

# FREEDOM

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## I. INTRODUCTION

More than two centuries after our Revolution, we Americans are still arguing over the nature, and even the coherence, of three of the natural rights in whose name the Revolution was fought. We contest (because it is also truly contestable in serious ethical discussions) whether the rights to equality<sup>1</sup> and to property<sup>2</sup> are either conceptually coherent or normatively desirable. The same conceptual and ethical queries exist for liberty, conceived of either as a right or as a value: Some contest its conceptual coherence, others pooh-pooh its plausibility as a basic value or as a general right.<sup>3</sup> Such skepticisms about liberty raise several large questions: What is liberty? Why is it valuable? Can there be a general right to liberty?

This short Article can hardly do justice to these three large questions. Nonetheless, in short compass I intend to sketch an answer to each of them.

## II. WHAT IS LIBERTY?

“What is . . . ?” questions are notoriously fuzzy in what they really seek. When attempting to answer such questions, it is wise for one first to discover what it is that is actually puzzling

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1. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

2. See, e.g., Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69 (J. Roland Pennock & John W. Chapman eds., 1980).

3. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 268–69 (1977); RAZ, *supra* note 1, at 13; Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L. REV. 1455, 1486 (1994).

one.<sup>4</sup> With liberty, our puzzlement is largely normative: What could plausibly be of value and also plausibly be referred to as “liberty” or “freedom”? This suggests that the conceptual question—what do we mean by “liberty”—and the normative question—why is liberty valuable—are like a pair of trousers: Just as we can suspend temporarily putting one leg in while inserting the other, so can we suspend temporarily asking one question while we ask the other. Ultimately we must have one answer that simultaneously satisfies both. What we seek, in other words, is not some concept of liberty that is simply extracted from linguistic or other social practice. Rather, we seek a concept of liberty that at least plausibly names something of interest to us in ethics, something of value such as a good or a right. When we are asking “What is liberty?” we are thus not engaged in conceptual analyses of the old Oxford ordinary language style. We are engaged in a simultaneously normative and descriptive task.<sup>5</sup>

Still, as with trousers, it helps to proceed one leg at a time. What roughly are people typically picking out when they refer to liberty? We have many uses of the word that could serve as our exemplars. Our current President, for example has, in his second term, given numerous “freedom” speeches. Yet such political rhetoric is too overblown for my purposes. Consider a much more mundane example reported recently by the *Wall Street Journal*.<sup>6</sup> In an article entitled “Risky Riders: Touting Freedom, Bikers Take Aim at Helmet Laws,” we hear that ABATE (A Brotherhood Against Totalitarian Enactments) and other motorcyclist lobbyist groups have successfully lobbied twenty-nine states to repeal or modify their helmet requirements for adult motorcycle riders. These groups call their program “five steps to freedom”; they call states where helmets are not required the “free states”; their most successful (and perhaps colorful) lobbyist, Sputnik (his legal name), has the word “FREE” tattooed across his forehead.

It is pretty plain what these motorcyclists intend to refer to by “free” and “freedom”: it is the absence of criminal laws re-

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4. Herbert Hart nicely illustrates this point in his treatment of the “What is law?” question. See H.L.A. HART, *THE CONCEPT OF LAW* 1–17 (2d ed. 1994). I employ a similar strategy in answering the “What is truth?” question in Michael S. Moore, *The Plain Truth About Legal Truth*, 26 HARV. J.L. & PUB. POL’Y 23 (2003).

5. See RAZ, *supra* note 1, at 14–16.

6. Karen Lundegaard, *Risky Riders: Touting Freedom, Bikers Take Aim at Helmet Laws*, WALL ST. J., Dec. 1, 2004, at A1.

quiring them to wear motorcycle helmets. This is the kind of usage of these words that should attract our normative interest. Notice that implicit in this usage are three restrictions: First, that the interest is in negative liberty as absence of constraint; the interest is not immediately, at least, in positive liberty, which is the ability to achieve or obtain something.<sup>7</sup> Second, that the interest is in political liberty, so that the restraint, the absence of which is wanted, is legal coercion. Third, that the specific form of legal coercion to be avoided is criminal sanctions; the liberty desired is part of the principled limits of the criminal law, leaving aside whether other forms of legal coercion or inducements might be acceptable.

These three restrictions define a normatively plausible concept of liberty, a concept that allows us to tell the government that some things are simply not its business. It is also a familiar concept of liberty, close to what John Stuart Mill<sup>8</sup> and his critics<sup>9</sup> and followers<sup>10</sup> addressed in Mill's famous essay *On Liberty*. Liberty in this conception is the absence of the coercion of the criminal law.

### III. WHY IS LIBERTY VALUABLE?

As we have seen, such a conception must ultimately be justified normatively, which I now propose to do. Why should freedom from criminal sanctions be thought of as a good? Surely the critics of libertarianism have a point when they proclaim that this conception of negative liberty cannot plausibly be thought of as an intrinsic good.<sup>11</sup> Positive liberty—the ability to obtain or do certain things—more plausibly looks to be good in itself, that is, “intrinsically good.” The negative liberty conceptualized here is surely only instrumentally good, if it is

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7. For a famous articulation of this distinction, see ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* (Clarendon Press 1958), reprinted in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118 (1969).

8. See generally JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859). Mill did not restrict his concept of liberty by the second and third restrictions above, but his famous harm principle is most plausible if those restrictions are honored.

9. See generally JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (Stuart D. Warner ed., Liberty Fund 1993) (1873).

10. See generally JOHN C. REES, *JOHN STUART MILL'S ON LIBERTY* (1985).

11. Michael Sandel is a current example. For a discussion of Sandel's earlier work, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 647–58 (1997).

good at all. It surely, in other words, is good only because, and only insofar as, it contributes to something else that is good.

Here are six suggestions as to the basic goods to which negative liberty may be a means. First, there is positive liberty itself. Negative liberty is one of the elements necessary for positive liberty to exist. One has the ability (positive liberty) to do some action *A* only if the state does not prohibit *A* by criminal sanction. Freedom from governmental coercion is of course only one of the items needed for one to do action *A*. One also needs physical and economic capacities, for example, as critics of negative liberty are so fond of pointing out. But negative liberty is needed too, so if positive liberty is of value then so is one of its necessary means, negative liberty.

Positive liberty is itself something good. One might plausibly view it as an intrinsic good.<sup>12</sup> This is the view that enhancement of opportunity sets is always good, full stop. Alternatively, one might think that positive liberty is the kind of universal, instrumental good that John Rawls called a primary good: something so useful to the attainment of a wide variety of ends that, no matter what those ends might be, you would want such a good.<sup>13</sup> Either way, positive liberty is valuable and thus so is one of its indispensable means, negative liberty.

Second, there is what might be called Millian autonomy, so called to distinguish it from Kantian autonomy, which is discussed shortly. Millian autonomy is the hard-to-pin-down idea that human choice gains value when freely made. Even bad choices have value in this sense, so long as they are free choices. The usual metaphor is that of authorship: The autonomous person is a being who is author of his or her actions, an agent in some full sense.<sup>14</sup> Mill contrasts this with a mere machine such as a steam engine: Although it can do many things, it is not the author of any of them, so its actions possess no value as autonomously chosen.<sup>15</sup>

If Millian autonomy is valuable, it is easy to see how legal coercion prevents its attainment. A coerced choice is not an

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12. An intrinsic good is something that is good not because it contributes to something else that is good, but because it is good in itself. Every theory of value, by its commitment to instrumental values, is also committed to there being intrinsic values, on pain of infinite regress. *See id.* at 157–58, 160–62.

13. *See* JOHN RAWLS, A THEORY OF JUSTICE 62 (1971).

14. *See, e.g.,* Charles Fried, *The Nature and Importance of Liberty*, 29 HARV. J.L. & PUB. POL'Y 3 (2005).

15. *See* MILL, *supra* note 8, at 125.

autonomous choice expressive of the agent's authorship. The threat of the law can rob our actions of any of those decisional processes one rightly values as autonomous or free choice.

The third value, Kantian autonomy, is to be distinguished from Millian autonomy. For Kant, an autonomous action is a right act done for a right reason.<sup>16</sup> Kant's thought is that there is value not just in doing the right act, but also, indeed mostly, in doing it for the right reason. The emphasis is on the motives for action, not the processes of choice. Although choice may well be involved whenever an act is motivated by reasons, valuing correct reasons is quite different from valuing free-choice processes.

Note that in the Kantian sense of autonomy, there is no value in an "autonomously" chosen wrong action, nor is there value in an "autonomously" chosen right action when that action is done for the wrong reason. No matter how free one's decisional process may have been, Kantian autonomy is not achieved in such cases because the right reason did not motivate the right action.<sup>17</sup>

Again, if there is value in acting for the right reasons, it is easy to see how legal coercion can prevent the attainment of that value, for the avoidance of legal sanctions can easily supplant the more virtuous motivations for an action that might otherwise have moved the agent to act. Consider, for example, gifts to the poor. If Kant is right about the locus of value residing in reasons and not just in actions, charitable giving is valuable not just because of the act of transferring wealth to those in need, but also because of the benevolence motivating that act. Legally coerce such acts, and the fear of sanctions will often supplant that benevolent motivation. In such cases the virtue of benevolent giving has become the necessity of paying one's taxes.

The fourth, fifth, and sixth considerations showing negative liberty to be instrumentally valuable are all broadly utilitarian in character. To begin with, a preference utilitarian might well regard negative liberty as a kind of presupposition of utilitarianism. Preference-utilitarianism is a monistic theory of the good in which there is only one intrinsically good thing, preference-satisfaction, and the right action or institution is one

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16. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 1–22 (1993).

17. Joseph Raz, who uses autonomy in its Kantian sense, draws both of these inferences. See RAZ, *supra* note 1, at 380–81, 411–12.

that maximizes the production of this one good. One might well think that part of what makes human preferences so valuable, and thus worth summing in the utilitarian calculus, is that they are arrived at free of governmental coercion. This is not just avoidance of the circularity problem, which is to wonder how governmentally coerced preferences can guide government policy when they are one of the products of that policy. More importantly here, preference-utilitarianism is committed to a monistic view of what is intrinsically good, which is preference-satisfaction. It bolsters the plausibility of this extraordinary ethical postulate if one limits the preferences so valued to those formed free of coercion of any kind, governmental included. As Mill himself exclaimed, what is the value of a person or his preferences if they are not freely formed?<sup>18</sup>

Fifth, there is the simple psychological truth that people generally prefer to make their own decisions free of coercion. Apart from some perhaps mythical happy slaves,<sup>19</sup> people almost universally prefer their decisionmaking to be free rather than constrained. Therefore, from this fact alone, a committed utilitarian must give some positive evaluation to negative liberty.

Finally, there are well known costs attendant upon the use of the criminal sanction. I refer not only to direct enforcement costs such as police, courts, and so on, although these are omnipresent costs of criminalizing behavior and punishing it. There are also less obvious costs of criminalizing certain behaviors that are (1) typically carried on in private and witnessed by no one other than the participants; (2) strongly motivated so that criminalization only minimally deters the conduct in question; and (3) typically harmful to no one other than those who willingly participate. Costs of criminalizing such behaviors are well known.<sup>20</sup> They include privacy costs in enforcement; costs in terms of disrespect for laws that predictably will be regularly ignored; opportunities for selective enforcement of laws that predictably will be underenforced; and the costs of funding organized crime by the "crime tariff," namely, the artificial restriction of supply of the goods or services in question in the

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18. See MILL, *supra* note 8, at 124.

19. See generally DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

20. These costs and the literature on them are summarized in MOORE, *supra* note 11, at 663–65.

face of relatively inelastic demand. These costs can be significant for behaviors with the three characteristics in question, and add weight to the value of not prohibiting such activities.

These six considerations strongly support the idea that negative liberty is of value, even if only instrumentally. Except for part of the sixth, these considerations argue in favor of negative liberty no matter what the character of the acts in question. In general, that is, they suggest reasons that the state should not criminalize behavior. Because of their generality, such values cannot justify the existence of a general right to negative liberty, for that would justify anarchy. The very generality of the value of negative liberty precludes it from having the kind of strength one characterizes as a right. For this reason, the general, instrumental value of negative liberty is best characterized in the most modest terms of a presumption in favor of liberty.<sup>21</sup> Such presumption requires that the burden be placed on the state to justify criminal legislation with reasons of sufficient weight to outweigh the reasons just outlined favoring liberty.

#### IV. THE GENERAL RIGHT TO LIBERTY

##### A. Introduction

Even those who are quite sympathetic to the values supporting liberty sketched above are often skeptical about any general right to liberty. The basis for such skepticism is easy to see: From Burke<sup>22</sup> to Bork,<sup>23</sup> certain conservatives, often called "Burkeans," have equated a general right to liberty with anarchy. As they point out, a right to be free of state coercion so general that it is applied to all behaviors would forbid the criminalization of murder just as much as it would forbid the criminalization of riding a motorcycle without a helmet. Criminal law is not compatible with such a general right to liberty.

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21. The presumption of liberty is usually associated with Joel Feinberg. See JOEL FEINBERG, *SOCIAL PHILOSOPHY* 20–22 (1973). I discuss this presumption in MOORE, *supra* note 11, at 746–50.

22. See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790), reprinted in *REFLECTIONS ON THE FRENCH REVOLUTION* 1, 6 (J.M. Dent & Sons 1910). I discuss this and other aspects of Burke's conservatism in Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 HARV. J.L. & PUB. POL'Y 263 (1996).

23. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

Such skepticism is compatible both with an insistence that individuals possess many discrete natural rights, such as the right to free speech, free exercise of religion, and the like,<sup>24</sup> and with a positive evaluation of liberty in some sense. Recognizing that there are discrete rights does not collapse into anarchism because such rights do not protect all behaviors. And, as Locke saw, natural-rights philosophies generally are already doctrines of freedom in a sense; a right (at least on the choice conception of it)<sup>25</sup> essentially gives its holder the power to waive it or to exercise it. This is unlike moralities, such as Thomistic natural-law views, where duty, instead of rights, is basic.<sup>26</sup> In some sense, therefore, even discrete rights are part of our notion of liberty.

But liberals of the libertarian cast have always hoped for more. They have hoped to make sense of some general right to liberty in a way that avoids both the Burkean reductio to anarchism and the skeptical flight to liberties (discrete rights). In my own writings, I have suggested that there are two such general rights, what I call the derived and the basic rights to liberty.<sup>27</sup> I will briefly sketch each below.

### B. *The Derived Right to Liberty*

The derived right to liberty derives its name from the fact that it is not basic. The citizen's derived right to liberty is merely the correlative of the more basic duty of a legislature. To understand the content of such a right will thus require us to understand the content of the more basic legislative duty.

The central idea is that it is the duty of a legislature to promote certain ends, but not others, in its use of the criminal sanction. Thus, a theory of proper legislative motivation is required: a theory of what sort of reasons are the right reasons with which a legislature can justify coercing its citizens with the threat of criminal sanctions. For such a derived right to exist, one must thus put aside J.F. Stephen's well known, majori-

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24. DWORKIN, *supra* note 3, and RAWLS, *supra* note 13, rely on just such a distinction: They urge that we each have many liberties (discrete rights), even though we have no general right to liberty.

25. On a choice-oriented theory of rights, it is essential to rights that their holders can choose to exercise them or not.

26. This is a contrast that was crucial (at least pre-Anita Hill) in the Clarence Thomas confirmation hearings. See Joseph R. Biden Jr., *Law and Natural Law: Questions for Judge Thomas*, WASH. POST, Sept. 8, 1991, at C1.

27. See MOORE, *supra* note 11, at 750–77.

tarian-based skepticism about such a theory.<sup>28</sup> Stephen argued that, in a democracy, the only limits are procedural, so that if the majority thinks that a practice should be criminalized, that is justification enough.<sup>29</sup>

The plausibility of Stephen's view depends in large part on the implausibility of any proposed limits on the proper ends of criminal legislation. The most famous proposal is John Stuart Mill's: Legislation aimed at deterring behavior harmful to others might be justified, but legislation aimed at deterring behavior harmful only to the actor, offensive to others, or thought to be immoral, cannot in principle be justified.<sup>30</sup>

Stephen objected to Mill's "harm principle" on the ground that there is no behavior harmful to self that is not also in some way harmful to others.<sup>31</sup> Against Mill's interpretation of a derived right of liberty, this is a toothless objection. The derived right focuses on legislative aim; even if all behavior harmful to self is also harmful to others, that does not mean that a legislator, motivated by the prevention of one sort of harm, must also be motivated by the prevention of the other sort of harm. Even if helmetless motorcycle riding always harms others when it harms the motorcycle rider (for example, bloody street scenes, higher medical insurance premiums for all of us, and so on) that does not mean we cannot distinguish the prevention of these harms as separate aims of criminal legislation.

Even so, Mill's harm principle is not a good statement of the content of the derived right to liberty. The fault lies deep in the four-part taxonomy of possible legislative reasons that Mill uses: harm to others, harm to self, offense to others, and harmless wrongdoings.<sup>32</sup> In a nutshell, Mill should have formulated his principle and his taxonomy in terms of wrongs rather than harms.<sup>33</sup> The derived right to liberty then becomes the right to have criminal legislation aim only at the punishment or prevention of moral wrongdoing, not other goods. The harm principle has some plausibility only because most serious moral

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28. See STEPHEN, *supra* note 9.

29. *Id.* at 96–97.

30. See MILL, *supra* note 8, at 80–81.

31. See STEPHEN, *supra* note 9, at 17.

32. This taxonomy was developed in great detail in Joel Feinberg's magisterial quartet of books: JOEL FEINBERG, HARM TO OTHERS (1984); JOEL FEINBERG, OFFENSE TO OTHERS (1985); JOEL FEINBERG, HARM TO SELF (1986); JOEL FEINBERG, HARMLESS WRONGDOING (1988).

33. See MOORE, *supra* note 11, at 642–52, 753–62.

wrongs happen to involve causing harm to others. But there are harmless wrongs, such as cruelty to animals or desecration of the dead, and wrongless harms, such as economic injury by fair competition. The proper focus of criminal legislation is wrongdoing, harm-causing being reduced to a rough proxy, but no more than that.

Notice that, on this view of the derived right to liberty, legislators must make substantive moral judgments about the behavior that they would criminalize,<sup>34</sup> and so must their critics, including courts exercising the power of judicial review. The derived right to liberty thus provides no amoral, neutral basis for objecting to the criminalization of homosexuality, abortion, assisted suicide, and so on. Quite the contrary: To argue that such criminalizations violate the derived right to liberty is to argue that they are not immoral behaviors. The disagreements between conservatives and liberals on such issues thus cannot be cast, as liberals are wont to do, as some second-order disagreement about what are and are not proper aims of legislation. Rather, the disagreement is a first-order, moral one: liberals denying that, for example, homosexuality is immoral and conservatives insisting to the contrary. Honestly expressed disagreements about the propriety of various criminalizations must really be about the morality of the behaviors being criminalized, not about the propriety of considering such morality.

### C. *The Basic Right to Liberty*

I call this second right the basic right to liberty because it is not merely the correlative of some more basic legislative duty. Rather, the basic right is basic in the sense that the legislature's duty is the correlative of such a right, not the other way around. From this difference between the two rights flows a second difference: The basic right protects acts themselves from criminal coercion; it does not merely protect citizens from badly motivated legislation about such acts. In the motorcycle helmet case, for example, the basic right protects the act of riding without a helmet from governmental coercion, no matter how that coercion may be motivated, whereas the derivative right protects riders against legal coercion of helmetless riding only if that coercion is motivated by paternalistic or other illegitimate concerns.

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34. On this Michael Sandel and I have long agreed. *See id.* at 652.

This more ambitious version of a general right to liberty runs head-on into the Burkean objection that such a general right is equivalent to anarchy. Unlike the derived right, the basic right to liberty secures an immunity against legal coercion for actions themselves. To avoid the Burkean objection, one has to limit the sphere of actions protected by such a general right, on pain of the entire criminal code being shown to be an illegitimate intrusion upon liberty. The trick is to specify a content to such a basic right that is limited to the protection of only certain kinds of actions.

It might seem that we already have such content if we combine the presumption of liberty and the derived right to liberty. That is, one might, from the foregoing discussion, rightly conclude that (1) all acts are presumptively protected from legal coercion by the six values behind the presumption of liberty; (2) not just any good state of affairs can justify the overcoming of this presumption—only the punishment or prevention of moral wrongdoing is eligible to justify the use of criminal sanctions; and therefore, (3) the basic right to liberty protects those acts insufficiently wrong that the goodness of their punishment or prevention is outweighed by the strength of the six values behind the presumption in favor of liberty. Less abstractly, (1) riding a motorcycle without a helmet is presumptively protected against legal coercion; (2) the only relevant motivation for coercing this behavior with criminal sanctions is the moral wrongness of it; and (3) this behavior is insufficiently wrong that the goodness of its punishment or prevention does not outweigh the six good things obtained if we do not punish it.

There is nothing wrong with this balancing calculus yielding in some sense a basic right to liberty. Such a calculus protects acts themselves, not just illicitly motivated coercion of acts. And the outcome of such a calculus does not protect all acts from criminalization, so it does not justify anarchy. Still, there are reasons to seek a content to a differently defined, more stringent, basic right to liberty. One reason is the rather contingent nature of the basic right to liberty if defined by the balancing calculus above. Whether such right protects a specific type of action like motorcycle riding depends on a complex calculation that easily can come out otherwise if either side of the balance changes. This contingency corresponds poorly to the crisp, absolute, almost strident character of the basic right to liberty as it was propounded by Mill. In Mill's famous lan-

guage, with such a right we seek “one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.”<sup>35</sup> Instead of such an absolute, simple principle, the balancing calculus above is no more than an application of what consequentialist rationality generally demands: Balance up the competing goods to be obtained by coercing or not coercing a behavior, and coerce only when the balance is favorable in that direction.

Second, any basic right to liberty defined by the balancing calculus above shares with the presumption of liberty that is part of the calculus an indifference to the character of the acts protected by liberty. The liberty to murder is as valuable as the liberty to ride a motorcycle without a helmet, the difference between them lying elsewhere: namely, in the justifications for overriding that value. This goes against many people’s sense that such liberties are not of equal value.<sup>36</sup> Rather, the intuition is that some kinds of behaviors are strongly protected by the value of liberty, so strongly that even strong and proper legislative motivations to coerce cannot overcome them. Abortion, for example, is thought by many to be a serious moral wrong, approaching the wrongness of killing a person. Yet for some, the libertarian intuition is compelling: Although the state acts with the right motive if it prohibits abortion because of its moral wrongness, and although the punishment or prevention of that wrongful behavior is a very important good, still the woman’s right to liberty trumps these justifications for prohibition. There is something special, in other words, about this kind of behavior (abortion) that protects it from well motivated, seemingly justified, legal coercion. It is whatever this “something special” might be that we seek when we look to give some content to the basic right to liberty different from the content yielded by the balancing calculus above. Such alternative content should be both narrower in the class of acts protected and more stringent in the degree to which such acts are protected against legal coercion.

This was Mill’s quest: to define a sphere of action absolutely immune to state coercion.<sup>37</sup> Mill’s own proposal, here as well as

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35. MILL, *supra* note 8, at 80.

36. See, e.g., RAZ, *supra* note 1, at 13 (“We feel intuitively that some liberties are more important than others.”).

37. This was Mill’s second quest in *On Liberty*, as I interpret him. The first quest was to develop a theory of proper legislative motivation for coercive legislation,

with the derived right to liberty, was in terms of his harm principle: only behavior harmful to others could be prohibited. Behavior that harms only the actor or his consenting co-participants, or which harms no one, is to be protected in Mill's version of the basic right to liberty.

This is not the place to rehearse in depth the well worn objections of myself and others showing that the harm principle cannot give the content of the basic right to liberty.<sup>38</sup> My main objection is the one mentioned earlier with regard to the analogous use of the harm principle to give content to the derived right to liberty. Concern with harm is undermotivated here because what matters for justified criminalization is the moral wrongness of the behavior, not its harmful effects on others. It is only the large overlap between serious moral wrongs and the causing of serious harms to others that lends superficial plausibility to Mill's harm principle here. But it is a plausibility that dissolves with the realization that there are some serious moral wrongs that harm no one, and that thus may be prohibited, and there are some serious harms to others which are not morally wrong, and thus should not be prohibited. One could, of course, amend Mill's harm principle, making it into a "moral wrong principle," but this would return us to a basic right to liberty of no greater stringency than that defined by the balancing calculus discussed above.

Mill's quest to define the basic right to liberty in terms of a sphere of action immune to state coercion is thus still very much an uncompleted quest. Not only did Mill himself fail to complete such a quest, but alternative attempts at doing so have not been very reassuring. I will briefly mention three of them.

The first is based on a return to the balancing calculus earlier described. Suppose we were to impose on it an indirect consequentialist structure. This is the familiar strategy of restricting consequentialist balancing—here, a balancing of the six values behind the presumption of liberty against the goodness of punishing or preventing certain acts—to general classes of actions only. And then, when the question to be resolved is whether to prohibit more specific kinds of action, one restricts oneself to the formal question of whether the behavior to be prohibited

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which gives the content of what I call the derived right of liberty. See MILL, *supra* note 8, at 82–83.

38. See MOORE, *supra* note 11, at 751–62.

does or does not instantiate the general type of behavior generally justified as immune to state prohibition. So, for example, one might say, à la an amended Mill, that all and only seriously immoral actions may be criminally prohibited, because that is where, in general, the balancing calculus above comes out. Then, when considering a prohibition on abortion or helmetless motorcycle riding, one only asks whether these are seriously immoral behaviors.

My own view (widely shared, I believe) is that all such two-level (or “indirect” or “rule”) consequentialisms are literally incoherent.<sup>39</sup> This stems from the tendency of such two-level consequentialisms to collapse either to some kind of long-range act-consequentialism, with rules as mere heuristics guiding the long range calculations required by this kind of act-consequentialism, or to a non-consequentialist absolutism. Either of these moves is quite sensible; one can be a dedicated act-consequentialist or an equally dedicated deontologist without evidencing in either case obvious irrationality. What one cannot be is a rule-consequentialist. For a consequentialist to adhere to a rule in the face of a consequentialist calculation showing that on this occasion more good would come from not following the rule, amounts to inexplicable, reason-less, and arbitrary “rule-worship.”<sup>40</sup> One cannot thus simply superimpose a categorical flavor to the balancing calculus earlier described. That there is a familiar strategy for doing so (“rule-consequentialism”) does not mean that the strategy makes any sense.

Likewise, there is no hope for a second, non-Millian definition of the content of the basic right to liberty. This is the definition of the content of the right in terms of the related distinctions between acts and omissions, doings and allowings, doings and enablings (or aidings), doings and preventings, and doings and double-preventions.<sup>41</sup> Examples here are clearer than generalities, given the philosophical thickets in which these distinctions are now embedded. Consider, therefore, the

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39. The locus classicus of this view is DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

40. This is the conclusion (and terminology) of a dedicated act-utilitarian, Jack Smart. See J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

41. Most of these distinctions are explored in MOORE, *supra* note 11, at 689–703, and more recently in Michael S. Moore, *Causal Relata*, 14 ANN. REV. L. & ETHICS (forthcoming 2006).

famous example of Judy Thomson:<sup>42</sup> You go to the symphony and the lead violinist collapses. You uniquely possess the life-saving potential to save him if you will only allow yourself to remain hooked to him for nine months. You are hooked up to him over your protest or while you are unconscious. Thomson's question: May you now unhook? Thomson's libertarian intuition: Liberty permits it even though it means the violinist will certainly die.

A lot of work is done in sustaining Thomson's intuition by the doing-allowing distinction. While unhooking is an act, not an omission, it is still only an allowing, not a doing or a causing. By unhooking you return the violinist to the appropriate moral baseline, which is, he is not yet hooked up, and you then allow nature to take its course. Such allowing here takes the form of a double prevention: You prevent by unhooking what would have prevented his death.

From such examples one might conclude that the sphere of liberty immune to state prohibition consists of all the things that are not doings or causings: preventions, omissions (which are failures to prevent), double preventions (which are preventions of what would have prevented the death), allowings, enablings, aidings, and the like. On this view, the state rightly prohibits killings; it cannot prohibit failures to rescue (omissions) or allowings of death.

Everyone recognizes to some degree the intuitive pull of this brand of libertarianism. That is because everyone recognizes the intuitive difference in moral stringency between positive and negative duties, as well as the intuitive difference in allied distinctions. Yet the differences here are not strong enough to yield the categorical nature needed by a basic right to liberty. Contrary to the assertions of some rabid libertarians, it is wrong not to rescue a stranger; it is just not nearly as wrong as it would be to positively kill him. Seeing this, one then could agree with Mill that the goodness achievable by the prohibition of omissions is usually outweighed by Millian autonomy and the other values lying behind the presumption of liberty. But

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42. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971).

not always: If the omission is a serious moral wrong, the balance may come out the other way.<sup>43</sup>

All of this is fine, but it fails to give categorical force to the basic right to liberty. Rather, it returns us to the balancing calculus mentioned earlier. Only those more radical libertarians—John Locke, Robert Nozick, Richard Epstein, Eric Mack—who believe that there is no moral wrongness involved in omissions, allowings, and so on, have much of a chance of deriving a categorical right here. Yet, to reverse an old saying, one person's valid inference is another person's reductio: Isn't it morally absurd to think we have no duties to strangers to prevent their death or that there is nothing wrong in allowing them to die? I myself have argued that we have no categorical (deontological, agent-relative) duties here, but we do have duties of other, less stringent kinds.<sup>44</sup>

The third non-Millian attempt to define a content to the basic right to liberty is loosely Aristotelian in character. On this view, the sphere of liberty is to be confined to those fundamental choices that define who we are as a person. I call this broadly Aristotelian because it was Aristotle who famously proclaimed that we each in some sense could choose our character. Choices such as those to beget a child or with whom to be sexually and emotionally intimate are protected; choices to ride a motorcycle without a helmet are not. This is the view animating the last forty years of U.S. Supreme Court jurisprudence on the misnamed "right of privacy," from *Griswold v. Connecticut*<sup>45</sup> to *Lawrence v. Texas*.<sup>46</sup> Its most forthright expression is found in the dissents of Justices Stevens and Blackmun in *Bowers v. Hardwick*.<sup>47</sup>

This third view too is beset by a number of difficulties, not least of which is clarifying exactly what is meant by "self-defining choices."<sup>48</sup> But I shall content myself here with one worry, in line with like worries expressed earlier about the other views of the basic right to liberty. The worry stems from the substantive thinness of the "Sixties values" of authenticity,

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43. Notice that, for omissions, Mill uses the moral wrongness of omitting to separate the prohibitible from that which is protected by liberty. See MILL, *supra* note 8, at 81–82.

44. See MOORE, *supra* note 11, at 688–705.

45. 381 U.S. 479 (1965).

46. 539 U.S. 558 (2003).

47. 478 U.S. 186, 199–214, 214–20 (1986).

48. I explore some of the worries in MOORE, *supra* note 11, at 771–77.

self-actualization, self-realization, and self-definition. However these notions are clarified, they seem insufficiently bounded in the possible choices they might protect to ward off the Burkean objection of anarchy. After all, couldn't one raised in a long family tradition of contract killing find a uniquely meaningful life in choosing to become a competent, flourishing practitioner of this particular line of work? Yet if such choices can be "fundamental" or "self-defining," what is to rule out protecting any form of anarchy under the banner of liberty, so long as such anarchism is "authentic"?

One might of course seek to limit the protected self-defining choices to those that are not immoral or perhaps not sufficiently immoral to warrant prohibition. But this would be to return the basic right to liberty to the balancing calculus conception earlier discussed. The usual move here is to seek to show how "authentic" or "true" self-definition is impossible for seriously immoral choices because of the constraints of human nature.

## V. CONCLUSION

James Wilson, often called the legal architect of the American Revolution, told his students at the University of Pennsylvania in the winter of 1791 that one of the three great rights for which the Revolution was fought was the right to liberty.<sup>49</sup> Undergraduate philosophy students in America in the early Twenty-First Century share Wilson's enthusiasm for liberty, at least if my own such classes at several universities, including the University of Pennsylvania, are representative. Liberty is important and we have long appreciated this fact.

Still, it is not unknown in history for people to have gone to the barricades in the name of ideals that, upon careful examination, make no sense. Some have thought liberty to be one of those. As we have seen with the presumption of liberty, liberty as a value is unproblematic. Negative liberty is of value, if only instrumentally so. With respect to a right to liberty, things are more complicated. It is easy enough to make sense of a general right to liberty when viewed in what I have called its derivative sense. More troublesome is the idea that there is a general right to liberty when viewed in what I have called its basic sense.

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49. JAMES WILSON, AN INTRODUCTORY LECTURE TO A COURSE OF LAW LECTURES 8 (Press of T. Dobson 1791).

This last is no small matter because this is the sense most people have in mind when they think about a right to liberty.

My own current take on this last issue is agnostic. On the one hand, I share the strong inclination of many to think that there must be such a right. Abortion, assisted suicide, a variety of parenting decisions, occupational choices, harmful speech, and so on, all suggest the protection of a right more stringent than could be generated by only the presumption of liberty in combination with the derived right to liberty. On the other hand, I have yet to see a morally defensible perimeter to be drawn for Mill's sphere of liberty, despite no dearth of attempts by many talented people.