

## SOCIAL SANCTIONS AND LIBERTY IN LIBERAL THEORY

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The defense of what John Stuart Mill calls “the liberty of tastes and pursuits” constitutes a major part of liberal theory. Yet there are recurrent attacks both on the liberal defense in general and on Mill’s particular claims. These attacks—and, often, the attempts at rebuttal—are important not only because of their possible effects for legislation and social policy, but because of the elements of utilitarian liberal theory like Mill’s that they frequently misconceive or forget. My object in this paper is to consider some of these charges that focus particularly on Mill. Specifically, my primary object is to show that some familiar attacks on, as well as defenses of, Mill’s famous argument are much weaker and more problematical than they appear. In doing this I shall, in the spirit of Mill’s ideas, defend the liberty of tastes and pursuits, sometimes by supplementing Mill’s arguments with my own.

### *A. Some Connected Problems*

Mill and other defenders of individual liberty have been criticized for holding a view that, the critics say, amounts either in theory or in practice to moral **indifference**. If individuals are to be left free, in their tastes and pursuits, both of legal coercion and of the more informal, social coercion, then, the criticism runs, society is taking an ultimately indifferent attitude toward individual behavior and traits of character. In Mill’s time, J.F. Stephen asked:

How is it possible for society to accept the position of an educator unless it has moral principles on which to educate? How, having accepted that position and having educated people up to a certain point, can it draw a line at which education ends and perfect moral indifference begins?<sup>1</sup>

<sup>1</sup> James Fitzjames Stephen, *Liberty, Equality, Fraternity*, ed. by R.J. White (Cambridge: Cambridge University Press, 1967), p. 157.

Mill himself anticipated objections of this general kind when in *On Liberty* he spent considerable time making a distinction between “loss of consideration” that one may incur because of certain faults, and criticism that amounts to “reprobation.”<sup>2</sup> An individual should be free in tastes and pursuits that do not harm others; but, at the same time, others are free to form their own opinions of him, so long as to do so does not amount to informal, non-legal coercion. The question, discussed anew just recently by David Richards,<sup>3</sup> is whether a liberal theory like Mill’s that rather strictly requires a sphere of individual liberty is also thereby committed either to moral indifference or to a subjectivity of values about the ways in which individuals use their freedom.

There are two additional, and connected, problems. Mill, like other proponents of individual liberty, thinks it not only permissible but desirable for individuals to be vigorous and independent judges of each other’s behavior and qualities of character.<sup>4</sup> However, criticism *can* be coercive, as both Mill and his detractors recognize. What, then, is the theoretical *and* the practical difference between that kind of criticism which is nothing more than the exercise of the critic’s autonomy, and that which is coercive and therefore inconsistent with the liberal scheme? This problem is connected to yet another: James Stephen<sup>5</sup> in Mill’s time and Gertrude Himmelfarb<sup>6</sup> in our own point out that, in *Utilitarianism*, Mill links the idea of wrong with that of a sanction: “We do not call anything wrong”, Mill says, “unless we mean to imply that a person ought to be punished in some way or other for doing it —if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience.”<sup>7</sup> The problem, the critics say, is the apparent inconsistency in holding the opinion that your neighbor’s behavior is morally wrong, even though he or she has a right, legal and moral, to engage in it. Does this mean that we are not to form moral opinions about a neighbor’s behavior? Does it mean that we may have such opinions, but they are subjective? Or does it mean, as both Stephen and Himmelfarb suggest,

<sup>2</sup> J.S. Mill, *On Liberty*, ed. by Currin V. Shields, (Indianapolis: Bobbs-Merrill, 1956), p. 96.

<sup>3</sup> David A.J. Richards, “Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism,” *Social Theory and Practice*, Vol. 5, Nos. 3-4 (1980), pp. 461-488.

<sup>4</sup> *On Liberty*, pp. 93-94. This is also one of Richards’ main points. See Richards, *op. cit.*, pp. 476-477.

<sup>5</sup> Stephen, *op. cit.*, p. 143.

<sup>6</sup> Gertrude Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knopf, 1974), pp. 106-108.

<sup>7</sup> J.S. Mill, *Utilitarianism*, ed. by Oskar Piets, (Indianapolis: Bobbs-Merrill, 1957), p. 60.

that Mill's position in *On Liberty* is at odds with that set forth in *Utilitarianism*?

### B. *The Form of Individual Criticism in the Sphere of Protected Liberty*

Let us consider first the kinds of criticism that may properly be directed at the individual whose actions are within the sphere of protected liberty. There are, to be sure, problems about how this protected sphere is to be delineated, and whether utilitarian theory is well equipped to do this delineation, but let us ignore these issues for the moment. There are many exercises of rights that may be judged foolish, uncaring, inhumane, or even morally wrong. One may have a contractual right to the performance of services which it nevertheless would be foolish or socially wasteful to request. One may have the liberty to waste one's time or even one's life, but the decision to do so might occasion criticism for being self-destructive or wasteful. David Richards has posed the liberal's dilemma as that of one who faces challenges from two sides: Both conservatives and Marxists attack liberalism for failing to provide individuals with standards by which they ought to live their lives.<sup>8</sup> Richards provides an answer to these attacks, attempting to show that liberal theory is not committed to subjectivism of values, nor to moral indifference. His discussion is illuminating and often elegant, but leaves significant gaps. He points out that criticism may be based on moral ideals that go beyond anything an individual could properly be pressured into doing; on standards of moral decency which do not justify applying legal coercion; and, in other cases, on ideals that simply do not warrant what Richards calls "enforcement via the morality of the criminal law". Criticism of the actions of others, he says, is limited both by the likelihood of mistake and by the vagueness and indeterminacy of the standards appropriate for judging such matters. Such judgments may be controversial, but they are not subjective; though the exercise of rights may be recognized as final, this is not to recognize it as infallible.<sup>9</sup> Richards stresses a point made just as forcefully by Mill: that it is precisely through the making of such critical assessments that both judges and judged exercise and develop their own capacities.

But, in spite of these valuable observations, serious questions remain. The distinction between finality and infallibility is useful for

<sup>8</sup> Richards, *op. cit.*

<sup>9</sup> Richards, *op. cit.*, pp. 478-482.

theoretical purposes, but in practice it may be quite insufficient. For example, suppose that I think your behavior immoral, and suppose that my opinion is shared by a large majority. Our vigorous criticism of you may have a very coercive effect, indeed, it just *is* the kind of informal social coercion that Mill was so concerned about, and it mitigates that coercion very little if at all that we in the majority recognize the *finality* of your decision in these matters. We think that it is objectively demonstrable that you lead an immoral life; we do not hesitate to criticize you and avoid your company on account of it; yet we recognize your decision as final even though wholly fallible. What is the *practical* substance of this recognition of finality? We should remember here that to recognize a liberty is to *withhold* a sanction of the relevant kind, and that direct criticism, especially when widespread, is itself a sanction. Stephen's criticism of Mill is yet to be answered. But beyond providing an answer to Stephen on this point, there is another, more subtle problem, and this concerns "subjectivity." It is tempting to think of human behavior in virtually all departments of life as governed, if not by moral duty, then at least by abstract moral ideals: that there is virtually always an objective standard governing what one *ought* to do, or be, however difficult it may be to determine just what that is. I shall argue that there is a sense, more robust than what Richards proposes, in which individuals have final authority over their actions; and that a limited form of value subjectivity is both defensible and a natural part of the utilitarian liberal tradition as exemplified in Mill.

First, we should examine Mill's attempt to make a distinction between "loss of consideration" and "reprobation." The first thing to notice is the juridical language he uses. Reprobation, unlike mere loss of consideration, is directed against one who "is an offender at our bar and we are called on not only to sit in judgment on him, but, in one shape or another, to execute our own sentence."<sup>10</sup> Reprobation is appropriate where the individual "has infringed the rules necessary for the protection of his fellow creatures, individually or collectively."<sup>11</sup> Thus we treat an offender as "an enemy of society." This juridical language shows quite clearly that, contrary to suggestions from the likes of Himmelfarb,<sup>12</sup> Mill is not departing from the conception of morality as analogous to law that appears in that famous passage in *Utilitarianism*. The moral criticism of behavior as wrong often

<sup>10</sup> *On Liberty*, p. 97.

<sup>11</sup> *Op. cit.*, p. 97.

<sup>12</sup> Himmelfarb, *op. cit.*, pp. 107-108.

is a sanction, and is the moral analogue of a judge's sentencing in the law. But more important here is the fact that, in executing such a sentence, we do not act just for ourselves, but for some larger group such as our society or, perhaps, all of humanity. And, if we recognize the importance of individual liberty, we must be very careful not to be too pretentious in this. Just as the judge at law has no authority to give vent to his purely personal desires, so too must the moral agent remember that directing moral criticism at others involves speaking for *society* in defense of *its* legitimate interests, and that here as elsewhere one can be mistaken; can claim too much; can be given to confusing personal aversions with social interests.

It is at this point that the positive arguments for liberty play a role. If Mill is right, society has a very strong legitimate interest in extending liberty. Given the tendency of moralizing to become, and by its very nature be, imperialistic, and if unchecked to reduce liberty, it is necessary to mark well the distinction between loss of consideration and reprobation. It is therefore one thing to tell you: "I personally don't like your style of life and will avoid your company wherever possible." It is another to tell you that your behavior is morally wrong, for then I implicitly claim to be speaking for society. Now *if* Mill were committed to the idea that anyone or any majority could, in the exercise of their own freedom, employ any moral ideals whatever in their criticisms, that would indeed be inconsistent with his doctrine of liberty, and both Stephen and Himmelfarb would be right in their charge of inconsistency. But Mill's liberal theory contains a quite natural way out of this. It is to impose constraints on the form that individual criticism may take: Because individual liberty is of enormous social importance, you and I must carefully trim away the unnecessarily imperialistic aspects of our criticisms, and especially so in a society in which majority opinion is already overburdening on individuals.

### C. *The Role of Value-Subjectivity*

As Richards has pointed out, it is fairly common to charge liberal theory with value-subjectivity. Stephen, in at least some ways, accused Mill of this.<sup>13</sup> A similar charge, though from the left, is made by

<sup>13</sup> Thus Stephen says in a footnote (*op. cit.*, p. 155):

As to the second point, Mr. Mill says in express words: "Society, as society, has no right to decide anything to be wrong which concerns only the individual." This I think is equivalent to denying that society ought to have a moral standard, for by a moral standard I understand a judgment that certain acts are wrong, whoever they concern.

Roberto Unger.<sup>14</sup> Richards goes to some length to argue that liberal theory is not committed to any value subjectivity. An individual may be quite objectively mistaken about the morally best way of living his or her life, Richards says, but that is quite consistent with our granting finality to that person's decisions. I think that both critic and defender have fallen into misunderstandings that may indeed spring from the same source.

It is not the standard of utility itself toward which the charge of subjectivity is usually directed; rather, it is the idea that, as Unger puts it, "an end is an end simply because someone holds it".<sup>15</sup> What is apparently troublesome to the critic of subjectivism is the idea that there is some individual sphere within which one person's choice is not only final but, at least within that area, infallible. But subjectivity, when properly understood, should not be so troublesome. Think of the importance that Mill, like others in the liberal tradition, attaches to variety of tastes and pursuits, and to economic activity. The argument for liberty depends on the argument for variety, which in turn depends on the premise that society makes the best use of available knowledge by allowing individuals spontaneously to organize their own activities with a minimum of outside supervision; but more than that, by allowing individuals the maximum opportunity for unexpected successes (and, as a corollary, failures). As Hayek puts it, "Humiliating to human pride as it may be, we must recognize that the advance and even the preservation of civilization are dependent upon a maximum of opportunity for accidents to happen."<sup>16</sup> Thus Mill and others in the liberal tradition are free to employ the utilitarian values of human progress and individual autonomy as the objective foundation of their argument for liberty, while at the same time allowing that individual choices of values are in large part subjective. To put it another way: Though the overarching utilitarian *macro*-values of progress and civilization may be objective, it does not follow that the *micro*-values that are revealed in an individual's choices are. For example, it may be good for society that some people be farmers, but nothing follows from that about whether you ought or ought not, to be a farmer. It may be socially desirable that most people be humane and loving, but it does not follow that everyone should be, or that any particular person should be. Many very different configura-

<sup>14</sup> Roberto Mangabeira Unger, *Knowledge and Politics* (New York: The Free Press, 1975), pp. 76-81.

<sup>15</sup> Unger, *op. cit.*, p. 76.

<sup>16</sup> F.A. Hayek, *The Constitution of Liberty* (London: Routledge Kegan Paul, 1960), p. 29.

tions of individual choices would be consistent with this macro-value. But the gap is even larger than that. We could not even hope to provide a very accurate summary, and certainly not a complete list, of the macro-values. It may be difficult to know just what social contribution is being made by a particular taste, pursuit, or activity. So from the point of view of these social macro-values, there may be no adequate demonstration that a particular person's pursuits are better or worse than any of a large set of alternatives. Such demonstrations would be possible more often if we knew the choices that everyone else would make, and knew also the long-range consequences of those choices; but we do not.<sup>17</sup> The subjectivity, then, is due primarily to two factors: i) a lack of knowledge that is systematically likely to be underestimated; and ii) the insufficiency of macro-values for drawing conclusions about particular individual (micro-) values.

Of course, individual human beings are sometimes also members of sub-groups such as families, communities, partnerships, and associations of various kinds. The existence of such sub-groups complicates the picture. In discussing liberty as the freedom from certain sanctions, and in thinking about the relation between social values and individual values, we must keep clearly in mind the group or groups of which the individual is a member; and, especially, the goals to which various individuals have become bound. For example, belonging to an association committed to the specific goal of advancing a particular religious view would impose greater objective constraints on individual values, and would also open the way for sanctions —sanctions that if originat-

<sup>17</sup> The importance of recognizing our own ignorance, and making that recognition systematic by tying our hands before approaching those situations in which we are likely to forget our ignorance is hard to overemphasize. Consider here the arguments that John Rawls levels against Mill's defense of liberty. Rawls says that:

Mill's contentions, as cogent as they are, will not, it seems, justify an equal liberty for all. We still need analogues of the standard utilitarian assumptions. One must suppose a certain similarity among individuals, say their equal capacity for the activities and interests of men as progressive beings, and in addition a principle of the diminishing marginal value of basic rights when assigned to individuals.

(See *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 210.) Rawls apparently does not take into account here the fact that we very often do not know who, by their experimentation, will make a contribution. If we did know that in advance, much of the reason for extending liberty in the first place would be undercut. As Hayek puts it (*op. cit.*, p. 32): "What is important is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society. This freedom we can assure to the unknown person only by giving it to all." Hayek's point is an important one to remember here, though still not absolutely decisive for equal liberty for all. What about a system in which those given liberty are a subset of the whole, and are picked out by using a randomizing device?



ing from society at large would be inappropriate. Thus if a religious community is organized around self-discipline and the denial of luxury, there would be for members of this group an objective demonstration of the evils of luxury, for this would be a *given*, and various sanctions might rightly be visited upon a deviant. Here I am simply assuming that members of sub-groups can, by some means or other, become bound to conceptions of the good more specific than those for members of the larger society. That individuals can simultaneously belong to several social groups accounts for the otherwise paradoxical fact that, from one point of view, there may be a quite objective reason for directing criticism against an individual, while, from another, there may not. It may from the broadest social point of view be in the interest of liberty and social utility to maintain a position of scrupulous neutrality. At the same time, once members of a subgroup have become committed to a more specific goal, adherence to that goal becomes for them a matter of internal public, rather than merely individual, concern. But it becomes so by their own choice rather than because it is dictated by any overarching principle to which all are bound. In this way, the value is, in Unger's sense, subjective. This multiplicity of social groups, bringing with it different sets of collective interests, calls for clarity about the interests we claim to be defending when we impose sanctions on others: Do you criticize another in defense of the legitimate interests of your religious faith, the legitimate interests of your nation, or of humanity? Most important, is that person whom you want to criticize bound to advance the interest in question? A member of another nation or religion cannot, in the absence of special arrangements, properly be criticized for failing to advance the interests of humanity, though the interests of humanity are, to be sure, so broad and diverse and pursued in so many different ways that neither the intention nor the fact of "failing to advance the interests of humanity" is a charge easily proved. The important point is that in a society guided by the ideals of liberalism, it is important for all to distinguish between those interests that can serve as the basis for coercion of members of some larger society, and those that bind only the members of some smaller group.

We are now in a better position to see whether liberal theory is committed to general moral indifference about those actions that take place within the protected sphere. In relation to the largest group, say, a large and diverse society, the individual is free to choose and to experiment, and in an enlightened liberal society there will be public knowledge that this freedom and experimentation is, at least in the long run, a good thing; that its value in a particular case does



not need to be evident, and probably will not be evident. This public knowledge is in fact far removed from moral indifference; for it is linked to the conviction that very many tastes and pursuits are making, or will make, a contribution to the good of society *even though few, if anyone, now know it*. And beyond this, the neutrality of the *state* with respect to individual micro-values does not imply the same neutrality of all other individuals or groups with respect to the values of their members. Both conservatives and defenders of liberalism tend too easily to forget this. There may be many good reasons why *I* should be neutral or even indifferent with respect to *your* values, and why, indeed, *I* should hold that *I* do not have an objective basis for criticizing *your* values; but it does not follow that everyone *else*, including members of your family, your closest friends and associates, etc., should take this same position. And this is not *simply* due to the fact that they are likely to have more intimate knowledge of how a set of overarching social values are likely to apply to your case. It is as much due to the fact that you may be a member of more specific groups that are bound by more specific ideals; that other persons in those groups rightly hold you to those ideals; and that they have a say, as *I* do not, in what those ideals are and what they require.

#### D. *The Distinction Between Self—and Other— Regarding Behavior*

I have so far assumed for the purposes of argument that a serviceable distinction can be made between self-and other-regarding behavior. But the distinction itself is both important as well as notoriously problematical. There are two central problems: i) whether a satisfactory distinction can be made; and ii) particularly in connection with Mill's account, whether the distinction comports with utilitarianism. This is obviously not the place to give a full scholarly treatment of the various attempts either to attack or defend Mill. But I shall consider briefly the most important points, along with giving the outline of what I think is a defensible utilitarian account that is at least broadly consistent with Mill's view. Whether all the details could, by historical exegesis, be extracted from Mill's own ideas I will leave for others to decide.

The main difficulty emerges when we try to think of any even mildly controversial behavior that does not badly affect someone. As Robert Paul Wolff has put it in his criticism of Mill, the very presence of certain people in the community, given their religious or sexual beliefs or practices, may be taken by some as a more serious affront

even than physical blows or the theft of one's purse.<sup>18</sup> Some have argued that it is not just any action having an adverse *effect* on others that is to be counted as other-regarding, but that it is actions prejudicial to the *interests* of others.<sup>19</sup> But unless this is in turn supplemented with an account of interests that does not hopelessly link interests to prevailing standards and majority values, the point will not be friendly to Mill or to individual liberty.<sup>20</sup> In its more general form, the problem is this: how can a professed utilitarian like Mill disregard the aversions of any member of the community? And if enough members of the community dislike certain behavior, for whatever reason, then might that not provide a solid utilitarian foundation for prohibiting that behavior? C.L. Ten, in the recent book, *Mill on Liberty*,<sup>21</sup> argues that Mill would have us treat some majority repugnance and abhorrence as irrelevant, and that Mill's position is therefore inconsistent with utilitarianism.<sup>22</sup>

Similarly, Robert Paul Wolff claims that Mill cannot make a distinction between the legitimate and illegitimate interests of other persons, because Mill has not allowed himself the use of natural rights or social contract arguments.<sup>23</sup>

Let us consider first the charge of inconsistency with utilitarianism. This charge is, I think, quite mistaken. The utilitarian argument for liberty has at its core the claim that people in groups have an inveterate tendency to take too strong an interest in what their neighbors are doing, imposing their majority will on individuals; that this tendency is destructive of the good of society in the long run; and that this phenomenon is damaging enough to justify tying the hands of the majority both in the making of laws and in constructing a moral code. Some aversions are to be ignored—or better, *limited*—because to indulge them is to thwart the attainment of more important, long-run social goods. Ten says that Mill treats as “irrelevant” the repugnance of the majority toward some self-regarding actions.<sup>24</sup> On the contrary, this is no more true than the claim that, in carefully saving money for old age rather than yielding to every present impulse to buy, I am treating my desire for some luxury now as irrelevant to what

<sup>18</sup> Robert Paul Wolff, *The Poverty of Liberalism* (Boston: Beacon Press, 1968), p. 24.

<sup>19</sup> J.C. Rees, “A Re-reading of Mill on Liberty”, in *Limits of Liberty* ed. by Peter Radcliff, (Belmont, Calif.: Wadsworth Publishing, 1966), p. 93.

<sup>20</sup> For a discussion and criticism of Rees, see C.L. Ten, *Mill on Liberty* (Oxford: The Clarendon Press, 1980), pp. 11-14.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Op. cit.*, p. 18, p. 29, p. 42.

<sup>23</sup> Wolff, *op. cit.*, p. 24.

<sup>24</sup> Ten, *op. cit.*, p. 18.

I ought to do. It is rather a matter of *budgeting* the satisfaction of desires, and much the same problems that the individual faces have their collective versions at the level of society. Such an argument is wholly utilitarian, is not in itself inconsistent with classical utilitarianism, and is a plausible interpretation of at least the major part of Mill's argument. This is not to say that Mill's argument for liberty is a purely utilitarian one, whatever that might mean; it is only to point out that the utilitarian reasons for denying a majority certain malevolent pleasures are deeper and more far-reaching than usually acknowledged.<sup>25</sup>

Another familiar line of thought proceeds from the observation that Mill uses the legal terminology of rights to the conclusion that he could not be sticking to his original commitment not to gain any advantage from the notion of abstract right as a thing independent of utility. This thought appears in Willmoore Kendall's attack on Mill.<sup>26</sup> It is also to be found in Joel Feinberg's more sympathetic treatment. After noting that Mill is fond of using such political "metaphors" in describing the individual as having *sovereignty, legitimate boundaries, reign, and title*, Feinberg says: "See how legalistic and un-utilitarian these terms are! The great wonder is that Mill could claim to have foregone any benefit in argument from the notion of an abstracts right."<sup>27</sup> I must disagree with Feinberg that there is

<sup>25</sup> In considering a view that roughly approximates my own on this point—that of Sartorius—Ten insists that this recognition of our own fallibility still does not exclude, as Mill might want, consideration of the majority's malevolent pleasures. (Ten, *op. cit.*, p. 34.) But surely the liberal argument "excludes" consideration of such utilities in a quite robust sense. Only if the Millian defender of liberty were to insist on liberty though the heavens fall would the exclusion be clearly insufficient, and the practical tone of Mill's political and moral writings does not suggest such absolutism. Moreover, Ten suggests that Mill departs here from classical utilitarianism. But surely Bentham's utilitarianism, with its calculus of pleasures and pains, allows for a kind of internal budgeting. Mill's—departure from Bentham seems to be in his broader theory of the good. In recent times, Brandt's utilitarian moral theory is an excellent example of one that focuses on the criticism and correction of existing desires so that they will form a rational, coherent whole. See Richard B. Brandt, *A Theory of the Good and the Right* (Oxford: The Clarendon Press, 1979).

<sup>26</sup> Willmoore Kendall, "The 'Open Society' and its Fallacies", in *Limits of Liberty*, ed. by Peter Radcliff, (Belmont, Calif.: Wadsworth Publishing, 1966), p. 34: "in short, if we are going to speak of a *right* to freedom of speech, a *right* to live in an open society, we are going to have to justify it with arguments of a different character from Mill's and so move the discussion onto a plane entirely different from Mill's." Then, in a footnote, Kendall observes that "We must distinguish here between a "natural" or "ethical" "right" to freedom of expression and a mere constitutional right. The case for the latter could of course be rested on Mill's grounds, insofar as they are valid." Kendall evidently does not consider the possibility that recognized moral rights, in the sense of conventions that we are to recognize as governing both conscience and informal, moral criticism of one another, may themselves be argued for, and recognized on the basis of, wholly utilitarian grounds.

<sup>27</sup> Joel Feinberg, "Legal Paternalism", in *Rights, Justice, and the Bounds of Liberty* (Princeton, N.J.: Princeton University Press, 1980), p. 113, note 5.

reason for great wonder here. A wholly plausible way of understanding Mill's earlier claim that he forgoes all non-utilitarian advantage to his argument is that any conception of individual sovereignty, legitimate boundaries, rights, title, etc. can properly be subjected to critical evaluation, and when it is, all relevant considerations are, broadly construed, utilitarian in character. The use of legal terminology in moral argument does not in itself rule out utilitarianism any more than it rules out a utilitarian theory of legislation.

Consider now the problem of delineating the sphere of self-regarding actions. The attempt to formulate a clear and authoritative line, and even more, the hope to formulate one that is not to some extent relative to social and historical conditions, is, I think, ultimately futile. Many tastes and pursuits, even those that are not only harmless but positively beneficial, can in extraordinary conditions become detrimental to society. It is harmless, even beneficial, that some people remain celibate or devote themselves to growing flowers. But in the admittedly unlikely event that nearly everyone did these things, the result would be disastrous. Clearly, what behavior is to be regarded as detrimental to society depends, among other things, on changing patterns of desire. The practical value of Mill's distinction lies elsewhere: not in a single formula that is in all circumstances unimpeachable, but rather in the raising, first of a strong presumption in favor of individual liberty and against interference; and then of a series of critical questions that must be answered before coercive sanctions are justified.

Beginning with the strong presumption in favor of liberty, the first necessity for the moral critic is to realize that criticism must be much more than gut reaction. In justifiably directing moral criticisms at others for their behavior, there must be a very strong case that there is a legitimate *social* interest in suppressing that behavior. Thus, in entering the arena of moral criticism, one automatically assumes new burdens. At this point, historical and anthropological evidence plays a role. Mill distinguishes those "modes of conduct which universal experience has condemned" from what he calls "uncertain matters."<sup>28</sup>

<sup>28</sup> He says:

It is easy for anyone to imagine an ideal public which leaves the freedom and choice of individuals in all uncertain matters undisturbed and only requires them to abstain from modes of conduct which universal experience has condemned. But where has there been seen a public which set any such limit to its censorship? Or when does the public trouble itself about universal experience?

*On Liberty*, p. 102.

If we can point to societies and historical periods in which the behavior in question has been permitted and without adverse effect, that is strong evidence that there is no social interest sufficiently important to justify the restriction of liberty. Those kinds of behavior now in the "uncertain" area may, of course, eventually prove to be detrimental to society; but just as often people will come to realize that tastes and pursuits that they once thought intolerable are either harmless or positively desirable, for they may have been mistaken, or their initial aversions may simply undergo change.

The criterion of "what universal experience condemns" as opposed to "uncertain matters" is not to be taken as a simple formula for distinguishing between the self-regarding and the other-regarding. That this is so can be seen by reflecting on those areas of human conduct that call for some set of governing rules, but are such that quite different sets of rules would function well, at least in different circumstances. For example, universal experience may condemn states of affairs in which there are no rules governing what belongs to whom —i.e., Hobbesian States of nature with respect to property. But universal experience does not condemn systems of socialist property ownership, nor does universal experience condemn systems of private property ownership. It would be mistaken to infer from this that the rights and duties associated with a system of property therefore belong to the self-regarding sphere. For again, universal experience does (it seems fair to assume) condemn situations in which there are no rules, even though that same universal experience does not single out just one set of rules as the only possible, whatever the prevailing conditions. In contrast, many prohibitions cannot be explained in this way. There is no similar argument, for example, that any existing prohibition on prostitution or homosexuality protects any similar social interest in establishing and protecting a set of mutual expectations. Mill recognizes both kinds of cases when he says, "In the conduct of human beings toward one another it is necessary that general rules should for the most part be observed in order that people may know what they have to expect; but in each person's own concerns his individual spontaneity is entitled to free exercise."<sup>29</sup>

<sup>29</sup> *On Liberty*, p. 93.