

1970

## On Liberty - 1970

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# Commentary

## On Liberty—1970

### INTRODUCTION

*On Liberty—1970* is a defense of the individual's right to do what he wants to do, to be what he wants to be, to think and act for himself. It is a protest against external authority, against groups, governments and institutions, against any entity which tells people what to think and what to do. It is not a defense of irresponsibility. It is not a defense of absolutism. It has little to do with the crude claim to live freely, such as we hear from artists and adolescents. It is a defense of that which is inherently and constitutionally guaranteed—liberty.

In 1859 John Stuart Mill published his book, *On Liberty*. The object of his essay was to assert one very simple principle:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.<sup>1</sup>

*On Liberty—1970* reasserts this particular principle. Its present relevance is obvious enough; its present application is at least a sensitive issue.

### THE NATURE OF LIBERTY AND AUTHORITY

A man may be enslaved by his physical limitations, his emotions, and with most frequency, his work. He may also be enslaved by the government and the masses. The subject of this comment deals not with the former, which will be left to the philosophers, psychiatrists, and economists, but deals with the nature and limits of authority

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1. J. STUART MILL, *ON LIBERTY* 17 (1859).

which can be legitimately exercised over man, the so-called civil or social liberty. Even in the most civilized or organized societies, the struggle between liberty and authority is conspicuous. When the struggle manifests itself, if that society is to remain orderly, some agent or agency must be responsible for a just settlement of the disagreement. Our courts have been assigned that role in America's governmental structure. The administration of the law becomes a process of balancing one good, liberty, against another good, order and social peace.

A man, in the absence of causing an injury to another, must have the absolute right to do what he wants to do, be what he wants to be, and think and act for himself. A man cannot rightfully be compelled to do or not to do an act because it will be better for him, because it will make him happier, because it should be done, because everybody is doing it, because nobody likes it, or because it is right. Admittedly, these are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him to conduct himself in a certain manner. To justify compulsion, the conduct from which it is desired to deter him must be calculated to produce an injury to someone else; power may be rightfully exercised over any member of a civilized community to prevent or remedy harm to another. This is often an issue of proximity and degree.

Just as a person may cause injury to others by his actions, he may cause injury to others by his inaction, and in either case he may be justly accountable to them for the injury. The latter case requires a much more cautious exercise of compulsion than the former. If the attempt to exercise control would produce other evils greater than those which it would prevent, there must be no exercise of control. For example, in the determination of existence of a duty to aid one in peril, the courts have tipped the scales in favor of liberty. The law has persistently refused to recognize the moral obligation of common decency and common humanity to come to the aid of another human being who is in danger, even though the outcome is to cost a man his life. Some decisions have been shocking. The expert swimmer with a boat and a rope at hand may sit idly by and watch a man drown. A physician is under no duty to answer the call of one who is dying and might be saved. One need not prevent a neighbor's child from hammering on an explosive. Because liberty precludes the enforcement

of a legal duty in such cases, the remedy is left to the conscience of the agent. There are exceptions, of course.

The law has respectfully recognized a sphere of action which must remain unrestrained because society has, at most, an indirect interest. Within this sphere is the liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects; and the liberty of expressing and publishing opinions. The liberty of expressing and publishing opinions may seem to fall under a different principle since such conduct does affect other people, but being almost of as much importance as the liberty of thought itself, and resting in part on the same reasons, is practically inseparable from it. Also within this sphere is the liberty of tastes and pursuits; the liberty to frame the plan of our own life to suit our own character; the liberty to do as we like without impediment from our fellow men, so long as what we do does not harm them.

Many persons refuse to accept this metaphorical sphere because they refuse to accept the distinction between conduct of a person which affects only himself and conduct of a person which concerns others. They assert it is impossible for a man to do anything seriously or permanently injurious to himself without affecting at least those near him. After all, no member of society is an isolated being. For example, if a man damages his property, he does harm to those who directly or indirectly derive support from it. If a man injures his own body or mind, he does harm to those who directly or indirectly derive support from him. Even if a man who injures his property or himself does no harm to those who depend on him, he at least does harm to society by his bad example. It is submitted that these injurious effects, at most, are too remote to warrant dwarfing a man or harnessing his potential. Such incidental injury society can afford to bear for the sake of the greater good—liberty.

The nature and degree of authority society has over an individual is a delicate computation. Man must have liberty, yet no one can doubt that anyone who receives the protection of society owes something in return for the benefit. The fact of living in society renders it indispensable that each should be bound to observe a certain mode of conduct towards the rest. More specifically, one should not injure the interests of another, and every man should bear his fair share of the labors and sacrifices incurred in defending the society in which he

lives. Mill submitted, "All that makes existence valuable to anyone depends on the enforcements of restraints upon the actions of other people."<sup>2</sup> This was true in the eighteen-sixties and is true today, but the present nature of the restraints, due to the infinite advancements and retrogressions, have been revamped. In the period at which Mill wrote, the demands of the state made life easy. A man would have a light burden on taxation, a rate on his house, a few pence in the pound income tax, some stamp duties, and taxes on certain luxuries. He would be free of passports, forms, licenses, regulations. On the other hand, the protections the state provided might not have made life so easy. In matters affecting one's private and intellectual life, one's love affairs, and one's views on religion, science and sex, one would find himself bound by a constricting philosophy and would have to guard his words and actions with a care which he might find intolerable. Clearly, the nature and degree is not invariable. Nor is the principle asserted unreasonable. But where the line is to be drawn between self-regarding acts and acts which regard others is, and must be, a matter of endless dispute.

#### LIBERTY IN AMERICA TODAY

In America today, liberty is one of our most sacred and valuable rights. It has been given maximum protection by our courts and by our legislatures. It has been protected by its inclusion as a guaranty in the various constitutions. It may not be submitted to a vote and may not depend on the outcome of an election since this right cannot require that one should be free not to be free. It is not freedom to be allowed to alienate one's freedom. Under our constitutional guarantees neither the federal, nor the state government, may deprive any person of liberty without due process of law. In America, *prima facie*, an individual may do what he wants to do, be who he wants to be, and think and act for himself. Liberty includes not only freedom from physical restraint, but the right to be let alone to determine one's mode of life. It includes the right to order one's life and manage one's affairs in a manner that will be most agreeable to him as long as he does not violate the rights of others or of the public. Implicit in the concept of liberty is the freedom of an individual to use and enjoy

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2. *Id.* at 9.

his faculties in all lawful ways, acquire useful knowledge, marry, establish a home, bring up children, worship God according to the dictates of one's own conscience, live and work where one chooses, engage in any of the common and lawful occupations, enter into all contracts which may be proper and essential to carrying out successfully the foregoing purposes, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

The liberties just mentioned are supported by the United States Constitution, by state constitutions, and by infinite case and statute citations. Furthermore, they are only a few of the many preserved and guaranteed. And still furthermore, it is submitted, there is an irreversible trend in our society to subject the exercise of power and authority to legal norms. Unequivocally, America today is the freest country in the world, and there has never been a freer people in the history of the world. But there is an enemy of liberty and its encroachment is palpable. Otherwise, there would be no need to reassert the individual's right to think and act for himself. There would be no need to protest against external authority, against groups, governments and institutions, against any entity which tells people what to think and what to do. There would be no need for radicals, militant youth, academic leftists, and expressions of shocked intelligence. In America, a man cannot think and act for himself even within the metaphorical sphere the courts have long recognized as inviolable, and our laws have sanctioned as absolute.

The enemy is the unorganized but frustrating power of general opinion, prejudice and bias. In the period at which Mill wrote, this problem, which he called the "tyranny of the majority," was most menacing.

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.<sup>3</sup>

Its menace today has not diminished. Public opinion, prejudice and bias force people in unwanted occupations, undesired relationships,

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3. *Id.* at 8.

modes of dress, modes of conduct, modes of thought. Liberty, our most sacred and valuable right, our right to do what we want to do, our right to be what we want to be, our right to think and act, is effectively and immorally, but not unlawfully, frustrated by the "tyranny of the majority."

The majority should let a man alone. This does not mean that people ought to live as if nothing whatever had been known in the world before they came into it. History and experience do tend to show, with absolute certainty, that one mode of existence or conduct is preferable to another. This history and experience is, and should be, taught and learned so that man may know and benefit by the ascertained results of human nature and experience. Nevertheless, it is the privilege of man to use and interpret experience in his own way, and it is his privilege to apply his interpretations to his own circumstances and character. Another man's experiences, or another people's, may be too narrow, and if not, they may not have been interpreted rightly, but assuming they have, the interpretation may be unsuitable. Customs have a certain claim to deference, but customs are made for customary circumstances and customary characters. A man's circumstances and character may be uncustomary. If a man refrains from making himself a nuisance to other people, he should be allowed, without molestation, to carry his opinions into practice at his own cost. Because man is imperfect, different opinions and different experiments should be manifested, free scope should be given to varieties of character, and different modes of life should be experienced. Man must use his senses to observe, his experience as material to temper, his mind to reason, judge and decide, and his firmness to live by his deliberate decisions. This is man's right. This is liberty.

The task of curbing public opinion, prejudice and bias is not easy. It may not even be possible. Our courts and legislatures are not divinely oriented, nor are they omniscient and omnipresent. But they are aware of the tyranny which is more constricting than the most heinous laws strictly enforced. They are aware that they and society have no jurisdiction over a person's conduct which affects the interest of no person but himself. They are aware that no person, nor any number of persons, has the right to say to another man that he shall not do with his life that which he chooses to do with it, even if his choice is eccentric. And they are aware that no society in which this liberty is not respected is free, whatever may be its form of government, and no government

is completely free in which this liberty does not exist absolute and unqualified. Man must be able to pursue his own good in his own way. This doctrine is anything but new.

Though the courts and legislatures do not have the forces to assail the "tyranny of the majority," there is a weapon—the individual. The individual is one who does what he wants to do, and is who he wants to be, and thinks and acts for himself. The individual does what he prefers, what suits his character and disposition, and what allows the best in him to manifest. He does not do that which is merely suitable to his position, or that which is usually done by persons of his station or circumstances, or worse yet, that which people tell him to do. When one man tells another what to do, he may be giving the wrong instruction at the wrong time and at the wrong place, even if the instruction given is the opinion of the majority. Too many people consider conduct injurious to themselves simply because it is distasteful. Too many people are satisfied with their ways merely because it is they who made them what they are. And too many people insist their ways are good enough for everybody else for the same reason.

Certainly it is possible for a man to be guided in some good path and kept out of harm's way by drifting with the majority, but it is imperative to employ one's faculties and choose a mode of life. To let others choose or demand one's mode is to prostitute his mental and moral powers. These powers, like the muscular, need use to function. The nature of a man's choice is not the issue, but public opinion, prejudice and bias often make it one. As a result, an individual often suffers severe penalties at the hands of others for conduct which directly concerns only himself; he suffers these penalties, not as the natural and spontaneous consequences of his faults, but because they are purposely inflicted on him for the sake of punishment. The individual is not deterred. He knows that if a person possesses even a minimum amount of common sense and experience, his own mode of existence will be the best, not because it is the best in itself, but because it is his own mode. It is not only what men do, but what manner of men they are that do it. And if what they do and how they do it is eccentric, and harmless, so what?

#### CONCLUSION

Public opinion, prejudice and bias are constricting and unduly confining. If this criticism is not valid, then no substantial proportion of



the people will be induced to act upon it. But act upon it they will. Man has rightly directed his energies into beautifying and perfecting many works; among all of them, the most in importance is man himself. The most material factor to this end is liberty. The means to this end is individualism.

If the demand for more individuals is a proposal impractically ideal and visionary, an impracticable scheme of human perfection, then the perimeters of man's confinement will never be widened. This measure is not suggested to encourage utopia, but to protect liberty, a right the framers of the Constitution believed in, a right the courts, legislatures, advocates and man have struggled for centuries to "perfect." This is not the time to turn away.

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