncing the “odious powers” the law gave husbands over wives and declaring that “I absolutely disclaim and repudiate all pretension to have acquired any rights whatever” over the woman he would marry.<sup>326</sup>

These views on sex and marriage are broadly reflected in *On Liberty*, where Mill approvingly mentions von Humboldt’s assertion that ending a marriage “should require nothing more than the declared will of either party to dissolve it.”<sup>327</sup> Mill

personal impulses to the social tension between the individual good and the common good. The conflicts or tensions can only be resolved by transcending them in a higher synthesis. This he attempted to do in every aspect of his life and thought. Autonomy and self-rule was the key. Mill’s relationship to Harriet Taylor was a symbol and microcosm of these larger macroscopic tensions. Aside from the attraction of her obvious charms and their shared philosophical interests, the challenge she represented for Mill was whether he could achieve the higher synthesis with and through her. . . . Unlike some other romantics, like William Godwin and Shelley, who advocated free love, Mill reached for a higher romantic plateau.

CAPALDI, *supra* note 2, at 113–14.

<sup>321</sup> *Id.* at 114 (quoting a letter Mill wrote to Lord Amberley in February, 1870).

<sup>322</sup> What any person may freely do with respect to sexual relations should be deemed to be an unimportant and purely private matter, which concerns no one but themselves. . . . But to have held any human being responsible to other people and to the world for the fact itself [for one’s sexual activities] . . . will one day be thought one of the superstitions and barbarisms of the infancy of the human race.

PACKE, *supra* note 32, at 319 (quoting a letter from Mill).

<sup>323</sup> He complained in a letter to Harriet that the “law of marriage as it now exists, has been made *by* sensualists, and *for* sensualists and to *bind* sensualists.” CAPALDI, *supra* note 2, at 106 (Mill’s emphasis).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 230.

<sup>326</sup> PACKE, *supra* note 32, at 348. This declaration was, as one feminist commentator on their relationship put it, “so heartfelt and so romantic that no feminist could help falling in love with John.” JACOBS, *supra* note 241, at 165.

<sup>327</sup> MILL, *On Liberty*, *supra* note 166, at 300.

qualified this slightly, concluding that, while the marital commitment creates a *moral* obligation to the other person and to any children born of the relationship, this obligation need not be fulfilled “at all costs to the happiness of the reluctant party.”<sup>328</sup> While the unhappy spouse should consider the effects of divorce on their partner and children, this purely moral obligation “ought to make no difference in the *legal* freedom of the parties to release themselves from the engagement.”<sup>329</sup>

Though he held this libertarian view of the right of divorce, his position concerning the protection of the rights of children to parental support was far more conservative than even modern Supreme Court jurisprudence. In a passage where Mill discusses the right of society to enforce public obligations, he indicates that where “a man fails to perform his legal duties to others, as for instance to support his children, it is no tyranny to force him to fulfill that obligation by compulsory labor, if no other means are available.”<sup>330</sup> Moreover, the state can justifiably require, as a condition for marriage, that the parties be able to demonstrate in advance that they will be able to support their offspring.<sup>331</sup> In contrast, the Supreme Court held in *Zablocki v. Redhail* that it was a violation of the Equal Protection Clause and the right to marry for a state to require that applicants for a marriage license demonstrate that they are current in child support payments for their previously born children.<sup>332</sup> Where the Court has prioritized the right to marry, Mill would have given preference to the claims of the partners’ previously existing children in the event that the new marriage compromised the children’s interests.<sup>333</sup>

In sum, Mill’s positions on marriage and divorce differ modestly from the modern Supreme Court’s rulings in the particulars: the Supreme Court has refused to restrict the right to marry in cases where Mill thought the state had an interest in limiting it, and the Court has not created a constitutional right to divorce, as Mill

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<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 300–01. In sum, there is an absolute legal right to divorce even if the divorcing party “is morally responsible for the wrong.” *Id.* at 301.

<sup>330</sup> *Id.* at 295.

<sup>331</sup> “The laws which, in many countries on the Continent, forbid marriage unless the parties can show that they have the means of supporting a family, do not exceed the legitimate powers of the State.” *Id.* at 304.

<sup>332</sup> 434 U.S. 374, 377 (1978). Perhaps these conclusions indicate that more freedom requires more responsibility, that a regime of augmented rights may, in some cases, require the willingness to use authoritarian modes of enforcement when the individual has abused his freedom.

<sup>333</sup> See 21 JOHN STUART MILL, *On Marriage*, in COLLECTED WORKS OF JOHN STUART MILL 48 (John M. Robson ed., 1984). Of course, the Court’s position in *Zablocki* may have been motivated less by abstract concerns with the potentially conflicting liberty interests of parents and children than with the pragmatic recognition that, in today’s society, marriage is no longer a culturally required prerequisite to having children. See generally *Zablocki*, 434 U.S. 374. To the extent that Mill’s position was motivated by the apprehension that the children of a second union might be preferred to those of the first, or that both might be impoverished, the modern social reality is that the danger would exist today whether or not the partners marry.

might have preferred (though the same result has been largely effected through the legislative process).<sup>334</sup> But Mill was among the first to argue for the liberalization of marriage and divorce law and, in this respect, his influence cannot be gainsaid. He would undoubtedly have supported cases such as *Loving v. Virginia*, which first recognized the right to marry in a case involving interracial marriage.<sup>335</sup> And he would have done so for the same two reasons the Court itself cited: he was a fierce opponent of racism, and he thought that marriage should not be restricted for any reason other than the interests of the future children of the relationship.<sup>336</sup> Given what he wrote about a broad right to marry, moreover, he would almost certainly have supported gay marriage as the Supreme Court has recently done.<sup>337</sup>

More generally, Mill was among the “first wave” of feminist thinkers in the nineteenth century—long before feminism was intellectually fashionable.<sup>338</sup> His last important book, *The Subjection of Women*, published in 1869, vigorously argued that women should be politically and legally equal to men in every way—that they should have the right to vote,<sup>339</sup> to hold office,<sup>340</sup> and to possess the same property rights as men.<sup>341</sup> Mill strenuously opposed, for example, the age-old tradition of making the husband the owner of the wife’s property upon marriage,<sup>342</sup> and, while in Parliament, he supported the Married Women’s Property Bill, which ultimately

<sup>334</sup> Since about 1970, virtually every state has moved to a no-fault divorce law which gives either spouse a right to divorce for any reason whatsoever. See W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFFAIRS (Fall 2009), <https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce> [<https://perma.cc/Z4KL-WLB7>].

<sup>335</sup> 388 U.S. 1, 2 (1967) (striking down, under equal protection and right to marry principles, Virginia’s anti-miscegenation statute prohibiting whites from marrying people of other races).

<sup>336</sup> *Loving* was a rare case in which the Court applied strict scrutiny for two independent reasons: because the anti-miscegenation law violated race equality, *id.* at 11, and because it violated the right to marry, *id.* at 12.

<sup>337</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (ruling that the right to marry embraces straight and gay relationships under the Equal Protection Clause). Indeed, since gay and lesbian couples cannot have children of their own without reproductive assistance, Mill’s one reason for limiting the right to marry would frequently not exist in the case of gay or lesbian couples. In fact, if anything, their availability to adopt needy children already in existence would make the case for gay marriage particularly strong.

<sup>338</sup> Feminist thinkers of the “first wave” include Mary Wollstonecraft, Elizabeth Cady Stanton, and Sojourner Truth. See Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them, Explained*, VOX (July 20, 2018), <https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth> [<https://perma.cc/CTL2-E7NJ>].

<sup>339</sup> To have a voice in choosing those by whom one is to be governed, is a means of self-protection due to every one . . . . Under whatever conditions, and within whatever limits, men are admitted to the suffrage, there is not a shadow of justification for not admitting women under the same.

MILL, *THE SUBJECTION OF WOMEN*, *supra* note 18, at 301.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 296–97.

<sup>342</sup> *Id.* at 297.



ended this practice.<sup>343</sup> He argued for full equality in the professions, expecting that, if there were natural differences between men and women, they would play themselves out in the free play of competition for jobs: “What women by nature cannot do,” he wrote in the *Subjection of Women*, “it is quite superfluous to forbid them from doing.”<sup>344</sup> While he thought that, in a wage-earning society, the best arrangement was generally for the man to earn the family’s living while the wife attended the home and children,<sup>345</sup> he went on to caution that every woman has the right to choose for herself whether to work or stay at home and that “the utmost latitude ought to exist for the adaptation of general rules to individual suitabilities.”<sup>346</sup>

Underlying Mill’s positions on issues of the family and gender equality were two broad sociological assumptions. First, he was deeply suspicious of arguments based on “natural differences” between men and women.<sup>347</sup> He was among the first to point out that it is almost impossible to separate the effects of biology from the effects of social institutions, and that, at the point he was writing, so little was understood of the sociological effects of cultural norms on gender that no one had the right to justify inequalities on the basis of “natural differences” between the sexes.<sup>348</sup> Women are victims of their dependence on men—a culturally imposed dependence.<sup>349</sup> It is not biology but, more likely, social institutions that leave both sexes in a

<sup>343</sup> 28 JOHN STUART MILL, *Public and Parliamentary Speeches*, in COLLECTED WORKS OF JOHN STUART MILL, 283–86 (June 10, 1868). The bill passed in 1870, after Mill had been voted out of office. See generally <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/propertychildren/> [<https://perma.cc/W7SH-QU7S>] (confirming the passage of this version of the Married Women’s Property Bill in 1870).

<sup>344</sup> MILL, *SUBJECTION OF WOMEN*, *supra* note 18, at 280. Not anticipating the argument that would be made later by proponents of affirmative action for women that prejudice, rather than natural ability, would keep them from certain jobs, he continued, “What they can do, but not so well as the men who are their competitors, competition suffices to exclude them from; since nobody asks for protective duties and bounties in favour of women . . .” *Id.*

<sup>345</sup> “When the support of the family depends, not on property, but on earnings, the common arrangement, by which the man earns the income and the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons.” *Id.* at 297. Mill went on to observe that, when women work, men seldom perform their end of the bargain with house and children. *Id.* at 279–98.

<sup>346</sup> *Id.* at 298.

<sup>347</sup> *Id.* at 277–78.

<sup>348</sup> The profoundest knowledge of the laws of the formation of character is indispensable to entitle any one to affirm even that there is any difference, much more what the difference is, between the two sexes considered as moral and rational beings; and since no one, as yet, has that knowledge, (for there is hardly any subject which, in proportion to its importance, has been so little studied), no one is thus far entitled to any positive opinion on the subject.

*Id.*

<sup>349</sup> Sex and child-rearing were, in turn, linked to the dependence of women on their husbands. Mill had read Rousseau, who had written that “it is impossible to enslave a man without

condition where “men [think] it a clever thing to insult women for being what men made them.”<sup>350</sup>

Second, Mill nurtured the progressive faith that social institutions are slowly evolving to a condition of equality and justice. The traditional household was a “school of despotism” when it should be “a school of sympathy in equality, of living together in love, without power on one side or obedience on the other.”<sup>351</sup> He tied these views in to his general understanding of society as an evolving set of institutions which has moved through an initial stage of paternal despotism, a second stage, influenced by Christian morals, where the husband’s power is tempered by beneficence, to a third stage where social relations should be based on simple equality: “We have had the morality of submission, and the morality of chivalry and generosity; the time is now come for the morality of justice.”<sup>352</sup>

Whether his influence has been direct or indirect,<sup>353</sup> Mill would have fully supported the gender equality jurisprudence of the modern Supreme Court.<sup>354</sup> The very first important equal protection case involving gender, *Reed v. Reed*, decided in 1971, involved a challenge to a state statute that required a preference for male over female

first putting him in a situation where he cannot do without another man . . . .” ROUSSEAU, *supra* note 187, at 106. As Mill put it in a letter to Harriet:

The first and indispensable step, therefore, toward the enfranchisement of woman, is that she be educated, as not to be dependent either on her father or her husband for subsistence. . . . women will never be what they should be . . . until women, as universally as men, have the power of gaining their own livelihood.

CAPALDI, *supra* note 2, at 106.

<sup>350</sup> MILL, THE SUBJECTION OF WOMEN, *supra* note 18, at 292.

<sup>351</sup> *Id.* at 294–95.

<sup>352</sup> *Id.* at 294.

<sup>353</sup> *The Subjection of Women* was first published in 1869. *See id.* It was among the earliest systematic defenses of feminism. *See id.* If we can assume that later feminist thinkers had studied their intellectual precursors—a reasonable assumption, under the circumstances—they must have read Mill and/or been aware of his arguments. In this respect, even if Mill’s influence on Supreme Court jurisprudence was indirect, there is a high probability that he influenced a later wave of feminist thinkers in the twentieth century.

<sup>354</sup> The first wave of equal protection cases in the gender context came in the early 1970s, almost a century after *The Subjection of Women* was published. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (using intermediate scrutiny for the first time to invalidate an Oklahoma law permitting girls, but not boys, between the age of 18 and 21 to drink low-alcohol beer); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating federal social security provision that permitted widows, but not widowers, to claim their spouse’s benefits); Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a federal law which permitted male members of the military to claim spouses as a dependent while conditioning this, in the case of female members, on more exacting criteria); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating a law that declared the children of unwed fathers, but not unwed mothers, wards of the state); Reed v. Reed, 404 U.S. 71 (1971) (invalidating Idaho provision designating male relatives, over female relatives, as administrators of a decedent’s estate).

administrators of a relative's estate.<sup>355</sup> In holding the provision unconstitutional, the Court made precisely the same argument Mill had made in *The Subjection of Women*: "It is quite true that things which have to be decided every day . . . ought to depend on one will: one person must have their sole control. But it does not follow that this should always be the same person."<sup>356</sup>

Similarly, Mill's suspicion that culture plays a greater role than biology in matters involving asserted differences between the sexes has been vindicated in several Supreme Court cases. In *Craig v. Boren*, the Court took issue with a law that permitted young women, but not men, to drink low-alcohol beer: the law was predicated on questionable statistical claims reflecting cultural, rather than biological differences concerning the likelihood that men or women would drink and drive.<sup>357</sup> In *Stanton v. Stanton*, the Court rejected a law based on "old notions" requiring parents to support sons until 21, but daughters only until the age of 18.<sup>358</sup> And in *United States v. Virginia*, a case which overturned the male-only admissions policy of the Virginia Military Institute (VMI),<sup>359</sup> the Court rejected the state's claim that women could not withstand the rigorous "adversative method" used to train and discipline male military recruits.<sup>360</sup> Indeed, the opinion, written by Justice Ginsburg, added a new requirement to the "intermediate scrutiny" test used in gender equality cases: the government must show an "exceedingly persuasive justification" for drawing any gender-based legal distinctions.<sup>361</sup>

We can, of course, question the extent to which Mill *directly* influenced the equal protection jurisprudence of gender in the 1970s and afterward. We might wonder whether these constitutional developments were instead a result of the influence of "second wave" feminist thinkers in the 1960s and 1970s, or even of general cultural changes occurring at the time. Certainly these other factors played a significant role in the Court's eventual recognition of gender equality principles under the Equal Protection Clause.

<sup>355</sup> 404 U.S. 71, 76 (1971) (holding unconstitutional under the equal protection clause an Idaho statute that required sons be preferred to daughters, husbands to wives, brothers to sisters, etc. in the appointment of administrators of an estate). In this case, a divorcing couple each sought to be named the administrator of their deceased son's estate. *Id.* at 71–72.

<sup>356</sup> MILL, *THE SUBJECTION OF WOMEN*, *supra* note 18, at 291. *Cf. Reed*, 404 U.S. at 76 ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . .").

<sup>357</sup> 429 U.S. 190 (1976). The Court noted that the statistical evidence illustrating that men were more frequently involved in traffic accidents failed to account for the fact that men drove more frequently than women, and that intoxicated girls were more likely to be escorted home, rather than arrested. 429 U.S. at 202–03 nn.14, 16.

<sup>358</sup> The old notion was that women tend to marry earlier than men, and that men need more time to acquire an education to support their families. 421 U.S. 7, 10 (1975).

<sup>359</sup> 518 U.S. 515, 519 (1996).

<sup>360</sup> *Id.* at 522.

<sup>361</sup> "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen soldier training afforded by VMI." *Id.* at 534.

And, yet, three things are undeniable. First, Mill is among the “first wave” of feminist theorists; along with Mary Wollstonecraft,<sup>362</sup> William Godwin<sup>363</sup> (Wollstonecraft’s husband) and a socialist thinker, Charles Fourier, who first coined the term “feminism,”<sup>364</sup> Mill must be counted a seminal thinker among feminism’s intellectual pantheon and credited for the influence his ideas had on twentieth-century feminist thinkers. Second, he made the case for feminism fully a century before second wave feminists of the 1960s and 1970s. The association of the feminist cause with the name of the greatest public intellectual of the nineteenth century lent feminism an intellectual pedigree that it would not have had without him. Finally, Mill’s argument for feminism is integral to the broader fabric of his social thought, including the sociological observations of *A System of Logic*, where he argued at length that many of the differences between men and women once thought to be “essential” were in fact caused by social, rather than innate biological factors.<sup>365</sup> In sum, Mill’s case for feminism was neither *ad hoc* nor *sui generis*. It did not stand on its own terms but was instead part of a genuinely comprehensive view of human freedom—a view which tied the cause of feminism closely to the cause of liberalism and the emerging field of sociology.

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<sup>362</sup> Wollstonecraft wrote the earliest modern feminist treatise: MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* (1792).

<sup>363</sup> WILLIAM GODWIN, *AN ENQUIRY CONCERNING POLITICAL JUSTICE, AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS* (1793). This work is considered the first modern defense of anarchism and defends, among other things, feminist principles. See *William Godwin*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/godwin/> [<http://perma.cc/FQC7-7WDQ>] (last visited Nov. 29, 2018). Godwin’s wife, Wollstonecraft, died a month after bearing him a daughter, the later Mary Shelley, author of the acclaimed novel, *Frankenstein*.

<sup>364</sup> Fourier (1772–1837) was a utopian socialist who was among the first to argue for gender equality and the total elimination of sexual stereotypes and limits. He used the French term “*feminisme*” to emphasize sexual equality, though today he would be considered a “difference” feminist. *Feminism*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Feminism> [<https://perma.cc/B95G-2YFQ>] (last visited Nov. 29, 2018); see also *id.* (defining “difference feminism” as one contemporary approach emphasizing that “there are important differences between the sexes” that “cannot be ignored”); Aviva Orenstein, “*My God!*”: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 184–89 (1997) (discussing “difference feminism” and contrasting it with other types of feminism).

<sup>365</sup> In his *System of Logic* (Book VI, Chapter V), Mill discussed what he calls the science of “ethology,” or what we would call the sociological and political causes of human character. MILL, *A System of Logic*, *supra* note 85, at 869. Mill assumed that most or all of the supposed differences between men and women are the product of social, rather than biological, factors. *Id.* at 868. “A long list of mental and moral differences are observed, or supposed, to exist between men and women: but at some future, and, it may be hoped, not distant period, equal freedom and an equally independent social position come to be possessed by both, and their differences of character are either removed or totally altered.” See MILL, *SYSTEM OF LOGIC*, *supra* note 85, at 868.

## V. MILL AND MODERN FREEDOM OF EXPRESSION

If Mill is sometimes not sufficiently credited for the influence of his feminism, he is generally acknowledged as one of the premier architects of our modern understanding of freedom of speech. In fact, Mill arguably had three significant influences on the free speech jurisprudence of the twentieth century. First, and most importantly, he refined our understanding of the theoretical *justification* for free speech, arguing that *all ideas and opinions* should be protected as a means to promoting a competition of ideas that leads to the truth.<sup>366</sup> Second, the emanations of the harm principle had implications for the free speech debate, leading the way to a far more liberal approach to “offensive” speech and speech deemed to be immoral.<sup>367</sup> Third, Mill was among the first to suggest that it was dangerous to attempt to separate the rational or propositional aspects of a message from its emotional or affective content—that censorship of *the way* in which a thing is expressed often amounts to censorship of the propositional content of the message.<sup>368</sup>

We begin with Mill’s case for the ultimate *justification* of free speech—the reason why we protect freedom of speech. Theorists usually distinguish between three distinct justifications for freedom of speech, press, and/or expression.<sup>369</sup> The most traditional (and arguably the narrowest) rationale views free expression as an important *political* value insofar as free speech is an essential ingredient of self-governance: democracy requires that a free people have the right to speak on matters of public policy.<sup>370</sup> The second rationale conceives of freedom of expression as an important *social* value conducive to the truth-finding function of speech; i.e., that

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<sup>366</sup> See *infra* note 371 and accompanying text.

<sup>367</sup> See *infra* note 395 and accompanying text.

<sup>368</sup> See *infra* notes 401–02 and accompanying text.

<sup>369</sup> The Framers themselves seem to have been uncertain about the scope and meaning of free speech. Benjamin Franklin declared that “[f]ew of us, I believe, have distinct [i]deas of [i]ts [n]ature and [e]xtent,” and Alexander Hamilton asked “[w]ho can give it any definition which would not leave the utmost latitude for evasion?” Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 320 (2001).

<sup>370</sup> This rationale, sometimes called the “republican” justification for free speech, was defended most famously by the constitutional theorist Alexander Meiklejohn. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15–16 (1948). Meiklejohn was explicit in limiting the coverage of freedom of speech. What does the First Amendment protect, he asked?

[T]he town meeting suggests an answer. That meeting is called to discuss and . . . to decide matters of public policy . . . . The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate . . . .

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.

*Id.* at 24–26.

the very exchange and cross criticism of ideas and conflicting opinions tends to refine the truth and lead to the discarding of false opinions in matters of politics, morality, culture, and science.<sup>371</sup> The third, most recent justification is that freedom of expression serves an *individual* value by permitting the person the right to disclose and express his or her innermost feelings and opinions.<sup>372</sup> Where the first two rationales are justified largely in terms of the effect on those who *hear* the message, the third is justified largely for its expressive benefits to the *speaker* himself, and protects not simply the rational content, but the emotional or affective aspect of the message as well.<sup>373</sup>

Mill developed a powerful and radical case for the second “truth-finding” function and began to lay the groundwork for the third expressive function. He was insistent that no idea may be censored and no opinion proscribed because of its content.<sup>374</sup> The most unpopular opinion might turn out to be true and, even if it is false, may have a grain of truth within it.<sup>375</sup> Unconventional—even radical—opinions must be protected as essential to the progress of knowledge since even one lone dissenter may turn out to be right:

If all mankind minus one were of one opinion . . . mankind  
would be no more justified in silencing that one person than he,

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<sup>371</sup> The “truth refining” function derives from Mill’s thought and, as we will see, influenced Oliver Wendell Holmes Jr.’s “marketplace of ideas” defense of freedom of speech. Following Mill, Holmes argued that diversity of ideas is socially productive in much the same way that a diversity of goods is productive. Ideas should compete for our adherence. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . .”). Even false opinions have a value insofar as they help to sharpen our understanding of the truth. And, of course, in matters of politics and morality, what counts as “truth” in the first place is almost always a matter of contention. *See also infra* note 372.

<sup>372</sup> The expressive function is connected with notions of self-respect and self-actualization. As one theorist puts it, “the significance of freed expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music . . . . Freedom of expression . . . encourages the exercise of these capacities . . . . In so doing, it nurtures and sustains the self-respect of the mature person.” David A. J. Richards, *Free Speech and Obscenity: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1975).

<sup>373</sup> In *Cohen v. California*, 403 U.S. 15 (1971), for example, the Court relied on just such an emotive or expressive idea of speech. In this case, Cohen was convicted of disturbing the peace when he walked into a courthouse with a jacket that read, “F—— the draft.” The prosecution argued that he could have expressed the rational content of the message in various ways, but that the form of expression violated laws prohibiting foul speech in a public place. The Court ruled, however, that the language was part of the message and was, thus, protected by the free speech provision of the First Amendment.

<sup>374</sup> MILL, *On Liberty*, *supra* note 166, at 229.

<sup>375</sup> *See id.*

if he had the power, would be justified in silencing mankind. . . . [T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. 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 error.<sup>376</sup>

This “truth finding” function also protects *the right to inquiry* in cases where the line between fact and opinion is unclear.<sup>377</sup> Mill observed that the “truth” is often complex, many-sided, and variegated.<sup>378</sup> True understanding requires looking at a subject from all sides, listening to every opinion, and weighing it against contrary opinion:

[T]he only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind.<sup>379</sup>

The variegated nature of truth is particularly significant in the sphere of politics and economics, where principles have a practical rather than absolute character. For example, though Mill believed that free markets were the best economic policy “nineteen times out of twenty,” he conceded that even this principle is a practical truth that needs to be qualified.<sup>380</sup> Qualification requires dialectical debate. Thus, freedom of expression permits this gradual refinement of our understanding of an issue by permitting us to hear answers on all sides of a question.

Mill’s defense of freedom of speech was, in both of these respects, bound up with his progressivism. While he would have rejected any romanticized notion that

<sup>376</sup> *Id.* at 229.

<sup>377</sup> *Id.* at 254.

<sup>378</sup> Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.

*Id.* at 254.

<sup>379</sup> *Id.* at 232.

<sup>380</sup> Believing with M. Comte that there are no absolute truths in the political art . . . we agree with him that the *laissez* [sic] *faire* doctrine, stated without large qualifications, is both unpractical and unscientific; but it does not follow that those who assert it are not, nineteen times out of twenty, practically nearer the truth than those who deny it.

MILL, *Auguste Comte and Positivism*, *supra* note 92, at 303.

truth magically wins out in the clash of ideas,<sup>381</sup> he possessed a sober faith that freedom of thought and discussion could gradually eliminate false opinion, prejudice, and superstition over the long haul.<sup>382</sup> That freedom and diversity of ideas is essential to this process was central to the progressive faith in human evolution.<sup>383</sup>

Justices Oliver Wendell Holmes, Jr. and Louis Brandeis, who argued for a broader understanding of free speech in a series of dissents in post–World War I First Amendment cases, had clearly been influenced by Mill’s ideas. We have seen that Brandeis championed a “right of privacy,” the inspiration of which is found in Mill’s harm principle.<sup>384</sup> Holmes, for his part, was a voracious reader of philosophy, economics, and political theory; he wrote admiringly of Mill’s influence.<sup>385</sup> In fact, Holmes met Mill personally in London when Holmes was twenty-four and Mill was a Member of Parliament.<sup>386</sup> There can be little doubt that Holmes had read *On Liberty* as a young man and that he had reread it in the summer of 1919, shortly before writing his first famous free speech dissent in the *Abrams* case.<sup>387</sup>

In *Abrams v. United States*, Holmes criticized the majority for upholding a conviction for distribution of socialist literature.<sup>388</sup> He wrote that “defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow.”<sup>389</sup> He offered one of the most eloquent, if sardonic, defenses of free speech ever:

Prosecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To

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<sup>381</sup> “It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake.” MILL, *On Liberty*, *supra* note 166, at 238.

<sup>382</sup> “Wrong opinions and practices gradually yield to fact and argument . . .” *Id.* at 231.

<sup>383</sup> *Id.*

<sup>384</sup> See Warren & Brandeis, *supra* note 6.

<sup>385</sup> He wrote at one point, “I doubt if Carlyle gave the world as great a shove as Mill.” 2 O.W. HOLMES, *HOLMES-LASKI LETTERS* 117 (Mark de Wolfe Howe ed., 1963).

<sup>386</sup> The meeting took place in 1866. Holmes was twenty-four and Mill was approaching the end of his life. The discussion topic of the meeting was “whether the financial policy of England should be governed by the prospective exhaustion of coal in H years as predicted by Jevons.” CAPALDI, *supra* note 2, at 351. Holmes mentions the meeting from his perspective in a letter to Laski. HOLMES, *supra* note 385, at 297.

<sup>387</sup> RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 217–18 (1987). Scholars have suggested that his change in views was the product of a lively exchange the previous summer between he and two other important legal theorists, Harold Laski and Judge Learned Hand, among others. See David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1311–17 (1983) (discussing this exchange).

<sup>388</sup> 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

<sup>389</sup> *Id.* at 629.



allow opposition by speech seems to indicate that you think the speech impotent . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>390</sup>

All of this—the appeal to the competition of “fighting faiths,” the sense that evolution is best served by “the free trade in ideas,” and the idea that “all life is an experiment”—are pure John Stuart Mill.

Mill set only one limit on the right to free speech: where a speech act can be expected to cause direct harm to a third party:

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.<sup>391</sup>

This is nothing other than the “imminent lawless action” test as it was developed decades later in *Brandenburg v. Ohio*<sup>392</sup>—a test which represents the logical culmination of the Holmes-Brandeis approach to free speech. *Brandenburg*, decided in 1969, overruled or cast doubt on a long series of cases—often the same cases in which Holmes and/or Brandeis dissented—in which the Court had used a less permissive “clear and present danger” test to uphold criminal convictions for advocating Communism, anarchism, or other radical causes.<sup>393</sup> *Brandenburg* held that advocacy

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<sup>390</sup> *Id.* at 630.

<sup>391</sup> MILL, *On Liberty*, *supra* note 166, at 260. As one commentator notes, this passage comes at the beginning of Chapter 3 of the work, not in Chapter 2, which covers “Liberty of Thought and Discussion.” K.C. O’ROURKE, JOHN STUART MILL AND FREEDOM OF EXPRESSION 126 (2001). Mill placed it here because he thought that this represents the line between speech and harmful action. *Id.* at 127.

<sup>392</sup> 395 U.S. 444 (1969). *Brandenburg*, a Ku Klux Klan member, was convicted under Ohio’s criminal syndicalism statute for advocating violence at a Klan rally. In a per curiam opinion, the Court reversed his conviction holding that political speech receives the highest form of protection under the Constitution, and that a person may not be punished for speech unless he is intentionally inciting others to imminent lawless action, similar to Mill’s corn-dealer example. *Id.* at 448–49.

<sup>393</sup> The Court adopted the “clear and present danger” test in *Schenck v. United States*, 249

of any cause was permissible and could not be punished unless the speaker was intentionally attempting to incite imminent lawless action *à la* Mill's "corn dealer" example.<sup>394</sup> It had taken over a century but, again, Mill's views were vindicated in the Supreme Court's free speech jurisprudence of the 1960s.

Even as Mill sought to broaden the protection for speech, his second influence, emanating from the harm principle, limits the government's interest in regulating speech in the first instance: just as the state should not prohibit *conduct* unless it directly harms another, so too, *speech* may not be censored or punished unless it is "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>395</sup> Speech may not be limited simply because there is a likelihood that listeners may be offended<sup>396</sup> or because the speech might provoke a violent response.<sup>397</sup> Similarly, the antimoralistic implications of the harm principle entail that speech may not be censored or punished simply because it is considered profane<sup>398</sup> or sexually offensive.<sup>399</sup> In sum, *à*

U.S. 47, 52 (1919) (upholding a conviction under the Espionage Act of 1917 for distributing fliers advocating resistance to the draft). This test was broadened into a "bad tendency" test in *Whitney v. California*, 274 U.S. 357, 371 (1927) (upholding a conviction for advocating communism and assisting in the founding of the Communist Party of America). The *Whitney* Court held that speech may be proscribed if it has a tendency to cause lawless action. *Id.*

<sup>394</sup> "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of use of force of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

<sup>395</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>396</sup> *Skokie v. National Socialist Party of America*, 373 N.E.2d 21, 23 (Ill. 1978) (overturning an injunction prohibiting Nazis from marching and displaying the swastika in Skokie, Illinois, a town in which many Jewish survivors of the Holocaust lived).

<sup>397</sup> *Cantwell v. Conn.*, 310 U.S. 296, 308 (1940) (overturning conviction of a Jehovah's witness for disturbing the peace after he played a phonograph record attacking Roman Catholicism and other religions). Free speech is, by its nature, intended to arouse disagreement. Indeed, "[the] function of free speech under our system of government is to invite dispute." *Terminiello*, 344 U.S. at 4.

<sup>398</sup> *See Cohen v. California*, 403 U.S. 15 (1971) (overturning appellant's conviction for disturbing the peace after wearing a t-shirt displaying the words "Fuck the Draft"); *cf. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding FCC sanction of radio station that broadcast George Carlin's "[seven] words you couldn't say on the public . . . airwaves . . . shit, piss, fuck, cunt, cocksucker, motherfucker and tits"). Even in *Pacifica*, the Court emphasized the narrowness of its decision—that it might be permissible to play this late at night, but that here the broadcast occurred at 2 P.M. *Id.* at 750–51.

<sup>399</sup> *See, e.g., Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (invalidating a local ordinance that prohibited drive-in theaters that were visible from the street from showing movies portraying bare buttocks, female breasts, or adult pubic areas).

la Mill, the constitutional touchstone for permissible regulation of speech is material *harm*, not cultural morality.<sup>400</sup>

Finally, Mill's third influence was to begin to lay the groundwork for the expressive justification for speech. He did this in two ways. First, he recognized that freedom of expression is tied to the flourishing of individual autonomy and the development of human character.<sup>401</sup> He also recognized that the *affective* or emotional dimension of a message is as important as the *propositional* or rational aspect.<sup>402</sup> *How* a thing is said may be as important as *what is said*.

These two points emerge together in his discussion of the effects of censorship on human character. He pointed out that even true opinions, when they are generally accepted, tend to deteriorate into dull platitudes that no longer excite the imagination:

But when [some opinion or view] has come to be an hereditary creed, and to be received passively, not actively—when the mind is no longer compelled, in the same degree as at first . . . there is a progressive tendency to forget all of the belief except the formularies, or to give it a dull and torpid assent, as if accepting it on trust dispensed with the necessity of realizing it in consciousness, or testing it by personal experience; until it almost ceases to connect itself at all with the inner life of the human being.<sup>403</sup>

Stifling freedom of speech thus has a doubly disabling affect. In the absence of vigorous discussion and debate, even true doctrines deteriorate into passively held “prejudice[s] with little comprehension or feeling of its rational grounds.”<sup>404</sup> Where opinions are not challenged and defended, moreover, people no longer appreciate what the doctrine *really means*.

Worse still, this has a degenerative effect not only on the doctrines themselves but on the “character and conduct” of those who passively hold them.<sup>405</sup> Where beliefs and opinions are no longer debated, even their defenders are deprived “of any real or heartfelt conviction, from reason or personal experience.”<sup>406</sup> This impoverishes the individual in the closest way to which Mill would call “spiritual.” To be a fully realized human being means to hold views that one has examined for himself, not simply to accept them because they have been learned at the knee of the parent

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<sup>400</sup> See *supra* notes 141–54 and accompanying text (discussing the antimoralistic consequences of the harm principle).

<sup>401</sup> The locus of this argument is in Chapter III of *On Liberty*, titled “Individuality as an Element of Well-Being.” See *supra* Part II (discussing the relationship between individuality and well-being).

<sup>402</sup> See *supra* Part II.

<sup>403</sup> MILL, *On Liberty*, *supra* note 166, at 248.

<sup>404</sup> *Id.* at 258.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

or the professor.<sup>407</sup> This is, again, the problem with custom, habit, and tradition for Mill: they rob the individual of forming a genuine understanding of even those traditional truths worth defending.<sup>408</sup>

Mill's conception of the autonomy-enhancing character of free speech principles has found its way into modern First Amendment doctrine. As Justice Brandeis observed in his concurrence in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.<sup>409</sup>

Similarly, the Court has repeatedly recognized that the content and form of a message—the *what is said* and the *how it is said*—cannot be distilled, one from the other, without the fear that censorship of the latter will result in censorship of the former.<sup>410</sup> Justice Holmes pointed this out in his dissent in *Gitlow v. New York*:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.<sup>411</sup>

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<sup>407</sup> As he wrote in an early essay, "To have erroneous conviction is one evil; but to have no strong or deep-rooted convictions at all, is an enormous one. Before I compliment either a man or a generation upon having gotten rid of their prejudices, I require to know what they have substituted in lieu of them." 22 JOHN STUART MILL, *SPIRIT OF THE AGE*, COLLECTED WORKS 233 (Ann Robson & John Robson eds., 1986).

<sup>408</sup> One is reminded of Thomas Jefferson's skepticism about tradition and the Constitution: Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well. . . . It was very like the present, but without the experience of the present . . . . Let us . . . [not] weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs . . . . The dead have no rights.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON*, 558–60 (Merrill D. Peterson ed., 1999).

<sup>409</sup> *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring) (upholding a conviction for attending a Socialist Party convention, but only for state criminal law grounds, not for political assembly under the Fourteenth Amendment).

<sup>410</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 18, 21, 25–26 (1971).

<sup>411</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

More recently, in *Cohen v. California*,<sup>412</sup> the Court showed the same solicitude for the problem of distinguishing the content from the emotive force of a message.<sup>413</sup> Cohen was convicted for breach of the peace for wearing a jacket that read “Fuck the Draft” in a courthouse.<sup>414</sup> The opinion, authored by Justice Harlan, declared that: “governmental bodies may not prescribe the form or content of individual expression . . . while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another man’s lyric.”<sup>415</sup> The opinion went on to point out that:

[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well . . . . We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message . . . .<sup>416</sup>

In fact, it is not possible to prohibit one without the other. “[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>417</sup>

These ideas—that heartfelt emotion breathes life into persuasion, that the very act of expressing both the rational and the emotive aspects of a message has a beneficial effect on speaker and hearer alike, and that, without the emotional edge provided by free and open debate, our positions lose their flavor and force so that understanding itself suffers—reflect the legacy of Mill’s romanticism as an express justification for freedom of speech.

## VI. LIBERALISM, FREE WILL, AND THE SELF

We now arrive at what is perhaps the central conundrum of Mill’s liberalism. The problem can be framed in this way: “freedom” is a Janus-faced idea. It is no coincidence that we use the term “freedom” to point outwardly to our social and

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<sup>412</sup> 403 U.S. 15 (1971).

<sup>413</sup> *Id.* at 18, 24–26.

<sup>414</sup> *Id.* at 15–17. Cohen was convicted in the Los Angeles Municipal Court and his conviction was affirmed in the Court of Appeals. *Id.*

<sup>415</sup> *Id.* at 24–25.

<sup>416</sup> *Id.* at 26.

<sup>417</sup> *Id.*

political liberties (as in freedom of expression, freedom of religion, economic freedom, etc.) and inwardly to our capacity to make choices (as with the idea of “free will”). Liberals from Locke through Mill recognized that our political liberty is in some way connected to our choice-making capacity as free agents—that freedom in the external, social, and political sense seems to depend on freedom in the internal sense expressed by the old idea that we possess a capacity for free will.<sup>418</sup> We protect freedom to live as we wish—freedom of expression, freedom of religion, freedom in the economic sphere, etc.—because our lifestyle choices, our speech, our religious commitments, and our economic activities, among other liberties, reflect our *choices* about how we wish to live our lives. Remove the idea that we make free choices and the very case for liberalism collapses.

Mill recognized this, as Locke had before him. Although he dismissed the idea of “free will” in the opening lines of *On Liberty*,<sup>419</sup> the view of liberty he wound up developing in that work reverberates with the theme of the interdependence of personal autonomy (a form of inner freedom) and political liberty.<sup>420</sup> For Mill, there was a reciprocal relationship between our inner freedom or autonomy and our external liberties: our inner freedom to make choices grounds and justifies our political liberties even as these external liberties serve to perfect our autonomy and refine the process of self-individuation.<sup>421</sup> As a political theorist, Mill’s theory of liberalism depends, as much as Locke’s did, on there being a genuine sense in which *there is a self whose choices are free*.<sup>422</sup>

In all of this, there is what can only be called a deeply “spiritual” aspect to Mill’s case for liberalism. Mill’s deepest criticism of Bentham was that the latter “never recognised . . . [man] as a being capable of pursuing spiritual perfection as an

<sup>418</sup> See, e.g., HILL, AFTER THE NATURAL LAW, *supra* note 25, at 161–62, 191–93, 244–46.

<sup>419</sup> In the opening lines of *On Liberty*, Mill distinguished the two ideas of freedom: “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.” MILL, *On Liberty*, *supra* note 166, at 217. Yet Mill ultimately rests his case for political liberty on notions of autonomy, authenticity, and self-individuation. *Id.* at 223–24, 226.

<sup>420</sup> *Id.* at 225–27.

<sup>421</sup> *Id.*

<sup>422</sup> HILL, AFTER THE NATURAL LAW, *supra* note 25, at 166–67. The idea of freedom and decision-making appears to be inextricably linked to the idea of the self. Without the concept of the self, the idea that the person makes choices and performs actions freely collapses. Even a contemporary materialist philosopher, John Searle, admitted that “to my surprise, I found that I could not give a satisfactory account of decision making without presupposing the existence of the self.” JOHN R. SEARLE, FREEDOM AND NEUROBIOLOGY 32 (Columbia Univ. Press 2007). He goes on to say that “there are certain formal features of conscious decision making that force us to recognize that *one and the same entity* is conscious, rational, capable of reflection, and capable of decision and action, and therefore of assuming responsibility.” *Id.* at 33 (emphasis added). But he then adds, immediately, “This *purely formal* entity I call the self.” *Id.* (emphasis added).

end.”<sup>423</sup> Mill never wavered from the belief that genuine moral change had to emerge through the development of what he called “self-culture” and “the ordeal of consciousness.”<sup>424</sup> *It is through our choices that we make ourselves and our world.* This vision requires that human beings are *free agents* in the deepest metaphysical sense of that term.

But herein lies the problem: Mill was a modern philosopher—a philosophical materialist<sup>425</sup> and an empiricist.<sup>426</sup> In his more academic philosophical writings—in particular, his *System of Logic* and *An Examination of Sir William Hamilton’s Philosophy*—he was openly skeptical of the very notions of freedom and the self that were essential to his liberal creed.<sup>427</sup> He defended determinism,<sup>428</sup> the doctrine that all human actions are causally precipitated by other causes—a doctrine that is usually understood to conflict with the idea that human beings make choices or possess a capacity for free will.<sup>429</sup> Mill wrote in *System of Logic* that “the law of

<sup>423</sup> MILL, *Bentham*, *supra* note 157, at 95.

<sup>424</sup> See CAPALDI, *supra* note 2, at 141.

<sup>425</sup> Roughly put, “materialism” is the doctrine that holds that the only things that exist are “physical” or “material.” See HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 15–16. The upshot of materialism is that all traditional ideas that cannot be explained in terms of matter and energy do not exist. See *id.* at 174–79. God, the soul, and, on most accounts, the mind cannot be said to have any real scientific existence of their own. *Id.* at 15, 26, 87, 175–78. Materialism is the view, as the late Atheist thinker, Christopher Hitchens put it, “that ‘earthly things’ are all that we have, or are ever going to have.” CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* 282 (2007).

<sup>426</sup> Empiricism is the view that all knowledge comes to the human mind through the senses. STEPHEN PRIEST, *THE BRITISH EMPIRICISTS* 5–7 (2d ed. Routledge 2007) (1990). We have no “innate knowledge”—no knowledge with which we are born. See *id.* We have no inborn moral conscience, for example—at least in the sense that we “know” good and bad in some immediate way. Cf. J. BUDZISZEWSKI, *WHAT WE CAN’T NOT KNOW* 4, 14, 78, 116 (2003) (arguing that there are basic moral truths that are “written on the heart”). Empiricists also reject the Cartesian view that we have certain “innate ideas,” that there are certain truths that we can know with absolute certainty as “clear and distinct” ideas. RENE DESCARTES, *A DISCOURSE ON THE METHOD OF CORRECTLY CONDUCTING ONE’S REASON AND SEEKING TRUTH IN THE SCIENCES* 331 (Ian Maclean trans., Oxford Univ. Press 2006) (1973) (discussing the classic treatment of innate ideas). The upshot of empiricism is that human knowledge is more provisional—that we know many things inductively, rather than deductively. See PRIEST, *supra*, at 192–95 (providing a good introduction to the thought of the most important empiricist thinkers, including Hobbes, Locke, Berkeley, Hume, and Mill).

<sup>427</sup> See MILL, *An Examination of Hamilton’s Philosophy*, *supra* note 90; MILL, *System of Logic*, *supra* note 85.

<sup>428</sup> MILL, *An Examination of Hamilton’s Philosophy*, *supra* note 90, at 165.

<sup>429</sup> As John Searle, a contemporary philosopher of mind, puts it, the basic facts of science seem to indicate that we cannot distinguish human actions from other natural phenomena. SEARLE, *supra* note 422, at 4–5. Our behavior is the product of physical causes in the world, just as is everything else:

[But] [i]t is not at all easy to reconcile the basic facts with a certain conception we have of ourselves. . . . as conscious, intentionalistic,

causality applies in the same strict sense to human actions . . . .”<sup>430</sup> He explicitly asserted that all events in the world are the product of natural, physical causes—including human behavior.<sup>431</sup> He attempted various verbal dodges to distinguish human choices from physical events in the world, but decided ultimately that all human actions must be causally determined.<sup>432</sup>

In fact, Mill’s dilemma ran even deeper. As an agnostic and a materialist, Mill was, of course, dubious about the existence of an immortal soul.<sup>433</sup> But he was also skeptical of its secular analogue, *the self*.<sup>434</sup> As an empiricist, he was sympathetic to David Hume’s critique of the idea of the self, which Hume took to be a secularized vestige of the idea of the soul.<sup>435</sup> As Hume famously put it:

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rational, social, institutional, political, speech-act performing, ethical and free will possessing agents. Now, the question is, How can we square this self-conception of ourselves as mindful, meaning-creating, free, rational, etc., agents with a universe that consists entirely of mindless, meaningless, unfree, nonrational brute physical particles?

*Id.* at 5.

<sup>430</sup> MILL, *System of Logic*, *supra* note 85, at 836.

<sup>431</sup> *Id.* at 838. Mill elaborated:

[T]he doctrine of Philosophical Necessity is simply this: that, given the motives which are present to an individual’s mind, and given likewise the character and disposition of the individual, the manner in which he will act might be unerringly inferred: that if we knew the person thoroughly, and knew all the inducements which are acting upon him, we could foretell his conduct with as much certainty as we can predict any physical event.

*Id.* at 836–37.

<sup>432</sup> In his *Examination of Sir William Hamilton’s Philosophy*, Mill drew a verbal distinction between “moral” and “physical” causes, the former is referring to our volitions and intentions while the latter is referring to natural causes. MILL, *An Examination of Hamilton’s Philosophy*, *supra* note 90, at 446–47. But in the end he had to admit that moral causes were simply special cases of physical causes; both unfold in an equally deterministic fashion: “A volition,” he conceded, “is a moral effect which follows the corresponding moral causes as certainly and invariably as physical effects follow their physical causes.” *Id.* Mill’s position, known as “compatibilism,” attempts to make freedom and determinism compatible by reconstructing the meanings of each. See HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 200–07. A person is “free” if he can do what he desires—even if those desires are determined by external factors. See *id.* at 200–01 (discussing and critiquing compatibilism).

<sup>433</sup> In a letter to Carlyle written when he was still in his twenties, Mill observed, “With respect to the immortality of the soul I see no reason to believe that it perishes; nor sufficient ground for complete assurance that it survives; but if it does, there is every reason to think that it continues in another state such as it has made itself here[.] . . . Consequently, in all we do here, we are working for our ‘hereafter’ as well as our ‘now.’” MILL, *Mill to Carlyle*, *supra* note 164, at 207.

<sup>434</sup> HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 165–66.

<sup>435</sup> *Id.*



For my part, when I enter most intimately into what I call *myself*, I always stumble on some particular perception or other, of heat or cold, light or shade, love or hatred, pain or pleasure. I never catch *myself* at any time without a perception, and never can observe any thing but the perception.<sup>436</sup>

There are thoughts, but no thinker, perceptions, but no perceiver—nothing that underlies and connects our momentary experiences. Just as God and the soul had to go, so did the self which was nothing, according to Hume, but “a bundle . . . of . . . perceptions.”<sup>437</sup>

In Mill’s most detailed treatment of the concept of the self, his *Examination of Sir William Hamilton’s Philosophy*, he wrestled with the idea that there is a self that undergirds our momentary thoughts and experiences.<sup>438</sup> He was tempted by Hume’s view that there is no self, but also saw that our experience points to a deeper continuity that ties our momentary thoughts and perceptions together, and our experience is *aware of itself* at each moment.<sup>439</sup> After puzzling through the problem for several pages, Mill wound up his discussion on a cautious and quizzical note: “I think, by far the wisest thing we can do,” he concluded, “is to accept the inexplicable fact [of the self] without any theory of how it takes place, and when we are obliged to speak of it in terms which assume a theory; to use them with a reservation as to their meaning.”<sup>440</sup> Thus, the same thinker who wrote in *On Liberty* that “[h]uman nature

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<sup>436</sup> 1 DAVID HUME, A TREATISE OF HUMAN NATURE 252 (Oxford Univ. Press 1928) (1896).

<sup>437</sup> *Id.*

<sup>438</sup> He observed with Hume that our mental lives seem to consist of a “thread of consciousness . . . a series of feelings.” MILL, *An Examination of Hamilton’s Philosophy*, *supra* note 90, at xlvi. At the same time, however:

our notion of Mind . . . is the notion of a permanent something, contrasted with the perpetual flux of the sensations and other feelings or mental states which we refer to it; a something which we figure as remaining the same, while the particular feelings through which it reveals its existence, change.

*Id.* at 189.

<sup>439</sup> Yet if each experience was self-contained, whence comes this enduring sense of connection between each momentary experience? How can each momentary thought, perception, or feeling be aware of those that came before and those that will come after it? And from what source does our innate intuitive sense arise of a subject who *has* these experiences? Mill pondered this:

If, therefore, we speak of the Mind as a series of feelings, we are obliged to complete the statement by calling it a series of feelings which is aware of itself as past and future; and we are reduced to the alternative of believing that the Mind, or Ego, is something different from any series of feelings . . . or of accepting the paradox, that something which *ex hypothesi* is but a series of feelings, can be aware of itself as a series.

*Id.* at 194.

<sup>440</sup> *Id.*

is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop [sic] itself on all sides, according to the tendency of the inward forces which make it a living thing<sup>441</sup> could not unequivocally accept the idea of an organically developing self in his academic work.

Indeed, Mill rejected the folk-traditional “mind over matter” view of human nature. He defended a cautious version of what is known today as “non-eliminative materialism.”<sup>442</sup> According to this view, our desires and beliefs, thoughts and feelings are “epiphenomena” of physical brain states.<sup>443</sup> Like a reflection in a mirror, they have a kind of shadowy existence of their own—a reflected existence that depends on the physical processes in the brain.<sup>444</sup> Yet, crucially, Mill held that *our mental states play no causal role in human behavior*: the mind and its contents are simply a by-product of physical processes in the brain.<sup>445</sup> In an ultimate metaphysical sense,

<sup>441</sup> Cf. MILL, *ON Liberty*, *supra* note 166, at 263 (emphasis added).

<sup>442</sup> All materialists agree that physical brain processes—and not mental states—do the real work of producing human actions. EDWARD FESER, *PHILOSOPHY OF MIND: A SHORT INTRODUCTION* 36, 39–40 (2005). “Eliminative” materialists deny the very existence of mental states—thoughts, beliefs, desires, intentions, etc. *Id.* at 153. “Non-eliminative” materialists believe that thought and other mental states exist in some sense (though it is not clear in what sense), but believe, with the eliminative materialists, that they play no causal role in human behavior. *See id.* at 172–73.

<sup>443</sup> *Id.* at 34–36.

<sup>444</sup> In his *System of Logic* he acknowledged the existence of mental states but insisted that they are simply a different way to classify physical brain states:

If the word mind means anything, it means that which feels. Whatever opinion we hold respecting the fundamental identity or diversity of matter and mind, in any case the distinction between mental and physical facts, between the internal and the external world, will always remain as a matter of classification . . . .

MILL, *A System of Logic*, *supra* note 85, at 849. Mill’s position gave psychology a kind of provisional status as a science. Our understanding of human behavior “must continue, for a long time at least, if not always,” to be pursued at the level of psychology, rather than neurophysiology. *Id.* at 851. On the other hand, thoughts and feelings are the epiphenomena, the side effects, of brain processes: they play no causal role in mediating human behavior. *Id.* at 851–52.

<sup>445</sup> Thoughts do not bring about other thoughts nor can the self be said to “call up” thoughts as our common sense experience seems to indicate. Rather:

According to this theory, one state of mind is never really produced by another: all are produced by states of body. When one thought seems to call up another by association, it is not really a thought which recalls a thought; the association did not exist between the two thoughts, but between the two states of the brain or nerves which preceded the thoughts . . . . On this theory the uniformities of succession among states of mind would be mere derivative uniformities, resulting from the laws of succession of the bodily states which cause them. There would be no original mental laws, no Laws of Mind . . . and mental science would be a mere branch, though the highest and most recondite branch, of the science of physiology.

MILL, *A System of Logic*, *supra* note 85, at 850.

Mill rejected the traditional picture of human nature according to which we have selves and make choices.<sup>446</sup>

As a philosopher, Mill's materialism and determinism harmonized well with his agnosticism, for if there is no God or human soul, we must understand human nature in purely naturalistic terms. In his *Autobiography*, Mill made well-known his antipathy to traditional religious ideas,<sup>447</sup> and in other works he excoriated the Christian idea of God as a non-starter.<sup>448</sup> The surplus of hardship and evil in the world left no doubt in his mind that if there was a God, he was either a bumbler or a moral monster:

Whatever power such a being may have over me, there is one thing which he shall not do: he shall not compel me to worship him. I will call no being good, who is not what I mean when I

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Contemporary philosophers call this “the causal closure of the physical domain.” WILLIAM HASKAR, *THE EMERGENT SELF* 58–59 (Cornell Univ. Press 1993). This means that only physical things (such as brain processes) can have physical effects (such as bodily actions). *Id.* at 58–61. A thought is not a physical thing; thus it cannot bring about any real physical actions such as my raising my arm. *See id.* The causal closure of the physical means not only that thoughts don't cause bodily movements but, as William Haskar puts it, “that mind cannot vary independently of the body.” *Id.* at 59. Or as Jaegwon Kim, a rigorous materialist, characterizes the view, “any physical event that has a cause at time *t* has a physical cause at *t*.” JAEGWON KIM, *The Myth of Nonreductive Materialism*, in *SUPERVENIENCE AND MIND: SELECTED PHILOSOPHICAL ESSAYS* 280 (1993) (rejecting Mill's form of non-eliminative materialism).

<sup>446</sup> Mill was what William James called a “soft determinist” and what later philosophers call a “compatibilist” on issues of freedom and determinism. WILLIAM JAMES, *The Dilemma of Determinism*, 22 *UNITARIAN REV. & RELIGIOUS MAG.* 193, 197 (1884). Compatibilism attempts to make freedom and determinism “compatible” by redefining freedom: in essence, freedom is opposed not to determinism, but to compulsion or constraint. HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 200–01, 206–07. In other words, a person is “free” when he is able to do what he wishes to do without compulsion—even if his desires are completely causally determined. *Id.* at 200–01. Only when a person is coerced against his will, is he “unfree” in the relevant philosophical sense. *Id.* at 201. Hobbes, Locke (on some accounts), Hume, Bentham, and Mill, among others, were compatibilists. *Id.*; *see generally id.* at 200–07 (discussing the history of, and the problems with, soft determinism or compatibilism).

<sup>447</sup> He wrote:

It would have been wholly inconsistent with my father's ideas of duty, to allow me to acquire impressions contrary to his convictions and feelings respecting religion: and he impressed upon me from the first, that the manner in which the world came into existence was a subject on which nothing was known: that the question “Who made me?” cannot be answered, because we have no experience or authentic information from which to answer it . . . . I am thus one of the very few examples, in this country, of one who has, not thrown off religious belief, but never had it . . . .

MILL, *Autobiography*, *supra* note 1, at 27–28.

<sup>448</sup> MILL, *On Liberty*, *supra* note 166, at 254–57.

apply that epithet to my fellow-creatures; and if such a being can sentence me to hell for not so calling him, *to hell I will go*.<sup>449</sup>

In his heart of hearts, Mill doubted that there is a non-material dimension to human existence. Yet this underscores his dilemma—for it is, indeed, difficult to see how Mill's materialism can be reconciled with the central idea exalted in *On Liberty* and his other political writings that humans are, by nature, choice-making and self-creating beings. Nor is it clear how the goal of authenticity can be reconciled with Mill's associationist theory of mind, a theory which holds that one idea calls up another idea because of previous experiences by which the two are associated in our minds.<sup>450</sup> How, moreover, can we defend freedom of choice as the central animating political value if our thought, beliefs, intentions, and choices are not the causes of our actions? In fact, if determinism is an accurate picture of the human condition, it is more than an obstacle to liberalism. It is a barrier to our age-old moral understanding of ourselves as worthy of praise and blame, merit, and responsibility, rights, and freedoms.<sup>451</sup>

At his best, Mill seemed to be seeking a middle way between traditional Christianity and the barren materialism he inherited from Bentham and his father. He always saw his mission in life as the unification of opposites, the synthesizing of half-truths. In a letter he wrote to Carlyle as a young man he said that the object of his work was "to translate the mysticism of others into the language of Argument."<sup>452</sup> Yet he fared

<sup>449</sup> MILL, *An Examination of Hamilton's Philosophy*, *supra* note 90, at 103.

<sup>450</sup> Associational theories of psychology hold that thoughts, desires, ideas, or other mental states get linked to our other mental states through our experiences. MILL, *An Examination of Hamilton's Philosophy*, *supra* note 90, at 177. Pavlov's dog was presented with food every time he heard a bell ring and came to associate the sounds with food. *Paula's Classical Conditioning*, PSYCHE STUDY, <https://www.psychestudy.com/behavior/learning-memory/classical-conditioning/pavlov> [<https://perma.cc/GS97-TBM8>] (last visited Nov. 29, 2018). Although there is certainly some truth to this, when the idea of associationalism is carried to its logical extreme, it precludes intentionality—the idea that the subject can control his or her thoughts and emotions. Like determinism, it undermines the notion of freedom or control by the subject of his thoughts and behaviors.

<sup>451</sup> It is, for example, difficult to see how we can hold responsible the criminal offender for acts which he was determined to commit. We can lock the offender away as a danger to society, of course, just as we cage a wild animal. But the traditional idea that the offender *deserves* his punishment as a morally responsible agent must be jettisoned as well. Conversely, why should we praise or reward a person for actions he was fated to take? If everything that each of us has and does is a function of factors well beyond our individual control, then nothing—no punishment and no accolade—is ultimately deserved in the grand cosmic sense. In fact, an undiluted determinism appears to make even the prospect of social reform quixotic: why should society at large be any more capable of self change than the individual? If determinism is true, as Mill thought, then all of our traditional moral and political values must be abandoned—or entirely rethought. *See generally* HILL, *AFTER THE NATURAL LAW*, *supra* note 25, at 165 (explaining that Mill was a determinist).

<sup>452</sup> MILL, *On Liberty*, *supra* note 166, at 219.

no better (and perhaps no worse) than any great thinker before or after him in synthesizing these particular “half-truths”—i.e., that we seem to be free even as we see the ways in which our choices are the product of biology and environment. The problem of human freedom remains the central mystery of the human condition, and of our politics.

#### CONCLUSION

There is always the danger in an Article such as this that the influence of one thinker may be overstated—that the contributions of those who influenced him, and of those who carried on his message after him, might be marginalized. This possibility is all the more real with a philosopher such as Mill, who was more a prodigy than a genius. He was a brilliant polymath and bold synthesizer of often conflicting ideas and influences rather than the originator of entirely novel ideas. His precursors were many, his successors many more.

Yet no other thinker managed to do what John Stuart Mill did for modern political and legal thought. No other philosopher even dared to reconcile and massage into a more or less coherent mosaic the multifarious and often conflicting influences—utilitarianism and individualism, empiricism and romanticism, socialism and libertarianism—that are Mill’s legacy to modern liberalism. Mill was influenced by the ideas of many others, but he spent his life tirelessly refining and improving these ideas, and placed his own stamp of originality on the harmony he imposed upon them. While, moreover, the nineteenth century spawned other writers on each of the subjects he wrote about—on liberalism, on democracy, on feminism, on freedom of speech, etc.—no other theorist managed to systematize each of these topical interests into one overarching theory of politics—a theory which has as its focal point a trenchant understanding of human freedom.

In his classic work on the history of liberal thought, L. T. Hobhouse wrote that the essence of liberalism is “the belief that society can safely be founded on this self-directing power of [human] personality.”<sup>453</sup> Mill’s work epitomizes this belief—indeed, this faith. Though it is seldom recognized today, no other political thinker has influenced modern American constitutional jurisprudence as significantly as Mill. If there is anyone worthy of the title “the father of American constitutional liberalism,” it is an Englishman, John Stuart Mill.

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<sup>453</sup> HOBHOUSE, *supra* note 141, at 123.

